



ALISHA TILL
Direct (503) 290-3628
alisha@mrg-law.com

February 3, 2021

VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
201 High Street SE, Suite 100
P.O. Box 1088
Salem, Oregon 97308-1088

Re: Docket UM 1987 – In the Matter of Portland General Electric Company, Request to Update Schedule 201 and Standard Power Purchase Agreements

Attention Filing Center:

Attached for filing in the above-captioned docket is Portland General Electric Company's Motion for Leave to Reply and Sur-Sur-Reply in Support of Motion to Lift Suspension.

Please contact this office with any questions.

Sincerely,

Alisha Till
Paralegal

Attachment

**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.

**PORTLAND GENERAL ELECTRIC
COMPANY’S MOTION FOR LEAVE
TO REPLY AND SUR-SUR-REPLY IN
SUPPORT OF MOTION TO LIFT
SUSPENSION**

1 Pursuant to OAR § 860-001-0420, Portland General Electric Company (PGE) respectfully
2 requests that the Public Utility Commission of Oregon (Commission) accept this Sur-Sur-Reply
3 to Obsidian Renewables, LLC’s (Obsidian) Sur-Reply filed on February 1, 2021.¹ PGE attempted
4 to confer with the parties in this docket regarding the request to file a Sur-Sur-Reply. Obsidian,
5 Evergreen Biopower, LLC, Commission Staff, the Renewable Energy Coalition, the Northwest &
6 Intermountain Power Producers Coalition, and the Citizens’ Utility Board indicated that they do
7 not oppose PGE’s request to file a sur-sur-reply.

8 In its Sur-Reply, Obsidian continues to assert its recently raised argument that docket UM
9 1987 must be dismissed because the only lawful way to adopt PGE’s updated standard power
10 purchase agreement (Standard PPA) for purchases from qualifying facilities (QF) under the Public
11 Utility Regulatory Policies Act of 1978 (PURPA) is through a rulemaking. For the reasons
12 explained in its Reply and herein,² PGE disagrees that a rulemaking is required or appropriate.
13 This Sur-Sur-Reply specifically addresses two claims made in Obsidian’s Reply.

14 **A. Obsidian applies the incorrect analysis to determining whether PGE’s Standard PPA**
15 **is “generally applicable.”**

16 Obsidian challenges PGE’s assertion that the Commission’s decision in UM 1987 is

¹ Obsidian’s Sur-Reply (Feb. 1, 2021).

² PGE’s Reply at 8-9 (Jan. 26, 2021).

1 appropriately issued in an order because the Commission would be directing PGE to adopt an
2 updated Standard PPA.³ Obsidian takes the position that the outcome of this docket will affect
3 every person interested in entering a standard contract with PGE—implying that the PPA terms
4 and conditions are therefore “generally applicable” and must be set by rule.⁴ Obsidian applies the
5 wrong analysis and provides no support for its position.

6 Under the Oregon Administrative Procedures Act, a rule is defined as “any agency directive,
7 standard, regulation or statement of *general applicability* that implements, interprets or prescribes
8 law or policy, or describes the procedure or practice requirements of any agency.”⁵ An order is
9 “any agency action . . . *directed to a named person* or named persons . . .”⁶ Obsidian seems to
10 assume, without citation, that PGE’s updated Standard PPA must be a rule because it could affect
11 many people.⁷ But the Oregon Supreme Court has confirmed that the relevant question is to whom
12 the action is directed—not how many people it may affect.⁸

13 In *Oregon Environmental Council v. Oregon State Board of Education*, the Supreme Court
14 considered whether the board’s approval of a textbook for use in Oregon schools was a rule or an
15 order.⁹ The lower court had found that the decision was a generally applicable rule because the
16 approval applied to every school district.¹⁰ The Supreme Court reversed, noting that the lower
17 court had focused on the “wrong issue.”¹¹ The court clarified that the appropriate analysis is
18 whether the decision is directed to a named person (*i.e.*, the book)—not whether the decision may
19 impact those interacting with the named person (*i.e.*, the schools).¹² The court analogized the case

³ PGE’s Reply at 8; Obsidian’s Sur-Reply at 1.

⁴ Obsidian’s Sur-Reply at 1.

⁵ ORS 183.310(9) (emphasis added).

⁶ ORS 183.310(6)(a) (emphasis added).

⁷ Obsidian’s Sur-Reply at 1 (“PGE forgets—or does not care—that the order it requests will directly affect every other person who wishes to or actually does execute that Standard PPA.”).

⁸ If Obsidian’s interpretation were correct, then almost every Commission decision would have to be a rule because Commission decisions frequently affect the public in some way.

⁹ 307 Or 30, 32, 35-36 (1988).

¹⁰ *Id.* at 32, 35-36.

¹¹ *Id.* at 36.

¹² *Id.* at 36.

1 to individual licensing decisions by state agencies, which “are orders, not rules, although they
2 affect others beyond the individual seeking a license.”¹³ The court concluded that the board’s
3 decision was “directed to a named textbook, if not a named person,” and therefore was an order,
4 not a rule.¹⁴

5 Similarly here, the Commission’s decision in UM 1987 will be to direct PGE to adopt an
6 updated Standard PPA, and therefore the decision will be “directed to a named person.”¹⁵ While
7 the Standard PPA will affect those contracting with PGE, it will not be directed to them, and
8 therefore will not be a “generally applicable” rule. The decision also will not be “generally
9 applicable” because it will not affect Idaho Power or PacifiCorp. Obsidian’s argument that PGE’s
10 updated Standard PPA must be adopted by rule is legally incorrect.

11 **B. ORS 758.535 does not require PGE’s updated Standard PPA to be adopted by rule.**

12 Obsidian claims that PGE “conspicuously” ignored language in Oregon’s PURPA
13 implementation statute, ORS 758.535(2)(a),¹⁶ which requires the Commission to adopt terms and
14 conditions by rule. Obsidian apparently overlooks the fact that PGE’s Reply included a paragraph
15 addressing the impact of Oregon’s PURPA implementation statutes,¹⁷ but in the face of Obsidian’s
16 claim, PGE now provides a more detailed response. While PGE agrees with Obsidian that ORS
17 758.535(2)(a) requires that the “terms and conditions” for the purchase of energy and/or capacity
18 from QFs be established by rule, PGE disagrees that this statute requires that PGE’s entire Standard
19 PPA be adopted by rule. First, as discussed in detail above, PGE’s Standard PPA is not “generally
20 applicable” and therefore does not fit within the APA definition of a “rule.”

21 Second, in the almost 40 years since ORS 758.535 was passed, the Commission and its Staff

¹³ *Id.* (internal citation omitted).

¹⁴ *Id.*

¹⁵ ORS 183.310(6)(a).

¹⁶ Obsidian’s Sur-Reply at 2.

¹⁷ PGE’s Reply at 8 (“Oregon’s PURPA implementation statutes do not require PGE’s revised Standard PPA to be adopted in a rulemaking. . .”).

1 have consistently recognized that it would not be feasible to adopt a generic PPA by rule and have
2 declined to do so. For example, in 1984, the Commissioner stated,

3 The Commissioner believes that, in light of the difficulty of setting general terms
4 that would adequately address the peculiarities of various projects, the legislature
5 intended the Commissioner to act as an arbitrator in ruling on the terms to be
6 included in specific contracts. He does not believe it is feasible to devise a “generic”
7 contract or contracts through the rulemaking process.¹⁸
8

9 Moreover, when Obsidian raised the exact same arguments five years ago in docket AR 593, the
10 Commission adopted Staff’s recommendation to conduct a rulemaking to translate its generally
11 applicable policies into rules,¹⁹ but the Commission did not adopt an entire generic PPA by rule—
12 and no party asserted that it should have done so.²⁰ Most recently, in AR 631, the Commission’s
13 current rulemaking to address standard PPA terms and conditions, Staff has been clear that the
14 outcome will *not* be to adopt a comprehensive PPA that all utilities are required to use.²¹

15 Third, to the extent that Obsidian takes the position that the Commission must dismiss this
16 docket entirely because it is prohibited from investigating issues related to a PURPA PPA in a
17 non-rulemaking docket,²² nothing in the text of ORS 758.535 supports this extreme position.
18 Moreover, such an interpretation of ORS 758.535 flies in the face of the Commission’s long-

¹⁸ *In the Matter of the Proposed Amendments to the Rules Relating to Cogeneration and Small Power Production Facilities as Required by Chapter 799, Oregon Laws, 1983 (HB 2320)*, Docket AR 102, Order No. 84-742 at 4 (Sept. 24, 1984).

¹⁹ *In the Matter of Obsidian Renewables, LLC, Petition to Amend OAR 860-029-0040, Relating to Power Purchases by Pub. Utils. from Small Qualifying Facilities*, Docket AR 593, Order No. 16-056 & App’x A (Feb. 9, 2016).

²⁰ See Docket AR 593, Order No. 18-422 (Oct. 29, 2018).

²¹ See *In the Matter of Rulemaking to Address Procedures, Terms, and Conditions Associated with Qualifying Facilities (QF) Standard Contracts*, Docket AR 631, Staff’s Letter to Participants re Proposal and Next Steps (Jan. 15, 2021) (proposing specific, discrete issues to be addressed in AR 631).

²² See Obsidian’s Sur-Reply at 2.

1 standing practice of investigating PURPA issues in contested case proceedings prior to translating
2 generally applicable policies into rules.²³

3 In sum, the Commission’s current rules fulfill the statutory requirement to set generally
4 applicable terms and conditions by rule, and PGE’s updated Standard PPA complies with the
5 current rules. If the Commission adopts new, generally applicable rules in AR 631 that affect
6 portions of PGE’s Standard PPA, PGE will update its PPA accordingly. But Obsidian’s argument
7 that UM 1987 cannot proceed because ORS 758.535 requires the Commission to adopt a single,
8 generic PPA for all utilities by rule is both impractical and unpersuasive.

9 **C. Conclusion**

10 Obsidian’s belated attempt to fundamentally change the process of this docket should be
11 rejected because Obsidian’s arguments are legally incorrect and unsupported by applicable
12 precedent. PGE notes that even if Obsidian’s arguments *were* legally correct and all PPA terms
13 and conditions for each utility were required to be established solely by rule, the result would be
14 significant uncertainty for PGE and those QFs seeking to contract with PGE, and the logical
15 remedy would be to consider PGE’s request to adopt an updated PPA with all possible haste. PGE
16 maintains that a rulemaking is not required, but regardless of which process the Commission uses,

²³ See, e.g., *In the Matter of an Investigation into Competitive Bidding by Investor-Owned Electric Utility Companies*, Docket UM 316, Order No. 91-1383 at 16 (Oct. 18, 1991) (increasing size threshold for standard rate eligibility and stating, “A rulemaking docket to consider changing the capacity limitation contained in OAR 860-29-040 will be opened.”); *In the Matter of Public Utility Commission of Oregon Staff’s Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket UM 1129, Order No. 07-360 at 43 (Aug. 20, 2007) (“A rulemaking docket is opened to promulgate rules consistent with our decision in this order on dispute resolution for negotiated QF contracts and to update Division 29 rules for consistency with federal and state PURPA requirements and decisions in this proceeding.”); Docket AR 593, Order No. 16-056 (adopting Staff’s recommendation to open a rulemaking to translate prior Commission decisions establishing PURPA terms and conditions into rules).

1 it should promptly set a schedule for review of PGE's updated Standard PPA.

Dated: February 3, 2021.

MCDOWELL RACKNER GIBSON PC



Lisa F. Rackner
Jordan R. Schoonover
419 SW 11th Avenue, Suite 400
Portland, Oregon 97205
Telephone: (503) 595-3925
Facsimile: (503) 595-3928
dockets@mrg-law.com

PORTLAND GENERAL ELECTRIC COMPANY

David White
Associate General Counsel
121 SW Salmon Street, 1WTC1301
Portland, Oregon 97204
Telephone: (503) 464-7701
david.white@pgn.com

Attorneys for Portland General Electric
Company