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November 30, 2015

VIA ELECTRONIC

PUC Filing Center
Public Utility Commission of Oregon
PO Box 1088
Salem, OR 97308-1088

**Re: UM 1725 – In the Matter of IDAHO POWER COMPANY Application to Lower
Standard Contract Eligibility Cap and to Reduce the Standard Contract Term**

Attention Filing Center:

Idaho Power Company's Response to Obsidian Renewables, LLC's Motion to Hold a
Proceeding In Abeyance.

Please contact this office with any questions.

Very truly yours,

A handwritten signature in black ink that reads "Wendy McIndoo". The signature is fluid and cursive.

Wendy McIndoo
Office Manager

Attachment

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1725

In the Matter of
IDAHO POWER COMPANY

**IDAHO POWER COMPANY'S RESPONSE
TO OBSIDIAN RENEWABLES, LLC'S
MOTION TO HOLD A PROCEEDING IN
ABEYANCE**

Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Charge, and for Change in Resource Sufficiency Determination.

I. INTRODUCTION

Pursuant to the November 19, 2015, Ruling issued by Administrative Law Judge (ALJ) Allan J. Arlow, Idaho Power Company (Idaho Power or Company) submits this Response to Obsidian Renewables, LLC's Motion to Hold a Proceeding in Abeyance (Motion to Abate or Motion). The Public Utility Commission of Oregon (Commission) should deny Obsidian's request to abate this case pending the resolution of its concurrently filed Petition for Rulemaking (Petition). Obsidian's Motion relies on meritless legal arguments, misstatements of Commission precedent, and an erroneous statement of the issues in this case.

Contrary to Obsidian's claims, the Commission is not adopting generally applicable policies in this case. Therefore, neither the Oregon Administrative Procedures Act (APA) nor the Commission's enabling statutes—including ORS 758.535(2)(a)—require rulemaking to modify Idaho Power's implementation of the Public Utility Regulatory Policies Act (PURPA). The Commission has a well-established and perfectly legal history of implementing PURPA through generic investigations using contested case processes. Obsidian's statements to the contrary are simply wrong.

1 Moreover, delay poses serious risk to customers that Idaho Power will be required to
2 enter into long-term contracts at excessive avoided cost prices. When adopting interim
3 relief in this case, the Commission recognized this risk and adopted an expedited
4 schedule that would provide for a Commission order by the end of the year.¹ Rather than
5 abide by that schedule, Obsidian waited until this case was nearly complete to pose its
6 “threshold question” regarding the process for this case.² The Motion provides no
7 explanation for Obsidian’s decision to wait until the case was effectively over to file its
8 Motion, a glaring omission considering that Obsidian has apparently intended to raise this
9 issue for months.³ The fact that Obsidian chose to wait until days before the hearing and
10 after parties filed their prehearing briefs demonstrates the disingenuousness of its
11 position.

12 Obsidian’s true intent here is to delay the implementation of important customer
13 protections that may be disadvantageous to its business. This motive is made all the
14 more clear by the fact that Obsidian has asked to delay resolution of every single issue in
15 this case even though Obsidian’s Petition addresses only one of the issues in this case—
16 the standard contract eligibility cap. To get around this inconvenient fact, the Motion
17 simply misstates Idaho Power’s requested relief, incorrectly stating that Idaho Power has
18 requested to modify the *standard* contract term, when the Company’s request is limited to

¹ *Re Applications to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Charge, and for Change in Resource Sufficiency Determination*, Docket No. UM 1725, Order No. 15-199 at 6-7 (June 23, 2015).

² Motion to Abate at 3 (presenting the “threshold question” of whether a contested case should be used to establish PURPA policies).

³ Docket UM 1610, Phase IIA, Joint Motion to Close Phase IIA at 1 (Sept. 8, 2015) (Obsidian objected to joint motion because the Commission must use rulemaking).

1 *negotiated* contracts.⁴ Given that Obsidian has not even asked for rulemaking related to
2 the remaining two issues, there is no reason to delay.

3 Both the parties and the Commission have expended considerable resources
4 developing a comprehensive record and once the parties file briefs on December 10,
5 2015, the matter will be fully submitted and ready for a Commission decision. Obsidian
6 has presented no persuasive legal or policy reason to throw out the last seven months and
7 start all over. Obsidian's Motion should be seen for what it really is—a thinly veiled
8 attempt to delay resolution of this case regardless of the impact on customers.

9 II. ARGUMENT

10 Obsidian advances three arguments in support of its requested delay. First,
11 Obsidian argues that the Commission's decision here will be generally applicable and
12 therefore the Oregon APA requires the Commission to use formal rulemaking. Second,
13 Obsidian claims that ORS 758.535(2)(a) requires rulemaking in order to modify the
14 standard contract eligibility cap or term. Third, Obsidian claims that rulemaking is better
15 policy because it will allow greater participation and require fewer resources. As
16 discussed below, each of Obsidian's arguments misses the mark and provides no legal or
17 policy reason to delay the resolution of this case.

18 A. The Oregon APA Does Not Require Rulemaking to Grant Idaho Power's 19 Requested Relief.

20 Obsidian contends that the Commission must address Idaho Power's requested
21 relief through a rulemaking because the Commission is "acting in a legislative capacity for
22 the purpose of adopting generally applicable PURPA policies."⁵ Obsidian's argument fails
23 in both its characterization of the Commission's action and its understanding of the APA.

⁴ Motion to Abate at 1 ("The issues Obsidian is requesting be resolved in the rulemaking specifically include the following relevant to this docket . . . The contract term for such **standard** contracts shall be twenty (20) years.") (emphasis added).

⁵ Motion to Abate at 3.

1 Contrary to Obsidian’s claims, the Commission is not adopting policies of general
2 applicability in this case and, even if it were, the APA does not prohibit it from doing so.

3 **1. The Commission is not Adopting Generally Applicable PURPA Policies**
4 **in this Case.**

5 Idaho Power has not requested that the Commission revise its generally applicable
6 PURPA policies, nor has the Commission indicated that it intends to revise its generally
7 applicable PURPA policies in this case. Rather, the Company has requested that the
8 Commission authorize revisions to *Idaho Power’s* Schedule 85 to lower the eligibility cap
9 for *Idaho Power* standard contracts, reduce the term for *Idaho Power* negotiated contracts,
10 and update *Idaho Power’s* avoided cost prices. Each of these requests relates exclusively
11 to the only named party in the case—Idaho Power. The APA clearly distinguishes
12 between a rule, which is generally applicable and requires formal rulemaking, and an
13 order, which is “directed to a named person” and can be issued in a contested case.⁶
14 Here, the Commission’s order will be directed to Idaho Power and therefore fits squarely
15 within the definition of an order.

16 Because Obsidian cannot dispute that the Commission’s decision here will be
17 directed to only Idaho Power, Obsidian claims that the Commission’s decision will be
18 “generally applicable to any person seeking to make a PURPA sale to [Idaho Power].”⁷
19 Obsidian cites no authority to support this novel interpretation of the APA, and in fact,
20 similar arguments been rejected by the courts. In *Oregon Environmental Council v.*
21 *Oregon State Board of Education*, the Oregon Supreme Court addressed whether the
22 board’s approval of a text book was a generally applicable rule or an order.⁸ The lower

⁶ ORS 183.310(6)(a), (9); *see also Pac. Nw. Bell Tel. Co. v. Eachus*, 107 Or. App. 539, 542-43 (1991) (determining a Commission order was actually a rule because it was not directed to a particular person).

⁷ Motion to Abate at 4.

⁸ 307 Or. 30, 35-36 (1988).

1 court had found that the decision was generally applicable because the approval applied
2 to every school district. The Supreme Court reversed, noting that the lower court had
3 focused on the “wrong issue.”⁹ The analysis must focus on whether the decision is
4 directed to a named person (*i.e.*, the book), not on whether the decision may impact those
5 interacting with the named person (*i.e.*, the schools).¹⁰ The court analogized the case to
6 individual licensing decisions by state agencies, which “are orders, not rules, although they
7 affect others beyond the individual seeking a license.”¹¹ The court concluded that the
8 board’s decision was “directed to a named textbook, if not a person,” and was therefore
9 not a rule.¹² Here, Obsidian also “focuses on the wrong issue.” Like a licensing decision,
10 which impacts the general public seeking to transact with the licensee, the Commission’s
11 decision will impact those seeking to transact with Idaho Power. But that impact does not
12 render the decision generally applicable for purposes of the APA.

13 Further, if adopted, Obsidian’s proposed standard would lead to absurd results. It is
14 difficult to conceive of a single Commission order that would not impact the general public
15 served by the named utility in the order. If Obsidian’s standard is adopted, then every
16 Commission decision is generally applicable and therefore must be made in a formal
17 rulemaking proceeding. Such a result is entirely unreasonable and demonstrates the error
18 of Obsidian’s position.

19 **2. The Commission can Exercise its Legislative Authority in a Contested**
20 **Case.**

21 Obsidian argues that whenever the Commission acts in its legislative capacity, it is
22 obligated to do so through rulemaking.¹³ To support this argument, Obsidian selectively

⁹ *Id.* at 36.

¹⁰ *Id.* at 36.

¹¹ *Id.* (internal citation omitted).

¹² *Id.*

1 and misleadingly quotes the Commission’s Internal Operating Guidelines to claim that the
2 Commission can hold contested cases only when it is exercising its quasi-judicial
3 authority.¹⁴ However, the Commission’s Internal Operating Guidelines in no way limit
4 contested cases to the exercise of quasi-judicial authority. The guidelines explain that the
5 Commission “uses contested case procedures to address a wide variety of issues,”
6 including purely legislative “general rate case proceedings.”^{15,16} Although Schedule 85 is
7 not technically a rate schedule, Idaho Power’s request to modify the terms of Schedule 85
8 is comparable to a rate case where the Commission uses contested cases to exercise its
9 legislative authority to set rates.¹⁷ Moreover, the guidelines explain that the Commission
10 also uses contested cases for “workshop and comment proceedings for generic policy
11 investigations.”¹⁸ Indeed, the Commission’s statutes specifically authorize it to investigate
12 and hold contested case hearings on any matter within the Commission’s jurisdiction, even
13 purely legislative matters.¹⁹

¹⁴ Motion to Abate, Exhibit A at 8-9.

¹⁵ Order No. 14-358, Appendix A at 8.

¹⁶ See e.g., *Am. Can Co. v. Lobdell*, 55 Or. App. 451, 463, 638 P.2d 1152, 1159 (1982) (“Rate-making is a purely legislative function, involving broad discretion in selecting policies and methods of allocating rates among classes of customers.”); *Pac. Nw. Bell Tel. Co. v. Katz*, 116 Or. App. 302, 309, 841 P.2d 652, 656 (1992) (“Utility regulation, including ratemaking, is a legislative function, and the legislature has granted broad power to PUC to perform its delegated function.”); see also *Re PacifiCorp*, Docket UM 1495, Order No. 11-366 (Sept. 22, 2011) (Commission acts in legislative capacity in a contested case to determine standards for granting a certificate of public convenience and necessity).

¹⁷ *Re Investigation to Determine if Pacific Power’s Rate Revision Is Consistent With the Methodologies and Calculations Required by Order No. 05-584*. Docket No. UM 1442, Order No. 09-427 (Oct. 28, 2009) (PURPA schedules are not tariffs for purposes of ORS 757.210 *et seq.*).

¹⁸ Order No. 14-358, Appendix A at 8.

¹⁹ ORS 756.515. The Commission’s broad authority to investigate is consistent with its general authority to regulate. Oregon law provides the Commission with “the broadest authority—commensurate with that of the legislature itself—for the exercise of [its] regulatory function.” *Pac. Nw. Bell Tel. Co. v. Sabin*, 21 Or App 200, 214, 534 P2d 984, *rev den* (1975). By statute, the Commission must represent utility customers and the public generally “in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction,” and to use its powers “to protect such customers, and the public generally, from unjust and

1 Obsidian is wrong. First, as discussed above, the Commission is not adopting policies of
2 general applicability in this case so it has no obligation to use formal rulemaking. Second,
3 Obsidian’s argument has long been rejected by the Commission, which has historically
4 used both contested cases and rulemaking to implement PURPA. Third, if the
5 Commission concludes that rulemaking is required, it can institute a formal rulemaking
6 proceeding to implement its decision in this case. There is no reason for the Commission
7 to disregard over seven months of effort in this case and the thoroughly developed record
8 just to start all over again in a rulemaking proceeding.

9 **1. The Commission is not Adopting Generally Applicable Policies so ORS**
10 **758.535 does not Apply.**

11 ORS 758.535(2)(a) directs the Commission to establish the terms and conditions for
12 the purchase of electricity from QFs “by rule.” The APA defines a “rule” as a regulation of
13 “general applicability that implements, interprets or prescribes law or policy . . .”²⁵
14 Together, these statutes make clear that the requirement for rulemaking in ORS
15 758.535(2)(a) applies to only generally applicable terms and conditions. As discussed
16 above, this case does not involve generally applicable terms and conditions and therefore
17 the rulemaking requirement in ORS 758.535(2)(a) does not apply.²⁶

18 **2. The Commission can Issue Revised Rules Implementing its Decision**
19 **without Delaying this Case.**

20 To the extent that the Commission believes that rulemaking is legally required or
21 good policy, it can open a rulemaking docket to implement the policy decisions made in
22 this case after this case has concluded. Obsidian appears to concede that this is an

²⁵ ORS 183.310(9).

²⁶ See *Portland Inn, Inc. v. Oregon Transp. Comm’n*, 39 Or. App. 749, 752, 593 P.2d 1233, 1235 (1979) (“an agency action cannot be both an ‘order’ and a ‘rule’”).

1 acceptable approach.²⁷ Moreover, as discussed below, the Commission has successfully
2 used this approach in the past.

3 Idaho Power has no objection to the Commission taking this same approach here.
4 Indeed, given that the Commission's current rules are inconsistent with its orders,²⁸ a
5 rulemaking is necessary to update the rules to reflect the generally applicable policy
6 determinations made in several recent PURPA dockets. However, the Commission
7 should not delay issuing a decision in this case pending rulemaking. The APA and
8 existing rules authorize the Commission to implement its decision here to prevent
9 customer harm during the pendency of a formal rulemaking. *First*, the Commission can
10 issue temporary rules of general applicability under ORS 183.335(5), which allows for the
11 immediate adoption of temporary rules without prior notice or hearing when, *inter alia*, the
12 failure to do so will result in "serious prejudice to the public interest or the interest of the
13 parties concerned . . ." ²⁹

14 *Second*, if the Commission determines that Idaho Power's specific factual
15 circumstances require a utility-specific policy to protect customers, the Commission can
16 grant Idaho Power a waiver of any of its generally applicable rules necessary to implement
17 its decision in this case.³⁰ By using both temporary rules and its waiver authority, the
18 Commission can act to protect customers now.

²⁷ Motion to Abate, Exhibit A at 10 (contested case investigations "may precede a rulemaking").

²⁸ For example, OAR 860-029-0040(4)(a) establishes a 1 MW eligibility cap for standard contracts.

²⁹ Even without temporary rules, the Commission's order in this contested case is enforceable during the pendency of a rulemaking proceeding. *Burke v. Children's Services Div.*, 288 Or 533, 538(1980).

³⁰ OAR 860-029-0005(4). In addition, if the Commission determines that its decision in this case will be generally applicable, it can also issue temporary rules to directly implement its decision in this case.

1 **3. The Commission has Historically Relied on Rulemaking and Contested**
2 **Case Proceedings to Implement PURPA.**

3 Obsidian claims that the Commission “has long agreed that ORS 758.535(2)(a)
4 requires rulemaking in order to establish PURPA policies.”³¹ Contrary to this
5 mischaracterization, the Commission has specifically rejected Obsidian’s argument that it
6 must exclusively use rulemaking to implement PURPA. Rather, the Commission has long
7 utilized both rulemakings and contested case proceedings to establish its PURPA policies.

8 In Order No. 84-742 the Commission adopted revisions to its administrative rules
9 necessitated by the passage of House Bill 2320, which amended Oregon’s PURPA
10 implementation statutes to include ORS 758.535.³² In that case, parties argued that ORS
11 758.535 required the Commission to set the terms of PURPA contracts through a
12 rulemaking process. The Commission disagreed, finding that establishing every term and
13 condition by rule would be infeasible and therefore the “legislature intended the
14 Commission[] to act as an arbitrator in ruling on the terms to be included in specific
15 contracts.”³³ Indeed, concurrent with the rulemaking, the Commission held a generic
16 investigation to establish guidelines for setting avoided cost prices for PURPA contracts.³⁴
17 Among the many policies established in that generic investigation, the Commission
18 determined the contract term applicable to PURPA transactions.

19 The Commission also established broadly applicable PURPA policies in a 1991
20 generic investigation.³⁵ Among the many policies adopted, the Commission increased the
21 eligibility cap for standard contracts from 100 kW to 1 MW and decided that the contract

³¹ Motion to Abate, Exhibit A at 11.

³² *Proposed Amendments to Rules Relating to Cogeneration and Small Power Production Facilities*, Docket No. AR 102, Order No. 84-742 (Sept. 24, 1984).

³³ *Id.* at 4.

³⁴ *Re Investigation of Avoided Costs and Cost Effective Fuel Use and Resource Development*, Docket No. UM 21, Order No. 84-720 (Sept. 12, 1984).

³⁵ *Re Investigation into Competitive Bidding by Investor-Owned Electric Utility Companies*, Docket No. UM 316, Order No. 91-1383 (Oct. 18, 1991).

1 term for each PURPA contract should be individually negotiated rather than dictated by
2 “Commission fiat.”³⁶ The Commission followed up this generic investigation with a
3 rulemaking that was narrowly tailored to only modify the eligibility cap, presumably
4 because the other policy decisions were not reflected anywhere in the Commission’s rules
5 and therefore did not require amendments.³⁷

6 Beginning in 2004, the Commission began another generic investigation to revise its
7 broadly applicable PURPA policies. Using a contested case procedure, in docket UM
8 1129 the Commission substantially modified many of its policies, including the contract
9 term and eligibility cap.³⁸ And, most recently, the Commission used a contested case
10 proceeding in the ongoing docket UM 1610 to revise its PURPA policies.³⁹

11 The Commission’s history demonstrates three relevant points all of which undermine
12 Obsidian’s selective reading of Commission precedent. First, the Commission has
13 explicitly rejected Obsidian’s argument that ORS 758.535(2)(b) requires rulemaking to
14 establish every term and condition of a PURPA contract. Second, the Commission has
15 regularly used contested case and other non-rulemaking proceedings to develop and
16 implement its PURPA policies. Third, the Commission has consistently, if not always,
17 established the contract term—one of Idaho Power’s requests in this case—through
18 generic investigations and never through rulemaking.⁴⁰

³⁶ *Id.* at 16.

³⁷ *Re OAR 860-029-040(5)(a) Relating to Qualifying Facilities*, Docket No. AR 246, Order No. 91-1605 (Nov. 26, 1991).

³⁸ *See generally Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 (May 13, 2005); *Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 07-360 (Aug. 20, 2007).

³⁹ *Re Investigation Into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 14-058 (Feb. 24, 2014).

⁴⁰ *See also* Order No. 05-584 at 10 (explaining that the Commission adopted five-year contracts in a 1996 PGE advice filing).

1 **C. Obsidian has Presented No Valid Justification for Delaying this Case.**

2 Obsidian asks the Commission to delay docket UM 1725 so that the Commission
3 can address the “threshold question that Obsidian is now raising”—whether a contested
4 case proceeding is appropriate for establishing PURPA policies.⁴¹ Based on over thirty
5 years of using contested cases to establish PURPA policies, the Commission has already
6 answered Obsidian’s “threshold question” and there is no reason to delay this case to
7 answer it again.

8 In support of a delay, Obsidian makes the conclusory statement that rulemaking
9 proceedings will allow greater participation and require fewer resources.⁴² But Obsidian
10 musters no actual evidence supporting either of these claims. Obsidian’s purported
11 interest in conserving resources is particularly disingenuous considering the timing of its
12 Motion. If Obsidian’s real intent was to conserve resources, it would have filed its Motion
13 months ago, instead of waiting until the contested case has run its course before asking
14 for a delay. Neither the Commission nor the parties are well served by Obsidian’s ill-timed
15 request for a do-over when there has been no demonstrated change in facts.

16 Obsidian also implies that the Commission will be unable to implement Oregon’s
17 energy policy in a contested case.⁴³ The Commission has a long history of doing exactly
18 that and there is no basis to conclude, as Obsidian apparently does, that the Commission
19 will disregard state energy policy in a contested case but not in a rulemaking.

20 **D. Delay will Potentially Harm Customers.**

21 The fully developed and undisputed record in this case demonstrates: (1) the
22 Company’s current avoided cost prices are excessive due to an outdated deficiency
23 period;⁴⁴ (2) long-term contracts have historically included systematically excessive

⁴¹ Motion to Abate at 3.

⁴² Motion to Abate at 6.

⁴³ Motion to Abate at 5.

⁴⁴ Idaho Power/100, Allphin/17.

1 avoided cost prices;⁴⁵ and (3) negotiating wind and solar PURPA contracts results in a
2 more accurate avoided cost price that better ensures customer indifference.⁴⁶ The
3 Company has asked the Commission to place customers first and adopt policies that first
4 and foremost protect their interests, as required by PURPA.⁴⁷

5 The suspect timing of Obsidian's Motion and its attempts to unreasonably delay
6 implementation of important customer safeguards indicates that Obsidian has placed its
7 own interests above those of Idaho Power's customers. The Commission's obligation,
8 however, is to protect customers and it should not disregard that obligation by
9 unnecessarily delaying this case.⁴⁸

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⁴⁵ Idaho Power/104, Allphin/1.

⁴⁶ Order No. 05-584 at 16; *Small Power Production and Cogeneration Facilities: Regulations Implementing Section 210 of the Public Utility Regulatory Policy Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214, 12,223 (Feb. 19, 1980).

⁴⁷ *Indep. Energy Producers Ass'n v. California Pub. Utilities Comm'n*, 36 F.3d 848, 858 (9th Cir. 1994) (PURPA requires that customers remain indifferent as to whether the utility used more traditional sources of power or the newly-encouraged alternatives);

⁴⁸ ORS 756.040.

