PACIFIC POWER
A DIVISION OF PACIFICORP

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November 30, 2015

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
201 High Street SE, Suite 100
Salem, OR 97301-1166

Attn: Filing Center

RE: UM 1734 —PacifiCorp's Opposition to Obsidian Renewable LLC's Motion to Hold a Proceeding in Abeyance

PacifiCorp d/b/a Pacific Power encloses for filing in the above-referenced docket its Opposition to Obsidian Renewable LLC's Motion to Hold a Proceeding in Abeyance.

If you have questions about this filing, please contact Erin Apperson, Manager of Regulatory Affairs, at (503) 813-6642.

Sincerely,

R. Bryce Dalley/kzm

R. Bryce Dalley
Vice President, Regulation

Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1734

In the Matter of PACIFICORP d/b/a PACIFIC POWER, Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap .	PACIFICORP'S OPPOSITION TO OBSIDIAN RENEWABLE LLC'S MOTION TO HOLD A PROCEEDING IN ABEYANCE

I. Introduction

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) respectfully asks the Public Utility Commission of Oregon (Commission) to deny Obsidian Renewable LLC's (Obsidian) Motion to Hold a Proceeding in Abeyance (the Motion). Obsidian's Motion in this docket is a thinly veiled effort to delay resetting fixed-price terms and eligibility thresholds. The reason is obvious—the longer the outdated eligibility threshold and 15 year fixed-price term remains in place, the longer QF developers have to foist long-term, fixed-price contracts for unneeded energy and capacity on PacifiCorp's customers.

PacifiCorp's application demonstrates the risk to customers presented by mandatory power purchase agreements with extended fixed-price terms; the longer the fixed-price term, the more susceptible customers are to overpaying for energy and capacity. PURPA's must-purchase construct magnifies this risk because QF developers can lock in fixed-prices regardless of whether the purchasing utility needs the energy and capacity. In the end, customers are left bearing the costs of these uneconomic contracts.

Obsidian's Motion should be denied. First, the Motion is procedurally improper. Obsidian has failed to explain why it waited until the last minute to file its Motion, rather than seeking to have it its "threshold" question resolved in a timely manner.[1] Obsidian has known of its argument for months but chose to sit on its hands and wait until the eve of hearing in UM 1725 and the last phases of testimony preparation in UM 1734. PacifiCorp, Commission staff, and other parties who have devoted considerable resources developing the administrative record in compliance with the procedural schedule will be prejudiced if Obsidian's request is granted and they are forced to start over in a new proceeding.[2]

Second, Obsidian's Administrative Procedures Act (APA) arguments are misplaced. The Commission has recognized that it may use contested case procedures to develop PURPA polices since it first began implementing the statute in the early 1980s. If accepted, Obsidian's argument would cast doubt on years of PURPA implementation in Oregon and cause significant disruption for both utilities and QF developers. Furthermore, Obsidian mistakes the nature of PacifiCorp's request. PacifiCorp is not seeking to develop a general applicability standard (i.e., a rule). Instead, PacifiCorp has asked the Commission to modify certain terms and conditions applicable only to PacifiCorp. Put another way, the Commission is not being asked to develop terms and conditions applicable to all utilities operating in Oregon. And even if this docket will result in generally applicable standards, the APA expressly authorizes the Commission to use contested case procedures to develop such standards.

Finally, Obsidian has failed to demonstrate any harm. Contested case procedures provide Obsidian and other stakeholders with superior participatory rights as compared to rulemaking.

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[1] Motion at 3 (asking the Commission to resolve the "threshold question" is whether contested case procedures can be used to develop PURPA policies).

[2] Concurrently with filing the Motion, and the related motion in UM 1725, Obsidian filed a Petition for Rulemaking to establish eligibility thresholds and fixed price terms for mandatory PURPA purchases (Docket No. AR 593). A copy of Obsidian's petition is attached to its Motion as Exhibit A.

Even if the decisions adopted in this docket are generally applicable rules, the Commission can develop them via contested case procedures then codify them in a rulemaking (as it has done in prior PURPA dockets).

II. Argument

A. Obsidian' Motion is Procedurally Improper

Obsidian's Motion (and the related motion in UM 1725) prejudices PacifiCorp and other stakeholders who have been diligently complying with the agreed-to procedural schedules. The Motion (which was filed nearly six months after this docket was opened) is the first effort by Obsidian to formally raise its novel legal argument. Obsidian did not timely move to dismiss PacifiCorp's application after it was filed in May 2015. Obsidian did not timely attempt to establish a briefing schedule for addressing its "threshold" argument at the July 29, 2015 prehearing conference where the parties (including Obsidian) agreed to a procedural schedule for this docket.

Instead of taking reasonable steps to have its arguments heard in a timely and non-prejudicial manner, Obsidian elected to wait to file its motions until the eve of hearing in UM 1725 and in the midst of testimony filings in UM 1734. Obsidian filed its motion in UM 1725 three business days before the hearing in UM 1725 (November 18, 2015) and the business day before cross examination statements were due (November 16, 2015). The Motion came on the same day as Staff's and intervenors' cross-response testimony in UM 1734 was filed.[3]

Obsidian's delay is made all the more egregious by the fact it has known for months it intended to raise this legal issue. Obsidian publically announced its theory as early as September 2, 2015, when it argued in a UM 1610 prehearing conference that solar integration charges could

[3] Indeed, if Obsidian was truly concerned about efficiency, it would have presented its arguments before the Staff and the parties devoted resources to addressing the merits of PacifiCorp's Application.

not be developed using contested case proceedings.[4] Despite knowing that it intended to raise these arguments, Obsidian has fully participated in this docket, UM 1725, and Phase II of UM 1610 without taking any steps whatsoever to have its arguments decided in an orderly and non-prejudicial manner. Since September 2, 2015, Obsidian filed response testimony in this docket[5] and two legal briefs in UM 1610[6]—none of which objected to the contested case procedures being used.

Simply put, Obsidian should not be allowed to disrupt this docket (or UM 1725) by filing an untimely motion when it had every opportunity to do so at an earlier date. PacifiCorp, Commission staff, and other parties, who have been diligently following the agreed-to procedural schedule, should not be prejudiced by Obsidian's transparent and self-serving efforts to delay the Commission's resolution of PacifiCorp's request. Denying Obsidian's Motion would not leave it without remedy—Obsidian would have ample opportunity to raise APA arguments in its prehearing brief (due January 5, 2016), opening brief (due February 12, 2016), and reply brief (due February 19, 2016).

B. Obsidian's APA Arguments Lack Merit

1. The Commission has consistently used contested Case procedures to develop PURPA policies.

Obsidian's request seeks to upset decades of PURPA implementation in Oregon. Since it first began implementing PURPA in the early 1980s, the Commission has recognized that it is not limited to formal rulemakings when developing general terms and conditions for mandatory

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[4] *See* Order No. 15-292, Docket No. UM 1610 at 1 (Sept. 23, 2015). The September 2, 2015, prehearing conference addressed the Commission's decision to open a new phase of UM 1610 (Phase IIA) to address solar integration charges and other issues. Upon request of all parties except Obsidian, the Commission closed Phase IIA.

[5] Obsidian's and Cyprus Creek's Response Testimony and Exhibits, UM 1734 (Oct. 15, 2015).

[6] *See* Obsidian's UM 1610 Phase II Prehearing Brief (Sept. 2, 2015) and Post-Hearing Brief (Oct. 13, 2015). Neither of Obsidian's legal briefs in Phase II of UM 1610 advanced its legal argument concerning rulemaking versus contested case procedures. In fact, Obsidian stipulated to the Phase II issue list and participated in that docket without objection even though the issues involved establishing generally applicable terms and conditions of PURPA purchases (e.g., legally enforceable obligations).

PURPA purchases. In one of its earliest orders implementing PURPA, the Commission addressed arguments that House Bill 2320 (which was codified at ORS 758.505-.555) requires the Commission to set the terms of power purchase contracts through a rulemaking process. The Commission interpreted the section codified as ORS 758.535(2) as not requiring formal rulemakings for developing generic contract terms:

> The [Commission] believes that, in light of the difficulty of setting general terms that would adequately address the peculiarities of various projects, the Legislature intended the [Commission] to act as an arbitrator in ruling on the terms to be included in specific contracts. [The Commission] does not believe it is feasible to devise a "generic" contract or contracts through the rulemaking process.[7]

Consistent with its statutory interpretation that ORS 758.535(2) does not always compel the use of rulemaking procedures, the Commission has repeatedly used contested case procedures to set PURPA terms and conditions, including the fixed-price term and eligibility threshold for standard pricing.[8] Most recently, the Commission has used contested case procedures to assess numerous critical PURPA policies of general applicability in Phases I and II of UM 1610.[9] As noted above, Obsidian fully participated in Phase II of UM 1610 but failed to formalize its objection to the contested case procedures as a legal issue for the Commission to resolve in that docket.

Obsidian argues that PURPA terms and conditions not established by rulemaking are invalid.[10] If accepted, this interpretation of the APA and ORS 758.535(2) would cast doubt on years of PURPA implementation in Oregon. Indeed, Obsidian boldly argues that "any PURPA

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[7] Order No. 84-742, AR 102 at 4 (Sept. 24, 1984).

[8] *See, e.g.*, Order No. 05-584, Docket No. UM 1129 (May 13, 2005) (increased fixed-price PPA term from five years to 15 years and increasing the eligibility threshold from 1 MW to 10 MW); Order No. 14-058, Docket No. UM 1610 (Feb. 24, 2014) (affirming 15 year fixed price term).

[9] *See generally* Order No. 14-058, Docket No. UM 1610 (Feb. 24, 2014) (addressing PPA terms and conditions).

[10] Motion, Ex. A at 7 ("Any purported rule, regulation or policy that is not adopted through rulemaking procedures required by the APA is invalid.")

polices established through contested case proceedings are not valid."[11] That argument implicates years of policy development in dockets UM 1129, UM 1369, and UM 1610, among others. Such a result defies reason and would result in chaos for both QF developers and purchasing utilities.

2. Obsidian misapprehends the nature of this docket.

Relying on the APA's definition of "rulemaking,"[12] Obsidian mistakenly argues that contested case procedures are improper for this docket because PacifiCorp seeks to develop a rule of general applicability. Obsidian argues that the reduced fixed-price term and eligibility threshold would be rules of general applicability because they "would be generally applicable to any person seeking to make a PURPA sale to [PacifiCorp]."[13]

This argument misses the mark. Obsidian correctly reads the APA's definition of "rule" as "an agency directive, standard, regulation or statement of general applicability."[14] But PacifiCorp's application does not seek to develop contract terms and conditions that would be "general[ly] applicable." Instead, PacifiCorp has asked the Commission to determine *PacifiCorp's* individual duties with respect to its mandatory PURPA purchase obligations—namely, the standard pricing eligibility threshold for wind and solar QFs and the fixed-price term for all PPAs. PacifiCorp's application does not seek to impose terms and conditions on any other utility, and the terms adopted in this proceeding would not be generally applicable. This fact is highlighted by Order No. 15-241, in which the Commission reduced the eligibility

[11] *See* Motion, Ex. A at 12. The following contested case orders, among others, have set generally applicable terms and conditions of PURPA purchases: Order Nos. 05-584, Docket No. UM 1129 (May 13, 2005); Order No. 07-360, Docket No. UM 1129 (Aug. 20, 2007); Order No. 11-505, Docket No. UM 1369 (Dec. 13, 2011); Order No. 10-488, Docket No. 1396 (Dec. 22, 2010); and Order No. 14-058, Docket No. UM 1610 (Feb. 24, 2014).

[12] ORS 183.310(9).

[13] Motion, Ex. A at 9.

[14] ORS 183.310(9).

threshold for standard pricing on an interim basis solely for PacifiCorp.[15] The Commission ordered similar interim relief for solely for Idaho Power in UM 1725.[16] But neither of those orders established generally applicable standards.

The use of contested case procedures in this docket is appropriate. The Commission uses "contested case procedures to address a wide variety of issues … [including] workshop and comment proceedings for generic policy investigations."[17] PacifiCorp has asked the Commission to determine its "individual legal rights [and] duties" of PacifiCorp with respect to its mandatory purchase obligation under PURPA. This determination will be made based on the unique characteristics of PacifiCorp's system and the dramatic rise in QF PPA requests that PacifiCorp's customers are exposed to; thus, PacifiCorp has asked the Commission to determine PacifiCorp's individual legal rights consistent with the APA and the Commission's operating procedures adopted in Order No. 14-358.[18]

Obsidian mischaracterizes PacifiCorp's application as seeking to establish a rule of general applicability because all QF developers would be subject to the new fixed-price term and eligibility threshold. Obsidian misunderstands what constitutes a rule of general applicability. Only one party will be *directly* impacted by the Commission's decision in this docket: PacifiCorp. The fact that QF developers may be *indirectly* impacted does not mean the Commission has been asked to develop a generally applicable standard.

Oregon Environmental Council v. Oregon State Board of Education is instructive. In that case, the Oregon Supreme Court explained that when determining whether an agency action

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[15]Order No. 15-241, Docket UM 1734 at 3 (Aug. 14, 2015) (Reducing "on an interim basis … the eligibility cap to 3 MW for standard contracts offered by PacifiCorp … to solar QF projects.").

[16] Order No. 15-199, Docket UM 1725 (June 23, 2015).

[17] Order No. 14-358, Docket No. UM 1709, App. A at 8 (Oct. 17, 2014).

[18] Finding that a contested case is one in which the Commission "determines the rights of individual parties." Order No. 14-358, App. A at 7.

is a generally applicable rule, the focus should be on the subject of the specific agency action, not on the parties that may be indirectly impacted.[19] The Court held that the Board of Education's (Board) decision to adopt a social studies text was not a rule of generally applicability, even though every school would be impacted:

> The Court of Appeals held that the Board's decision to approve [the textbook] was a rule … the rational being that the decision was generally applicable to all school districts. This analysis focuses on the wrong issue. Although the decision applies to all school districts, it concerns but one book.[20]

The Court analogized the Board's decision to "individual licensing decisions made by professional licensing agencies [which] are orders not rules … even though they affect others beyond the individual seeking a license."[21]

Here, like the Board's decision in *Oregon Environmental Council* or individual licensing decisions, PacifiCorp seeks to revise certain standards applicable to its mandatory PURPA purchase obligation. The decision the Commission has been asked to adopt is not generally applicable—it would apply only to PacifiCorp; the fact that QF developers would be indirectly impacted is irrelevant.

3. The Commission may use contested case procedures to develop generally applicable standards.

Assuming for argument's sake that the Commission will develop a generally applicable standard in this docket, it is authorized to use contested case procedures to do so. The Commission's enabling legislation endows the Commission with "the broadest authority—commensurate with that of the legislature itself—for the exercise of [its] regulatory function."[22] The expansive grant of legislative power empowers the Commission with considerable discretion

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[19] 307 Or. 30, 35-36 (1988).

[20] *Id.*

[21] *Id.* at 36 (citing *Megdal v. Bd. Of Dental Examiners*, 288 Or. 293 (1980)).

[22] *Pac. Nw. Bell Tel. Co. v. Sabin*, 21 Or. App. 200, 214 (1975); ORS 756.515.

to conduct investigations to "protect … customers, and the public generally, from unjust and unreasonable rate exactions and practices and to obtain for them adequate service at fair and reasonable rates." [23] The Commission's decision to use contested case procedures in this docket is consistent with this broad grant of legislative discretion.

Furthermore, the "APA provides that agencies are authorized to adopt general policies that otherwise would qualify as 'rules' during contested case proceedings, without going through notice-and-comment rulemaking."[24] More specifically, ORS 183.355 states that: "if an agency, in disposing of a contested case, announces in its decision the adoption of general policy applicable to such case and subsequent cases of like nature the agency may rely upon such decision in disposition of later cases." Thus, rules of general applicability need not be developed solely by formal rulemaking procedures. As the Oregon Court of Appeals has explained, "[w]e do not believe that administrative agencies should be hobbled by an inflexible requirement that every refinement of an articulated policy be promulgated through the rulemaking machinery of the [APA]."[25]

It is true that ORS 758.535(2)(a) states that the Commission must establish the "terms and conditions for the purchase of energy or capacity from a [QF] … by rule." The statute, however, does not specify how the Commission must establish such rules (i.e., generally applicable standards), and does not expressly reference the APA's rulemaking provisions found at ORS 183.335. The Legislature's silence on what procedures the Commission must use when establishing terms and conditions under ORS 758.535(2)(a) stands in stark contrast to other Oregon laws where the Legislature expressly ordered agencies to adopt rules via APA

[23] ORS 756.040.

[24] *Homestyle Direct, LLC v. Dep't of Human Servs.*, 354 Or. 253, 266 (2013).

[25] *Larsen v. Adult & Fam. Servs. Div.*, 34 Or. App. 615, 619-20 (1978) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-93 (1974)).

rulemaking consistent with ORS 183.335.[26] By omitting an express reference to formal rulemaking under ORS 183.335, the Legislature did not intend the Commission to be bound by those procedures when developing PURPA purchase terms and conditions.[27]

Furthermore, Obsidian's argument that the Commission may only use the rulemaking procedures found in ORS 183.335 would render ORS 183.355 superfluous. As discussed above, ORS 183.355 allows agencies to develop generally applicable standards in contested case proceedings. Obsidian's interpretation would nullify the Commission's authorization to develop generally applicable standards in contested cases and would render ORS 183.355 moot. Such a result conflicts with the axiomatic canon of statutory construction under which interpretations that render statutory language superfluous are rejected.[28]

Even if formal rulemaking procedures are required, there is no authority that would prevent the Commission from developing policies via contested case procedures then codifying them via rulemaking. In fact, the Commission has previously used a similar approach to develop PURPA policies. In Docket No. UM 1129, the Commission developed policies and procedures related to negotiated contracts between utilities and large QFs. Among other things, the Commission established dispute resolution policies applicable to negotiated contracts between utilities and large QFs.[29] The Commission then opened a rulemaking to "promulgate rules

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[26] *See, e.g.,* ORS 707.670 ("The Director of the Department of Consumer and Business Services may specify by rule, in accordance with ORS 183.315, 183.330, 183.335 and 183.341 to 183.410, the minimum frequency with which a board of directors of a banking institution must meet.")

[27] *In the Matter of Perlenfein,* 316 Or. 16, 22–23 (1993) (en banc) ("When a legislature or agency uses a particular term in one provision of a statute or regulation, but omits that same term in a parallel and related provision, we infer that the legislature or agency did not intend that the term apply in the provision from which the term is omitted.")

[28] *See, e.g.*, *Henry v. Yamhill Cty.*, 37 Or. 562, 564 (1900) ("It is a cardinal rule of interpretation that a statute should be so construed as to give effect to every clause … and to reject none…"); *Shoulders v. SAIR Corp.*, 300 Or. 606, 615 (1986) (en banc) (rejecting interpretation that would render statutory provisions superfluous); *State v. C.C.*, 258 Or. App. 727, 733 (2013) ("As a matter of statutory construction, we assume that the legislature does not create superfluous language.").

[29] *See* Order No. 07-360, Docket No. UM 1129 (Aug. 20, 2007).

consistent with our decision in this order on dispute resolution for negotiated QF contracts."[30] If a formal notice and comment rulemaking is necessary (which it is not), the Commission can develop policies via contested case procedures then initiate a rulemaking to promulgate rules consistent with its final order resolving the issues presented in PacifiCorp's application.[31]

Finally, the Commission's Internal Operating Guidelines do not support Obsidian's argument that contested case procedures may only be used when the Commission is exercising its quasi-judicial (rather than legislative) authority. The Commission's Internal Operating Guidelines expressly state that the Commission may use contested case procedures to "address a wide variety of issues" including purely legislative "general rate case proceedings."[32] PacifiCorp's Petition is analogous to a rate case where the Commission exercises its legislative function and employs contested case procedures to establish just and reasonable rates. PacifiCorp has asked the Commission to modify the terms of Schedule 37 (which applies only to PacifiCorp) in order to prevent its customers from being harmed. While Schedule 37 is technically not a rate schedule, the Commission's broad grant of legislative authority nonetheless authorizes it to open a contested case investigation to address the terms of Schedule 37 purchases that are "unreasonable" to customers.[33]

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[30] *Id.* at 3.

[31] Using formal notice and comment rulemaking procedures to codify policy decisions made in contested case proceedings is administratively cumbersome and would significantly extend the time needed to modify PURPA policies. If the Commission elects to codify the standards developed in this docket via a rulemaking, it can prevent harm to customers by issuing temporary rules under ORS 183.335(5). That provision authorizes the Commission to immediately adopt temporary rules without prior notice or when the failure to do so would result in "serious prejudice to the public interest or the interest of the parties concerned…" 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).

[32] Order No. 14-358, App. A at 8.

[33] ORS 756.515(1).

C. Obsidian Has Failed to Show any Harm

Finally, there is no evidence that Obsidian or any other party will be harmed by the use of contested case procedures in this docket. Contested case procedures provide Obsidian and other stakeholders with greater participatory rights as compared to notice and comment rulemakings. Contested cases provide parties with an opportunity to propound discovery, file sworn testimony, conduct cross-examination, and present evidence and arguments at a hearing. Furthermore, ex parte rules applicable to contested cases ensure neutral participation by the Commission and its staff. These procedural requirements result in a robust and tested administrative record that can support sound policy development by the Commission.

Notice and comment rulemaking, on the other hand, provides Obsidian and other stakeholders with diminished participatory rights (usually limited to filing comments). While there is a greater opportunity for general public comment, the ability of parties to develop evidence (and test the evidence of other parties) is almost nonexistent in rulemaking. While rulemaking is appropriate in many circumstances, it is inferior to contested case proceedings when addressing complex and technical policy issues like those present in this docket.

III. Conclusion

Obsidian's Motion should be denied on numerous grounds. Obsidian's untimely requested relief would prejudice PacifiCorp, Commission staff, and other parties who have devoted considerable resources to developing the record in this docket. More importantly, PacifiCorp's customers would be prejudiced as outdated eligibility thresholds and fixed-price terms would remain in place while a new rulemaking is conducted.

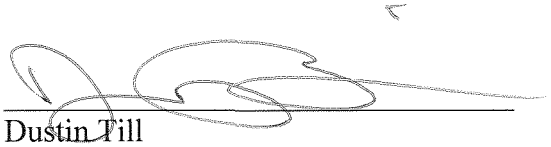
On the merits, Obsidian's legal arguments lack any merit. First, Obsidian misapprehends the nature of this docket. This docket does not involve standards of general applicability.

PacifiCorp seeks only to modify the eligibility threshold and fixed-price term applicable to *PacifiCorp's* PURPA obligations; PacifiCorp does not seek to develop or impose standards on any other utility. Because this docket does not involve generally applicable standards, rulemaking procedures are inappropriate.

Second, consistent with its broad grant of legislative discretion, the Commission has correctly interpreted its enabling legislation to allow the use of contested case procedures when developing PURPA policies. PURPA has been consistently implemented in Oregon via policies developed in contested case proceedings. Obsidian's arguments, if accepted, would cast doubt on decades of PURPA implementation. Third, even if this docket involved generally applicable standards (which it does not), the APA expressly authorizes the Commission to announce generally applicable standards via contested case orders. Obsidian's overly formalistic arguments cannot be reconciled with the APA's express language.

PacifiCorp respectfully asks the Commission to deny Obsidian's Motion and allow the parties to move forward with this docket without further delay.

Respectfully submitted this 30th day of November, 2015

By: 

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