



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

January 26, 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 Reply in Support of its 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 REPLY IN SUPPORT OF
MOTION TO LIFT SUSPENSION**

1 Pursuant to OAR § 860-001-0420 and the Administrative Law Judge’s January 21, 2021
2 Ruling, Portland General Electric Company (PGE) respectfully submits this Reply to Public Utility
3 Commission of Oregon Staff (Staff), NewSun Energy, LLC (NewSun), Obsidian Renewables,
4 LLC (Obsidian), and Northwest & Intermountain Power Producers Coalition, Renewable Energy
5 Coalition, and Community Renewable Energy Association’s (collectively, the QF Parties)
6 Responses to PGE’s Motion to Lift Suspension. PGE’s Motion seeks an order lifting the stay
7 imposed in this docket in December 2019 and directing the Administrative Law Judge to set a
8 prehearing conference to adopt a schedule for processing PGE’s request to update its standard
9 power purchase agreement (Standard PPA) for purchases from qualifying facilities (QF) under the
10 Public Utility Regulatory Policies Act of 1978 (PURPA). The QF Parties, Obsidian, and NewSun
11 oppose PGE’s Motion,¹ while Staff takes no position.²

12 No party has presented a compelling argument for continuing the stay. Now that Staff has
13 presented its proposal for the issues to be resolved in the generic rulemaking addressing certain
14 standard contract terms and conditions, docket AR 631, PGE will remove any issue slated for
15 resolution in AR 631 from its proposed Standard PPA and will revert to the status quo—thereby

¹ NewSun’s Response (Jan. 13, 2021); QF Parties’ Response (Jan. 15, 2021); Obsidian’s Response (Jan. 20, 2021).

² Staff’s Response (Jan. 15, 2021).

1 eliminating concerns about duplication of efforts. And although stakeholder review of PGE's
2 filing will require effort, this is not a valid reason to further delay substantive consideration of
3 PGE's proposal. Nor should stakeholders' concerns about the substance of the filing or the lack
4 of universal support for the filing prevent PGE from obtaining a procedural schedule for
5 Commission review now, more than two years after PGE's initial filing. Instead, stakeholders'
6 substantive concerns should be addresses when the Commission considers the merits of the filing.
7 Finally, because PGE's revised filing does not seek generally applicable policy changes,
8 stakeholders' arguments that the revised Standard PPA must be adopted through rulemaking are
9 unpersuasive.

I. BACKGROUND

10 PGE initiated this docket in December 2018 to revise and update its Standard PPA, which
11 was adopted in 2005 and has been the subject of many disputes in recent years. PGE's experience
12 has shown that the Standard PPA contains ambiguities and lacks many standard commercial terms
13 that are present in other utilities' standard PURPA PPAs and in PGE's non-PURPA PPAs. PGE
14 engaged with stakeholders regarding its initial filing for the better part of a year before making a
15 revised filing in October 2019 that incorporated many changes proposed by the QF stakeholders
16 and requesting to proceed with Commission review. However, in December 2019, the
17 Commission granted the QF Parties' Motion to Stay this docket pending resolution of docket AR
18 631.³ One year later, in the absence of significant progress in AR 631, PGE moved to lift the
19 suspension and adopt a schedule for review of PGE's revised filing in UM 1987.⁴

20 In response to PGE's Motion to Lift Suspension, the QF Parties and NewSun continue to
21 insist that UM 1987 should remain stayed until AR 631 is completed, and Obsidian asserts that
22 UM 1987 must be dismissed entirely because it is procedurally improper. Staff takes no position
23 regarding the Motion but raises questions about whether UM 1987 can be processed efficiently.

³ Commission Ruling – Proceedings Suspended at 3 (Commission Ruling) (Dec. 23, 2019).

⁴ PGE's Motion to Lift Suspension (Dec. 31, 2020).

II. ARGUMENT

1 A. Dockets UM 1987 and AR 631 will not overlap.

2 The QF Parties argue that AR 631 must be resolved before UM 1987 can proceed because
3 PGE’s revised filing addresses “the same subject” as AR 631 and will necessarily overlap with
4 AR 631.⁵ In support of this argument, the QF Parties rely on a case in which the Commission
5 declined to resolve an issue regarding one utility that was being adjudicated generically for all
6 utilities.⁶ The QF Parties’ argument is unpersuasive and the precedent on which they rely is
7 inapposite because *PGE is not proposing that UM 1987 will address any of the issues slated for*
8 *resolution in AR 631*. Instead, PGE has repeatedly stated that it will remove from UM 1987 any
9 items that overlap with AR 631.⁷ As Staff notes, now that its proposal in AR 631 has been issued,
10 it will be straightforward to determine whether any provisions proposed in UM 1987 conflict or
11 overlap with matters that Staff proposes to address in AR 631.⁸ Thus, instead of “numerous
12 overlapping issues,” as the QF Parties claim,⁹ there will actually be no overlap between the two
13 dockets.

14 The QF Parties assert it will not be possible for UM 1987 to avoid addressing issues to be
15 considered in AR 631 because the Standard PPA cannot just omit key provisions that are being
16 considered in AR 631.¹⁰ This argument misses the mark because PGE’s proposal is not that the
17 Standard PPA will fail to address such issues entirely; PGE’s proposal is that PGE’s revised
18 Standard PPA will adhere to the status quo for those issues slated for resolution in AR 631. The
19 QF Parties seem to concede that sticking with the status quo is not prejudicial.¹¹

⁵ QF Parties’ Response at 1-2, 9-12.

⁶ QF Parties’ Response at 10-11.

⁷ PGE’s Motion to Lift Suspension at 8; PGE’s Response to Motion for Stay at 7 (Nov. 26, 2019).

⁸ Staff’s Response at 1.

⁹ QF Parties’ Response at 14.

¹⁰ QF Parties’ Response at 13.

¹¹ QF Parties’ Response at 11 (“There was no prejudice with the stay because it maintained the status quo for the contracting parties.”).

1 NewSun argues that AR 631 is the best place to resolve PURPA contracting issues “more
2 holistically.”¹² However, AR 631 is not slated to address the vast majority of the changes PGE
3 proposed.¹³ For example, in response to QF requests, PGE revised Section 12.3.3 of its Standard
4 PPA to allow QFs to purchase claims-made insurance coverage,¹⁴ but Staff does not propose to
5 address the type of insurance coverage QFs must obtain in AR 631.¹⁵ In addition, PGE revised
6 its Standard PPA provisions regarding planned maintenance to make it easier and faster for QF
7 developers to maintain their facilities, but Staff does not propose changes to scheduled outage
8 provisions in AR 631.¹⁶ PGE also proposed to add several definitions to its Standard PPA to
9 increase clarity, and this is not the type of change slated for consideration in AR 631.¹⁷ In sum,
10 delaying resolution of UM 1987 pending the outcome of AR 631 is not needed to prevent
11 duplication or conserve party resources, because the two dockets will not address the same issues.

12 **B. The fact that review of PGE’s filing will require stakeholder effort is not a valid**
13 **reason to deny consideration of PGE’s updates.**

14 The QF Parties and NewSun emphasize the number of words and pages in PGE’s revised
15 filing and characterize the filing as “extremely burdensome to analyze and evaluate fully,”¹⁸
16 suggesting that the purported burden warrants continuing the stay. PGE agrees that proceeding
17 with UM 1987 will require stakeholders to review PGE’s revised filing and articulate their
18 objections. However, PGE disagrees that the effort required is a valid reason for keeping this two-

¹² NewSun’s Response at 3, 6.

¹³ 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).

¹⁴ Revised Filing Cover Letter at 4 (Oct. 1, 2019).

¹⁵ Docket AR 631, Staff’s Letter to Participants re Proposal and Next Steps at 11 (discussing rating of insurance carrier but not the type of insurance policy QFs must obtain).

¹⁶ Docket AR 631, Staff’s Letter to Participants re Proposal and Next Steps at 10 (no changes proposed re “Scheduled Outages”).

¹⁷ See Docket AR 631, Staff’s Letter to Participants re Proposal and Next Steps.

¹⁸ QF Parties’ Response at 4-5; NewSun’s Response at 1, 5.

1 year-old docket suspended indefinitely.¹⁹ PGE’s filing requested Commission approval of a
2 revised Standard PPA that is more functional, clear, and comprehensive than its current PPA.
3 Given that this improved PPA lays the foundation for reasonable and predictable contractual
4 relationships between PGE and QF developers, and given that each new Standard PPA PGE signs
5 commits customers to paying more than \$5 million, it is entirely reasonable to ask that stakeholders
6 devote some resources to processing this docket to ensure that the new Standard PPA works for
7 all involved.

8 Moreover, the concerns about the sheer magnitude of PGE’s filing are overstated. PGE seeks
9 approval of a revised Schedule 201 and Standard PPA. The filing includes eight Standard PPA
10 forms to account for project-specific characteristics (i.e., on- and off-system, renewable and non-
11 renewable, and variable and non-variable), but the PPAs are substantially the same. They vary
12 only in specific provisions—for example, all four renewable PPAs have a handful of provisions
13 regarding renewable energy certificates that are absent from the four non-renewable PPAs. In
14 addition, the parties’ emphasis on the length of PGE’s filings ignores the fact that many pages of
15 the filings comprise matrices and redlined documents that PGE provided to assist parties with their
16 review. If length were a factor in determining whether a filing should be considered, PGE could
17 have made its filing much shorter, but instead PGE opted to make a longer filing that included
18 additional explanatory material for the reviewing parties’ benefit.²⁰

19 The QF Parties and NewSun also claim that PGE is seeking to “rush its enormous filing with
20 vast and unknowable consequences through the Commission,”²¹ that PGE requests “special
21 expedited treatment,”²² and that PGE is trying to “force” changes through.²³ None of these

¹⁹ Similarly, the fact that the other utilities could, hypothetically, seek to update their standard PPAs in the future is not a basis for refusing to consider PGE’s update now. *See* QF Parties’ Response at 10.

²⁰ If, as NewSun claims, PGE’s motivation in seeking to resume UM 1987 was to burden Staff and stakeholders with additional work, NewSun’s Response at 5, PGE would not have gone to such effort to assist parties with their review.

²¹ QF Parties’ Response at 9.

²² QF Parties’ Response at 16.

²³ NewSun’s Response at 3.

1 assertions is correct. PGE stated that it designed its revised filing so that it could be expeditiously
2 reviewed, and PGE has asked that the Commission proceed with processing its filing.²⁴ But to be
3 clear, PGE is not seeking approval on an expedited basis or any other special treatment.²⁵ PGE is
4 simply asking that the Commission adopt a schedule to begin the review and approval process.
5 PGE’s request is reasonable and should be granted.

6 **C. PGE is not required to gain consensus to obtain a schedule for review of its filing, and**
7 **stakeholders’ substantive concerns about the filing do not justify keeping this docket**
8 **stayed.**

9 Although it does not oppose PGE’s Motion to Lift Suspension, Staff raises concerns about
10 whether PGE’s request for approval of a revised Standard PPA can be processed efficiently, noting
11 that the process of litigating PGE’s filing may not be quickly concluded given the history of
12 opposition from parties.²⁶ The QF Parties fault PGE for abandoning the stakeholder process to
13 make its revised filing.²⁷ However, PGE engaged in good faith in a months-long process with
14 stakeholders—which included six workshops and the exchange of several rounds of redlines—
15 before making the revised filing. Unfortunately, that collaborative process did not yield complete
16 consensus, and as a result, the Commission will need to resolve disputed issues. The fact that
17 Commission resolution is needed is not a basis for declining to consider PGE’s filing. Instead, it
18 supports lifting the stay so the litigation process can proceed toward that resolution.

19 Similarly, PGE should not be denied the formal process necessary to obtain Commission
20 approval of its new contract simply because parties have stated that they oppose some of the
21 proposed changes. The QF Parties and NewSun raise several cursory criticisms regarding the
22 substance of PGE’s proposed updates, but such concerns are more appropriately addressed during
23 the process of reviewing PGE’s filing. They are not an adequate basis to continue to block the

²⁴ Revised Filing Cover Letter at 2.

²⁵ In any event, a docket that has been pending for more than two years without adoption of a schedule cannot be characterized as “expedited.”

²⁶ Staff’s Response at 1-2, 5.

²⁷ QF Parties’ Response at 9, 13.

1 entry of a procedural scheduled more than two years after the Company’s initial filing. PGE will
2 nevertheless address these concerns briefly.

3 NewSun asserts PGE’s filing contains “policy changes.”²⁸ However, no party has identified
4 a single provision in PGE’s revised filing that is contrary to established Commission policy. The
5 QF Parties allege that PGE resolved ambiguities in its current Standard PPA in its own favor and
6 made “numerous changes adverse to the status quo.”²⁹ But the QF Parties do not support these
7 claims by pointing to any such changes, and they wholly ignore the portion of PGE’s revised filing
8 listing the changes PGE made that benefit QFs.³⁰ Next, the QF Parties criticize PGE’s revised
9 PPA because it is longer and allegedly more complex.³¹ However, the PPA is longer because it is
10 more detailed and addresses issues that the current PPA does not address to increase clarity.

11 The QF Parties also claim that PGE is asking the Commission to overlook stakeholder
12 concerns regarding the revised Standard PPA.³² This is incorrect. PGE’s Motion to Lift
13 Suspension simply asks that a procedural schedule be established to allow parties to voice their
14 concerns, PGE to respond, and the Commission to resolve them. Finally, the QF Parties and
15 NewSun object that PGE’s current Standard PPA is known, whereas an updated Standard PPA
16 would create additional disputes.³³ PGE disagrees with their premise that the updated Standard
17 PPA will necessarily lead to disputes; PGE specifically designed the revised PPA to be more
18 comprehensive and less ambiguous in order to *avoid* disputes. In any event, PGE should not be
19 prevented indefinitely from making improvements to its contract simply because the current
20 contract terms are familiar to the parties.

21 In sum, the parties’ substantive criticisms are unfounded and should be addressed during the
22 review process—not used to preclude Commission review entirely.

²⁸ NewSun’s Response at 3.

²⁹ QF Parties’ Response at 3, 9.

³⁰ See Revised Filing Cover Letter at 3-4.

³¹ QF Parties’ Response at 5-6.

³² QF Parties’ Response at 3.

³³ NewSun’s Response at 6; QF Parties’ Response at 9, 12.

1 **D. The Commission is not required to adopt PGE’s updated standard PPA in a**
2 **rulemaking.**

3 The QF Parties and Obsidian³⁴ argue that the Commission must establish the terms and
4 conditions of PGE’s Standard PPA in a rulemaking proceeding.³⁵ This argument is unpersuasive
5 for three reasons.

6 First, the Oregon Administrative Procedures Act (APA) does not require that PGE’s revised
7 Standard PPA be adopted in a rulemaking. The APA clearly distinguishes between a rule, which
8 is generally applicable and requires formal rulemaking, and an order, which is “directed to a named
9 person” and can be issued in a contested case.³⁶ PGE is not requesting that the Commission revise
10 its generally applicable PURPA policies in UM 1987. In addition, the outcome of UM 1987 will
11 be to direct a single named party, PGE, to adopt a revised Standard PPA. Therefore, the
12 Commission’s decision in UM 1987 will be directed to “a named person,” and is appropriately
13 issued in an order.³⁷

14 Second, Oregon’s PURPA implementation statutes do not require PGE’s revised Standard
15 PPA to be adopted in a rulemaking. As explained above, PGE’s Standard PPA is not generally
16 applicable and therefore does not fit within the APA definition of a “rule.”³⁸ Moreover, the
17 Commission has recognized consistently over the last 40 years that adopting an entire PPA by rule
18 would not be feasible or desirable,³⁹ and PGE’s current Standard PPA is not contained in a
19 Commission rule.

³⁴ Obsidian’s Response was filed several days late, without explanation. *See* ALJ Ruling Granting Motion for Clarification (Jan. 7, 2021) (clarifying that Responses to PGE’s Motion to Lift Suspension were due “no later than January 15, 2021”). Obsidian’s Response was filed on January 20. PGE will nevertheless address Obsidian’s arguments briefly in the interest of completeness.

³⁵ Obsidian’s Response at 1; QF Parties’ Response at 15.

³⁶ 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).

³⁷ *See Or. Env’tl. Council v. Or. State Bd. of Educ.*, 307 Or 30, 35-36 (1988) (finding that a decision was directed at a named person, even though the decision would impact many more people).

³⁸ *See* ORS 183.310(9).

³⁹ *See In the Matter of the Investigation of Cost Effective Fuel Use and Res. Dev. in Or.*, Docket No. UM 21, Order No. 84-720 (Sept. 12, 1984); *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

1 Third, the Court of Appeals decision Obsidian relies on is not analogous to PGE’s request in
2 this docket.⁴⁰ That appeal concerned a change in Commission policy made in a complaint docket
3 filed under ORS 756.500, and the Court of Appeals found that the Commission’s subsequent
4 rulemaking mooted the arguments that the Commission’s policy change was neither procedurally
5 appropriate nor supported.⁴¹ Here, PGE has not filed a complaint and does not ask the Commission
6 to change its policies, so the type of process that was or was not required in that case has no
7 relevance here. Moreover, contrary to Obsidian’s suggestion, the Court of Appeals did not opine
8 that the Commission was required to undertake a rulemaking to adopt the policy change at issue.⁴²
9 Because UM 1987 does not involve any policy changes and because the outcome applies only to
10 PGE, Obsidian’s argument is meritless.

III. CONCLUSION

11 Consideration of PGE’s request to update its Standard PPA will not overlap with efforts
12 underway in AR 631. PGE acknowledges that review of PGE’s updated Standard PPA will require
13 stakeholder effort, and that some issues will be disputed and require Commission resolution, but
14 that is not a valid reason for declining to consider the filing at all. PGE has made every effort to
15 assist stakeholders with understanding the proposed changes to its Standard PPA and will continue
16 to do so. Finally, adopting PGE’s proposal does not require a rulemaking. For all of these reasons,
17 the Commission should lift the suspension and schedule a prehearing conference to adopt a
18 schedule for processing PGE’s request.

19 ////

20 ////

AR 593, Order No. 16-056, App’x A at 3 (Feb. 9, 2016) (noting that it would not be feasible to develop a PPA by rule and that the Commission should instead adopt generic rules, as necessary); *see also* UM 1129, UM 1396, and UM 1610.

⁴⁰ Obsidian’s Response at 2-3.

⁴¹ *Nw. & Intermountain Power Producers Coal. v. Portland Gen. Elec. Co.*, 308 Or App 110 (2020).

⁴² Obsidian’s suggestion that PGE might challenge a Commission decision in UM 1987 on procedural grounds is absurd; any such challenge would certainly fail on the basis of invited error.

Dated: January 26, 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