

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1987**

In the matter of

PORTLAND GENERAL ELECTRIC  
COMPANY,

Request to Update Schedule 201 and  
Standard Power Purchase Agreements

OBSIDIAN RENEWABLES LLC'S  
RESPONSE TO PORTLAND GENERAL  
ELECTRIC COMPANY'S MOTION TO  
LIFT STAY

Obsidian Renewables, LLC (“Obsidian”) respectfully request that the Public Utility Commission of Oregon (“Commission”) deny Portland General Electric Company’s (“PGE”) Motion to Lift Stay in this docket. Obsidian has reviewed and largely agrees with the objections filed by the Commission Staff, the QF Parties, and NewSun Energy LLC. Rather than merely repeating those arguments, Obsidian emphasizes an additional point: Oregon law *requires* that the Commission establish the terms and conditions of PGE’s standard contract by rule through a formal rulemaking. PGE’s request to rewrite its standard contract should never have been filed as a contested case. It is a request for rulemaking, and AR 631 is the appropriate forum. The Commission should not only reject PGE’s Motion, it should dismiss UM 1987 altogether.

In AR 593, Obsidian laid out in detail a comprehensive legal argument as to why Oregon law requires that the Commission establish PURPA contracting policies through rulemakings rather than contested case proceedings. For convenience, a copy of Obsidian’s Petition in AR 593 is attached to this Response. The plain language of ORS 758.535(2) requires that the terms and conditions of PURPA contracts shall “be

established by rule by the Commission.” According the Oregon Administrative Procedures Act, a “rule” promulgated by an agency such as the Commission is legally enforceable only if adopted through a valid rulemaking proceeding.<sup>1</sup>

Recently, PGE made similar procedural arguments in its appeal of the Commission’s policy decisions made in the UM 1805 contested case proceeding. In UM 1805, the Commission determined that the start date of future PGE standard contracts would be the date of commercial operation. PGE’s arguments were summarized by the Oregon Court of Appeals in its December 23, 2020 decision, which is attached to this Response. First, PGE argued that the Commission’s modification of the contract start date was a change in policy that was not supported by substantial reason. Second, PGE argued that the Commission acted outside “the range of discretion delegated to the agency by law” by announcing a new policy decision in the context of a complaint proceeding initiated under ORS 756.500.

The Commission’s embattled policy decision made in the UM 1805 contested case proceeding were saved by the Commission’s subsequent rulemaking. Following supplemental briefing on the matter, the Court determined that the Commission’s rulemaking rendered moot PGE’s appeal of UM 1805. It is not clear that the Commission’s policy decisions would have survived PGE’s appeal had it not been for the subsequent rulemaking.

In reaching its decision, the Court appeared critical of the Commission’s prior contested case proceedings. The Court noted, for example, that Order 05-584 “left

---

<sup>1</sup> See ORS 183.335(11) “A rule is not valid unless adopted in substantial compliance with the provisions of this section . . .”)

ambiguous” the standard contract start date. In describing the contested case proceedings that followed, the Court explained that “[a]lthough it took a series of three orders, the PUC ultimately resolved the case by leaving the past murky . . . .” In contrast to the “ambiguous” and “murky” policies established by contested case, the Court appeared to praise the future clarity afforded by Commission’s subsequent rulemaking: “Going forward, PGE’s standard contracts must satisfy the administrative rules, which the PUC is bound to follow.”

By trying to revive its contested case proceeding to establish new PURPA contracting policies, PGE is now asking the Commission to establish PURPA contracting policies in a manner that violates Oregon law. Any policy decisions established by the Commission through UM 1987 would invite further legal challenge—possibly by PGE itself. Proceeding with the rulemaking in AR 631, however, is clearly within the Commission’s legal authority and would avoid any doubt about the procedural legitimacy of the Commission’s policy decisions.

DATED this 19<sup>TH</sup> day of January, 2021.

Respectfully submitted,

/s/ Richard Lorenz

Richard Lorenz, OSB No. 003086

Cable Huston LLP

1455 SW Broadway, Suite 1500

Portland, OR 97201

Telephone: (503) 224-3092

E-Mail: [rlorenz@cablehuston.com](mailto:rlorenz@cablehuston.com)

*Of Attorneys for Obsidian Renewables, LLC*

**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 “insufficiency” 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

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

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.<sup>1</sup> 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

---

<sup>1</sup>[http://www.oregonlive.com/business/index.ssf/2014/03/eight\\_things\\_ratepayers\\_should.html](http://www.oregonlive.com/business/index.ssf/2014/03/eight_things_ratepayers_should.html). <https://www.idahopower.com/aboutus/energysources/>

- 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,

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*.<sup>2</sup> 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.<sup>3</sup> 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

---

<sup>2</sup> <http://edocs.puc.state.or.us/efdocs/HTB/um1734htb94351.pdf>

<sup>3</sup> <http://edocs.puc.state.or.us/efdocs/HTB/um1725htb1698.pdf>



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

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,<sup>4</sup> 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

---

<sup>4</sup> 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.

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.<sup>5</sup> 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

---

<sup>5</sup> <http://apps.puc.state.or.us/orders/2014ords/14-358.pdf>

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

guidelines, the Commission must establish new PURPA 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

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:

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.”

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:

David Brown  
Obsidian Renewables, LLC  
5 Centerpointe Drive, Suite 590  
Lake Oswego, OR 97035  
(503) 245-8800  
[dbrown@obsidianrenewables.com](mailto:dbrown@obsidianrenewables.com)

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



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.

#### 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

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:

- (a) Increase the marketability of electric energy produced by qualifying facilities located throughout the state for the benefit of Oregon 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 to 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

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

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,

CABLE HUSTON LLP

/s/ Richard G. Lorenz

Richard G Lorenz, OSB No. 003086  
Of Attorneys for Obsidian Renewables, LLC

**ATTACHMENT A: INTERESTED PERSONS**

**PACIFIC POWER**

R. Bryce Dalley  
825 NE Multnomah Street, Ste. 2000  
Portland, OR 97232-2149  
[bryce.dalley@pacificorp.com](mailto:bryce.dalley@pacificorp.com)

Dustin Till  
825 NE Multnomah Street, Ste. 1800  
Portland, OR 97232-2149  
[dustin.till@pacificorp.com](mailto:dustin.till@pacificorp.com)

**PORTLAND GENERAL ELECTRIC**

J. Richard George  
V. Denise Saunders  
121 SW Salmon Street - 1WTC1301  
Portland, OR 97204  
[richard.george@pgn.com](mailto:richard.george@pgn.com)  
[Denise.saungers@pgn.com](mailto:Denise.saungers@pgn.com)

Rob MacFarlane  
Jay Tinker  
121 SW Salmon Street - 1WTC-0702  
Portland, OR 97204  
[Pge.opuc.filings@pgn.com](mailto:Pge.opuc.filings@pgn.com)

**LOYD FERY FARMS LLC**

Loyd Fery  
11022 Rainwater Lane SE  
Aumsville, OR 97325  
[dlchain@wvi.com](mailto:dlchain@wvi.com)

**OREGON DEPARTMENT OF ENERGY**

Diane Broad  
Kacia Brockman  
Matt Krumenauer  
Wendy Simons  
625 Marion Street NE  
Salem, OR 97301  
[diane.broad@state.or.us](mailto:diane.broad@state.or.us)  
[Kacia.brockman@state.or.us](mailto:Kacia.brockman@state.or.us)  
[matt.krumenauer@state.or.us](mailto:matt.krumenauer@state.or.us)  
[wendy.simons@state.or.us](mailto:wendy.simons@state.or.us)

**PUBLIC UTILITY COMMISSION OF OREGON**

Brittany Andrus  
P.O. Box 1088  
Salem, OR 97308-1088  
[Brittany.andrus@state.or.us](mailto:Brittany.andrus@state.or.us)

**PACIFICORP, DBA PACIFIC POWER**

Oregon Dockets  
825 NE Multnomah St., Ste. 2000  
Portland, OR 97232  
[oregondockets@pacificorp.com](mailto:oregondockets@pacificorp.com)

**THOMAS H. NELSON**

PO Box 1211  
Welches, OR 97067-1211  
[nelson@thnelson.com](mailto:nelson@thnelson.com)

**ANNALA, CAREY, BAKER, PC**

Will K. Carey  
PO Box 325  
Hood River, OR 97031  
[wcarey@hoodriverattorneys.com](mailto:wcarey@hoodriverattorneys.com)  
[wcarey@gorge.net](mailto:wcarey@gorge.net)

**ASSOCIATION OF OREGON  
COUNTIES**

Mike McArthur  
PO Box 12729  
Salem, OR 97309  
[mmcarthur@aocweb.org](mailto:mmcarthur@aocweb.org)

**CITIZENS UTILITY BOARD OF  
OREGON**

OPUC Dockets  
Robert Jenks  
G. Catriona McCracken  
Sommer Moser  
610 SW Broadway, Ste. 400  
Portland, OR 97205  
[dockets@oregoncub.org](mailto:dockets@oregoncub.org); [bob@oregoncub.org](mailto:bob@oregoncub.org)  
[catriona@oregoncub.org](mailto:catriona@oregoncub.org);  
[sommer@oregoncub.org](mailto:sommer@oregoncub.org)

**CITY OF PORTLAND-  
PLANNING AND SUSTAINABILITY**

Andria L Jacob  
David Tooze  
1900 SW Fourth Street, Ste. 7100  
Portland, OR 97201  
[Andria.jacob@portlandoregon.gov](mailto:Andria.jacob@portlandoregon.gov)  
[david.tooze@portlandoregon.gov](mailto:david.tooze@portlandoregon.gov)

**CLEANTECH LAW PARTNERS , PC**

Diane Henkels  
420 SW Washington Street, Ste. 400  
Portland, OR 97204  
[dhenkels@cleantechlaw.com](mailto:dhenkels@cleantechlaw.com)

**EXELON BUSINESS SERVICES  
COMPANY, LLC**

Paul D. Ackerman  
100 Constellation Way, Ste 500C  
Baltimore, MD 21202  
[Paul.ackerman@constellation.com](mailto:Paul.ackerman@constellation.com)

**DAVISON VAN CLEVE, PC**

S. Bradley VanCleve  
Tyler C. Pepple  
333 SW Taylor Street, Ste. 400  
Portland, OR 97204  
[bvc@dvclaw.com](mailto:bvc@dvclaw.com)  
[tcp@dvclaw.com](mailto:tcp@dvclaw.com)

**ENERGY TRUST OF OREGON**

Betsy Kauffman  
Thad Roth  
John M. Volkman  
421 SW Oak Street, Ste. 300  
Portland, OR 97204-1817  
[betsy.kauffman@energytrust.org](mailto:betsy.kauffman@energytrust.org)  
[thad.roth@energytrust.org](mailto:thad.roth@energytrust.org)  
[john.volkman@energytrust.org](mailto:john.volkman@energytrust.org)

**SANGER LAW PC**

Irion A Sanger  
1117 SE 53<sup>rd</sup> Avenue  
Portland, OR 97215  
[irion@sanger-law.com](mailto:irion@sanger-law.com)

**IDAHO POWER COMPANY**

Christa Barry  
Julia Hilton  
Donovan E Walker  
PO Box 70  
Boise, ID 83707-0070  
[cbarry@idahopower.com](mailto:cbarry@idahopower.com)  
[jhilton@idahopower.com](mailto:jhilton@idahopower.com)  
[dwalker@idahopower.com](mailto:dwalker@idahopower.com)

**SMALL BUSINESS UTILITY  
ADVOCATES**

James Birkelund  
548 Market Street, Ste. 11200  
San Francisco, CA 94104  
[james@utilityadvocates.org](mailto:james@utilityadvocates.org)



**LOVINGER KAUFMANN, LLP**  
Kenneth Kaufmann  
Jeffrey S. Lovinger  
825 NE Multnomah Street, Ste. 925  
Portland, OR 97232-2150  
[kaufmann@lklaw.com](mailto:kaufmann@lklaw.com)  
[lovinger@lklaw.com](mailto:lovinger@lklaw.com)

**MCDOWELL RACKNER & GIBSON PC**  
Lisa F. Rackner  
419 SW 11th Avenue, Ste. 400  
Portland, OR 97205  
[dockets@mcd-law.com](mailto:dockets@mcd-law.com)

**NORTHWEST ENERGY SYSTEMS  
COMPANY LLC**  
Daren Anderson  
1800 NE Eight Avenue, Ste. 320  
Bellevue, WA 98004-1600  
[da@thenescogroup.com](mailto:da@thenescogroup.com)

**ONE ENERGY RENEWABLES**  
Bill Eddie  
206 NE 28th Avenue, Ste. 202  
Portland, OR 97232  
[bill@oneenergyrenewables.com](mailto:bill@oneenergyrenewables.com)

**OREGON DEPARTMENT OF  
JUSTICE**  
Renee M. France  
Natural Resources Section  
1162 Court Street NE  
Salem, OR 97301-4096  
[renee.m.france@doj.state.or.us](mailto:renee.m.france@doj.state.or.us)

**OREGON SOLAR ENERGY  
INDUSTRIES ASSOC.**  
OSEIA Dockets  
PO BOX 14927  
Portland, OR 97293-0927  
[dockets@oseia.org](mailto:dockets@oseia.org)

**OREGONIANS FOR RENEWABLE  
ENERGY PROGRESS**  
Kathleen Newman  
1553 NE Greensword Drive  
Hillsboro, OR 97214  
[k.a.newman@frontier.com](mailto:k.a.newman@frontier.com)

**OREGONIANS FOR RENEWABLE  
ENERGY PROGRESS**  
Mark Pete Pengilly  
PO Box 10221  
Portland, OR 97296  
[mpengilly@gmail.com](mailto:mpengilly@gmail.com)

**REGULATORY &  
COGENERATION SERVICES, INC**  
Donald W. Schoenbeck  
900 Washington ST Ste 780  
Vancouver, WA 98660-3455  
[dws@r-c-s-inc.com](mailto:dws@r-c-s-inc.com)

**STOLL BERNE**  
David A Lokting  
209 SW Oak Street, Ste. 500  
Portland, OR 97204  
[dlokting@stollberne.com](mailto:dlokting@stollberne.com)

**PUBLIC UTILITY COMMISSION  
STAFF--DEPT OF JUSTICE**  
Stephanie S. Andrus  
Business Activities Section  
1162 Court Street NE  
Salem, OR 97301-4096  
[stephanie.andrus@state.or.us](mailto:stephanie.andrus@state.or.us)

**RENEWABLE ENERGY COALITION**  
John Lowe  
12050 SW Tremont Street  
Portland, OR 97225-5430  
[jravenesanmarcos@yahoo.com](mailto:jravenesanmarcos@yahoo.com)

**RENEWABLE NORTHWEST  
PROJECT**

Renewable Northwest Dockets  
Megan Decker  
Dina Dubson Kelley  
Michael O'Brien  
421 SW Sixth Avenue, Ste. 1125  
Portland, OR 97204-1629  
[dockets@renewablenw.org](mailto:dockets@renewablenw.org)  
[megan@renewablenw.org](mailto:megan@renewablenw.org)  
[dina@renewablenw.org](mailto:dina@renewablenw.org)  
[michael@renewablenw.org](mailto:michael@renewablenw.org)

**ROUSH HYDRO, INC.**

Toni Roush  
366 E Water Street  
Stayton, OR 97383  
[tmroush@wvi.com](mailto:tmroush@wvi.com)

**CREA**

Brian Skeahan  
PMB 409  
18160 Cottonwood Road  
Sunriver, OR 97707  
[Brian.skeahan@yahoo.com](mailto:Brian.skeahan@yahoo.com)

**CORONAL DEVELOPMENT  
SERVICES**

Andrew Foukal  
17 Fourth Street, Ste B  
Charlottesville, VA 22902  
[afoukal@coronalgroup.com](mailto:afoukal@coronalgroup.com)

Caroline Whittinghill  
2120 University Avenue  
Berkeley, CA 94704  
[cwhittinghill@coronalgroup.com](mailto:cwhittinghill@coronalgroup.com)

**RICHARDSON ADAMS, PLLC**

Gregory M. Adams  
Peter J. Richardson  
PO Box 7218  
Boise, ID 83707  
[greg@richardsonadams.com](mailto:greg@richardsonadams.com)  
[peter@richardsonadams.com](mailto:peter@richardsonadams.com)

**PORTLAND GENERAL ELECTRIC**

V. Denise Saunders  
121 SW Salmon ST - 1WTC1301  
Portland, OR 97204  
[denise.saunders@pgn.com](mailto:denise.saunders@pgn.com)

Jay Tinker  
121 SW Salmon ST - 1WTC-0702  
Portland, OR 97204  
[Pge.opuc.filings@pgn.com](mailto:Pge.opuc.filings@pgn.com)

**CABLE HUSTON LLP**

Richard Lorenz  
Chad M. Stokes  
1001 SW Fifth Avenue, Ste. 2000  
Portland, OR 97204-1136  
[rlorenz@cablehuston.com](mailto:rlorenz@cablehuston.com)  
[cstokes@cablehuston.com](mailto:cstokes@cablehuston.com)

**EXELON WIND LLC**

John Harvey  
4601 Westown Parkway, Ste. 300  
West Des Moines, IA 50266  
[john.harvey@exeloncorp.com](mailto:john.harvey@exeloncorp.com)

**FOLEY & LARDNER, LLP**

Shao-Ying Mautner  
Thomas McCann Mullooly  
Kurt Rempe  
3000 K Street NW, Ste. 600  
Washington D.C. 20007-5109  
[smautner@foley.com](mailto:smautner@foley.com)  
[tmullooly@foley.com](mailto:tmullooly@foley.com)  
[krempe@foley.com](mailto:krempe@foley.com)

**CYPRESS CREEK RENEWABLES**

David Bunge  
3250 Ocean Park Boulevard, Ste. 355  
Santa Monica, CA 90405  
[bunge@ccrenew.com](mailto:bunge@ccrenew.com)

**PACIFIC NORTHWEST SOLAR,  
LLC**

Ryan N. Meyer  
8221 King Road  
Loomis, CA 95650  
[Ryan.meyer@pacificnorthwestsolar.net](mailto:Ryan.meyer@pacificnorthwestsolar.net)

**CITY OF PORTLAND – CITY  
ATTORNEY’S OFFICE**

Benjamin Walters  
1221 SW Fourth Avenue, Rm 430  
Portland, OR 97204  
[Ben.walters@portlandoregon.gov](mailto:Ben.walters@portlandoregon.gov)

**SIERRA CLUB ENVIRONMENTAL  
LAW PROGRAM**

Travis Ritchie  
Gloria D. Smith  
Alexa Zimbalist  
85 Second Street, 2<sup>nd</sup> Floor  
San Francisco, CA 94105  
[Gloria.smith@sierraclub.org](mailto:Gloria.smith@sierraclub.org)  
[Travis.ritchie@sierraclub.org](mailto:Travis.ritchie@sierraclub.org)  
[Alexa.zimbalist@sierraclub.org](mailto:Alexa.zimbalist@sierraclub.org)

**OBSIDIAN RENEWABLES, LLC**

David Brown  
Todd Gregory  
5 Centerpointe Drive, Ste. 590  
Lake Oswego, OR 97035  
[dbrown@obsidianrenewables.com](mailto:dbrown@obsidianrenewables.com)  
[tgregory@obsidianrenewables.com](mailto:tgregory@obsidianrenewables.com)

**NW ENERGY COALITION**

Fred Heutte  
PO Box 40308  
Portland, OR 97240-0308  
[fred@nwenergy.org](mailto:fred@nwenergy.org)

**BLUE PLANET ENERGY LAW LLC**

Carl Fink  
628 SW Chestnut Street, Ste. 200  
Portland, OR 97219  
[cmfink@blueplanetlaw.com](mailto:cmfink@blueplanetlaw.com)

**NW & INTERMOUNTAIN POWER  
PRODUCERS COALITION**

Robert Kahn  
PO Box 504  
Mercer Island, WA 98040  
[rkahn@nippc.org](mailto:rkahn@nippc.org)

## 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 require 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.

**FILED: December 23, 2020**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION,  
COMMUNITY RENEWABLE ENERGY ASSOCIATION, RENEWABLE ENERGY  
COALITION, and THE PUBLIC UTILITY COMMISSION OF OREGON,  
Respondents,

v.

PORTLAND GENERAL ELECTRIC COMPANY,  
Petitioner.

Public Utility Commission of Oregon  
UM1805

A167707

Argued and submitted on September 24, 2019.

Anna M. Joyce argued the cause for petitioner. Also on the briefs were Dallas S. DeLuca, Anit K. Jindal, and Markowitz Herbold PC.

Nadia H. Dahab argued the cause for respondents Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition. Also on the answering brief were Steven C. Berman, Keil M. Mueller, Stoll Stoll Berne Lokting & Shlachter PC, Irion A. Sanger, and Sanger Law PC. Also on the supplemental brief were Steven C. Berman, Keil M. Mueller, Stoll Stoll Berne Lokting & Shlachter PC, Irion A. Sanger, and Sanger Thompson PC.

Jordan R. Silk, Assistant Attorney General, argued the cause for respondent The Public Utility Commission of Oregon. On the answering brief were Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Keith L. Kutler, Assistant Attorney General. On the supplemental brief were Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Jordan R. Silk, Assistant Attorney General.

Before Lagesen, Presiding Judge, and DeVore, Judge, and Powers, Judge.

LAGESEN, P. J.

Petition for judicial review dismissed as moot.

---

**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Respondents

- No costs allowed.  
 Costs allowed, payable by  
 Costs allowed, to abide the outcome on remand, payable by
-

1           LAGESEN, P. J.

2           This dispute about certain contracts to buy and sell electric power is before  
3 us on Portland General Electric Company's (PGE) petition for judicial review under ORS  
4 183.482 of a final order of the Public Utility Commission of Oregon (PUC). We  
5 conclude that it has become moot by virtue of subsequent rulemaking by the PUC.  
6 Accordingly, we dismiss the petition.

7           At the core of this case are the PUC's requirements for standard contracts  
8 for the purchase of electricity from operators known as "qualifying facilities" or "QFs."  
9 In 2005, to implement the Public Utility Regulatory Policies Act, 16 USC § 824a-3, the  
10 PUC issued Order 05-584. In that order, the PUC adopted a policy requiring standard  
11 contracts for purchase of electricity from QFs to (1) have 20-year terms, (2) set fixed  
12 prices for the purchase of electricity for the first 15 years of the term, and (3) provide for  
13 market prices for the last five years of the contract term.

14           What Order 05-584 arguably left ambiguous was the start date for the  
15 period of 15 years of fixed prices: Did it run from the date of contract execution or did it  
16 start when the QF became operational and began supplying power under the contract?  
17 Although Order 05-584 prescribed standard terms for contracts with QFs, it did not  
18 prescribe a standard form for such contracts.

19           Following the issuance of Order 05-584, some power companies provided  
20 in their standard contracts with QFs that the 15-year fixed-price period commenced when  
21 the QF became operational and began to supply power. PGE apparently took a different



1 approach.<sup>1</sup> Its standard contracts, in its view, allowed for the 15-year period to start on  
2 the date of contract execution. All of PGE's standard contracts were filed with, and  
3 approved by, the PUC.

4           In December 2016, the Northwest and Intermountain Power Producers  
5 Coalition, the Community Renewable Energy Association, and the Renewable Energy  
6 Coalition (collectively, complainants) initiated this complaint proceeding against PGE  
7 under ORS 756.500. They requested that (1) the PUC order PGE "to cease and desist  
8 \* \* \* openly disputing that it must offer 15 years of fixed prices from the QF's operation  
9 date," which is what complainants alleged the PUC orders required; (2) the PUC declare  
10 that PGE's standard contract "requires payment by PGE at fixed prices for 15 years after  
11 the QF's operation date rather than merely 15 years after the time of contract execution,  
12 unless express language is inserted by the QF that demonstrates a contrary intent"; (3) in  
13 the alternative to the first two forms of relief requested, order "PGE to file revised  
14 standard contracts clearly stating that the 15 years of fixed prices run from the  
15 commercial operation date"; and (4) the PUC order any additional relief "deem[ed]  
16 necessary" by the PUC.

---

<sup>1</sup> We say "apparently" because the parties dispute how PGE's previous standard contracts should be read. The PUC did not reach the issue in this proceeding, noting only that "PGE's approved standard contract filings \* \* \* may have limited the availability of fixed prices to the first fifteen years measured from contract execution," and, further, that if the contracts did in fact do so, "PGE cannot be found to have been in violation of our orders" because the PUC had approved those contracts.

1           Although it took a series of three orders,<sup>2</sup> the PUC ultimately resolved the  
2 case by leaving the past murky and making the future clear.

3           As for the past, the PUC declined to interpret PGE's previously approved  
4 standard contracts. Consequently, it did not determine the date on which the 15-year  
5 fixed-price term began under them. Relatedly, the PUC declined to determine whether  
6 PGE's past standard contracts complied with Order 05-584, explaining that the agency's  
7 approval of them meant that PGE could not be found to be in violation of its orders.

8           As for the future, the PUC explained how things should work going  
9 forward. It clarified that policy 05-584 should be understood "to explicitly require  
10 standard contracts, on a going-forward basis, to provide for 15 years of fixed prices that  
11 commence when the QF transmits power to the utility." The PUC stated further that  
12 "PGE should promptly file revisions to Schedule 201 which shall include a revised  
13 standard contract PPA with language consistent with our requirement that the 15-year  
14 term of fixed prices commences when the QF transmits power to the utility." Ultimately,  
15 the PUC ordered two things: (1) the dismissal of the complaint; and (2) "[w]ithin five  
16 business days of the date of this order, [PGE] shall file revisions to Schedule 201 of its

---

<sup>2</sup> After the PUC issued the final order on review, Order No. 17-256, one of the complainants requested rehearing or reconsideration and, in Order No. 17-465, the PUC denied that request but "amend[ed] and clarif[ied] Order No. 17-256." Then, PGE requested rehearing or reconsideration and, in Order No. 18-079, the PUC denied that request but again made clarifying statements. For purposes of this opinion, general references to the order on review are to Order No. 17-256, as amended and clarified in the two later orders.

1 tariffs consistent with this order."

2           Following the PUC's rejection of two requests for reconsideration, which  
3 resulted in some revisions and clarifications to the order on review, PGE filed this  
4 judicial-review proceeding under ORS 183.482. PGE raises two assignments of error.  
5 First, PGE argues that the PUC's decision to direct PGE "to alter the start date for the 15-  
6 year period of fixed prices for all future PGE standard contracts with QFs" represents a  
7 change in policy that is not "supported by substantial reason." Second, PGE contends  
8 that the PUC acted outside "the range of discretion delegated to the agency by law," and  
9 inconsistently with past practice, when, in the context of a complaint proceeding under  
10 ORS 756.500, it announced what PGE views as a new policy. For relief, PGE requests  
11 that the PUC's order be vacated and remanded.

12           Meanwhile, before complainants filed their answering briefs in this matter,  
13 the PUC promulgated administrative rules to address timing issues with the required  
14 contract terms for power purchase agreements with QFs. The pertinent rule, OAR 860-  
15 029-0120(3), provides:

16           "Qualifying facilities have the unilateral right to select a purchase  
17 term of up to 20 years for a power purchase agreement. Qualifying  
18 facilities electing to sell firm output at fixed-prices have the unilateral right  
19 to a fixed-price term of up to 15 years."

20 For purposes of the provision, a "purchase term" is "the period of a power purchase  
21 agreement during which the qualifying facility is selling its output to the public utility."  
22 OAR 860-029-0010(26). Additionally, a "fixed-rate term," something that all parties

1 agree is synonymous with a "fixed-price term,"<sup>3</sup> means,  
2 "for qualifying facilities electing to sell firm energy or firm capacity or  
3 both, the period of a power purchase agreement during which the public  
4 utility pays the qualifying facility avoided cost rates determined either at  
5 the time of contracting or at the time of delivery."

6 OAR 860-029-0010(16).

7 Complainants then filed their answering brief in this matter. They argue  
8 that the administrative rules mooted the issues raised by PGE because the rules supersede  
9 any policy statement made by the PUC in the order on review. Complainants argue  
10 further that, if the proceeding is not moot, then the PUC's decision is not erroneous. In its  
11 answering brief, the PUC argues that the matter is moot for a different reason: PGE  
12 complied with the directive to submit revised contracts and did not seek judicial review  
13 of the PUC orders approving those revised contracts. This means, according to the PUC,  
14 that resolution of PGE's contentions will not have a practical effect on its rights because it  
15 cannot affect those approved standard contracts.

16 Because the PUC did not address the effect of its own administrative rules  
17 in its initial brief to us, following oral argument, we requested supplemental briefing  
18 from the parties on that point; we viewed it as important to have the agency's take on how  
19 its own act of rulemaking might displace any policy announcement it made in the order  
20 on review. In its supplemental brief, the PUC explains that it interprets its new rules to

---

<sup>3</sup> The parties' agreement on that point is consistent with the PUC's rules, which define the word "rate" to include "price." OAR 860-029-0010(28).

1 require the 15-year fixed-price period to start on the date a QF becomes operational and  
2 begins supplying power, not on the date of contract execution. The PUC argues that, for  
3 this additional reason, this proceeding is moot. In their supplemental brief, complainants  
4 generally agree with the PUC's take, echoing the position taken in their earlier brief.

5           In its supplemental brief, PGE disagrees with the PUC's interpretation of its  
6 rules to require the 15-year fixed-price term to commence when the QF becomes  
7 operational, arguing that it does not plausibly account for their text, context, and, in  
8 particular, rulemaking history. PGE argues further that neither the rules, nor the fact that  
9 it filed new standard contracts, make this proceeding moot. In its view, vacating and  
10 remanding the order could provide grounds for withdrawing the new standard contracts  
11 that it filed; PGE suggests that we would have the authority in this proceeding to order  
12 the PUC to take action in the contract-approval proceedings under ORS 183.486(1)(b).  
13 PGE also suggests that a favorable decision by us could affect 60 power purchase  
14 agreements that it entered into with QFs between the entry of the final order on review  
15 and the effective date of the administrative rules. According to PGE, "If the  
16 Commission's policy was invalid, that calls into question the terms of a standard [power  
17 purchase agreement] issued to comply with that invalid policy."

18           Having considered the parties' arguments on the point, we conclude that the  
19 PUC's rulemaking has mooted this proceeding. "An appeal becomes moot when a  
20 decision 'will no longer have a practical effect on the rights or obligations of a party.'"  
21 *City of Cave Junction v. State of Oregon*, 289 Or App 216, 222-23, 410 P3d 306 (2017)

1 (quoting *State v. Walraven*, 282 Or App 649, 654, 385 P3d 1178 (2016)). Here, the  
2 issues raised by PGE are (1) whether the PUC acted outside the boundaries of its  
3 authority by prospectively clarifying agency policy in a complaint proceeding under ORS  
4 756.500; and (2) whether substantial reason supports the PUC's determination that the  
5 policy announced in Order 05-584 required the 15-year fixed-price term to start upon  
6 delivery of power.

7           The PUC's act of formal rulemaking has mooted the first issue because,  
8 whether or not the PUC had the authority to announce policy in the context of a  
9 complaint proceeding, its act of rulemaking has superseded any policy announced. Even  
10 if the PUC should have engaged in rulemaking or some other formal process to announce  
11 what it did in the order on review, as PGE contends it should have, it has now done so,  
12 thereby rendering academic the question of whether it is procedurally proper for the PUC  
13 to do what it did in terms of announcing prospective policy in an order issued in a  
14 complaint proceeding.

15           As for the substantial reason issue, that is also academic at this point. As of  
16 now, the PUC's rules set forth its current policy for the fixed-price terms of power  
17 purchase agreements with QFs. That is so regardless of what party is right about how  
18 those rules should be interpreted (a point we do not resolve); one way or another, the  
19 rules, not the order on review, are the current source of the PUC's articulation of its  
20 policy on the point. If PGE believes that the rules allow for standard contracts containing  
21 terms different from the ones that it filed in response to the order on review, then it can

1 seek approval of new standard contracts under the terms of the rules. An order from us  
2 directing the PUC to vacate its approval of the standard contracts that PGE filed in  
3 accordance with the order would not alter what is now the case: Going forward, PGE's  
4 standard contracts must satisfy the administrative rules, which the PUC is bound to  
5 follow. *See Harsh Investment Corp. v. State Housing Division*, 88 Or App 151, 157, 744  
6 P2d 588 (1987), *rev den*, 305 Or 273 (1988) (having promulgated administrative rules, an  
7 agency must follow them).

8           That PGE opted to enter into 60 power purchase agreements between the  
9 time the order on review was entered and the effective date of the rules, apparently using  
10 the standard form contract that it was ordered to file, does not render this proceeding  
11 justiciable. PGE asserts that a ruling in its favor would call the terms of those contracts  
12 into question, and that is why this proceeding is not moot. But there has never been any  
13 question that Order 05-584 *allowed* for power purchase agreements with QFs in which  
14 the 15-year fixed-price term started to run when the QF started to deliver power. The  
15 only question was whether Order 05-584 *also* allowed for power purchase agreements  
16 where the 15-year fixed-price term started earlier, upon contract execution. In other  
17 words, there is no basis to think that the executed power purchase agreements *conflict*  
18 with Order 05-584 by having the 15-year fixed-price term start when the QF becomes  
19 operational, or to otherwise question the validity of any such terms.

20           Beyond that, there is no nonspeculative basis to conclude that a ruling in  
21 PGE's favor on the issues raised would provide it with grounds for avoiding power

1 purchase agreements that it executed of its own accord with QFs that are not parties to  
2 this proceeding. That is, even if we were to rule that the PUC somehow overstepped its  
3 authority or acted without substantial reason in clarifying in the order on review how the  
4 15-year fixed-price terms were to operate, there is no nonspeculative basis to think that  
5 PGE would be entitled to avoid the bargains that it made with nonparties to this  
6 proceeding, even if PGE would have preferred to have made those bargains on different  
7 terms.

8                   Petition for judicial review dismissed as moot.