

BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

DR 48

IN THE MATTER RENEWABLE ENERGY)	
COALITION: PETITION FOR)	COMMENTS OF THE COMMUNITY
DECLARATORY RULING)	RENEWABLE ENERGY ASSOCIATION
)	IN SUPPORT OF PETITION FOR
)	DECLARATORY RULING
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I. INTRODUCTION

Pursuant to OAR 860-001 -0430(2), the Community Renewable Energy Association (“CREA”) hereby respectfully submits these Comments in Support of the Renewable Energy Coalition’s (“REC”) Petition for Declaratory Ruling. Contrary to PacifiCorp’s assertions, the Commission possesses the authority to render an interpretation of PacifiCorp’s standard contract available under the Oregon Public Utility Commission’s (“OPUC” or “Commission”) implementation of the Public Utility Regulatory Policies Act of 1978 (“PURPA”). Furthermore, the plain terms of the standard contract and the Commission’s prior order mandate that PacifiCorp may not terminate the contract on the basis of delay default occurring during a time when PacifiCorp is resource sufficient. Consequently, CREA urges the OPUC to substantively consider the Petition and to expeditiously issue the requested declaratory ruling.

II. PROCEDURAL BASIS FOR COMMENTS

The Commission’s rules expressly allow for CREA to comment at the public hearing that must be held to determine whether the Commission will entertain the Petition. *See* OAR 860-001 -0430(2). CREA acknowledges that its petition to intervene has not yet been addressed. However, prior to a public hearing on the petition for declaratory ruling, the procedural rules do

not technically apply as a bar to comments by interested parties. *See In Re Tillamook People's Utility District: Petition for Declaratory Ruling*, OPUC Docket No. DR 42, ALJ Ruling (Jan. 27, 2009). Additionally, written comments filed prior to the public hearing should provide the Commission with more time to consider the issues and thus better ensure the just, speedy and inexpensive resolution of the proceedings. *See* OAR 860-0001-0000(1). Moreover, these Comments are filed within 15 days of PacifiCorp's Response, which is the typical time period within which to make a responsive filing, and PacifiCorp will have an opportunity to respond at the public hearing. *See* OAR 860-0001-420(5). Thus CREA respectfully requests that the Commission accept and consider these Comments.

III. COMMENTS IN SUPPORT OF PETITION

CREA supports REC's Petition and agrees with the arguments set forth in REC's Reply to PacifiCorp's Response. These Comments will elaborate on only two points: (1) A declaratory ruling is the most appropriate procedural mechanism to address the issue raised; and (2) PacifiCorp's interpretation of its standard contract should be rejected because it defies the plain language of the contract available to unsuspecting qualifying facilities ("QFs").

A. The Petition for Declaratory Ruling is Procedurally Proper.

CREA supports resolution of the disputed issue through issuance of a declaratory ruling. REC's Petition sets forth a straight-forward legal question squarely within the Commission's jurisdiction – whether PacifiCorp's standard contract approved by the Commission allows PacifiCorp to terminate the contract on the basis of a delay default occurring while PacifiCorp's own resource plans indicate PacifiCorp does not need new generation resources and is thus not materially harmed by the delay? The dispute involves a simple interpretation of the terms in the contract and the Commission's order that mandated the contract's terms.

PacifiCorp is incorrect to claim there is no “rule or statute” at issue to warrant a declaratory ruling. *See* ORS § 756.450. With limited exceptions not applicable here, a “rule” is “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.” ORS § 183.310(9).¹ And Oregon law declares: “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” ORS § 758.535(2)(a) (emphasis added). The Commission has accordingly acted to require PacifiCorp’s standard contract, and specifically addressed the standard contract term at issue through a formal order. *See In re Staff’s Investigation*, OPUC Docket No. UM 1129, Order No. 06-538, at 27 (2006) (“we determine that a QF’s operational delay pursuant to a contract with a resource sufficient utility should result in default, but not in termination”). That order is a *rule* that is properly the subject of a declaratory ruling regarding its applicability and meaning in the standard contract. The matter is best resolved through issuance of a declaratory ruling by the Commission.

Yet, without citing any Oregon case law, PacifiCorp appears to suggest that the Petition is “best-suited for the courts.” *See PacifiCorp’s Response* at 4. Contrary to PacifiCorp’s position, Oregon law provides the Commission with jurisdiction to interpret the meaning of the standard PURPA contract, particularly in this case where the term at issue derives directly from the Commission’s prior order. *See Boise Cascade Corp. v. Bd. of Forestry*, 325 Or. 185, 196, 935 P.2d 411, 419 (1997) (“a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer,” quoting

¹ The Commission is an agency to which this definition of “rule” applies, *see* ORS § 183.310(1), and this definition is not among the provisions of Oregon’s Administrative Procedures Act from which the Commission is exempt. *See* ORS § 183.315(6).

Kenneth Culp Davis, *Administrative Law* 121 (6th ed.1977)); *Reinwald v. Dept. of Employment*, 148 Or.App. 75, 80-82, 939 P.2d 86, 88-89 (Or. App. 1997) (holding agency had primary jurisdiction over interpretation and enforceability of settlement agreement entered into pursuant to agency's jurisdiction); *see also United States v. Western Pac. R. Co.*, 352 U.S. 59, 64-65 (1956). An Oregon court presented with the issue raised by the Petition would likely "dismiss the action on the basis that it should be brought before the agency instead." *Reinwald*, 148 Or.App. at 81, 939 P.2d at 89 (internal quotation omitted).

PacifiCorp's standard contract itself supports the Commission's jurisdiction. Section 19 of the standard contract provides: "This Agreement is subject to the jurisdiction of those governmental agencies having control over either Party or this Agreement." *See Petition for Declaratory Ruling* at Exhibit A at page 23 of 32. The Commission undoubtedly has control over PacifiCorp and its PURPA contracts, and therefore PacifiCorp's own contract directly points to the jurisdiction of the Commission.

Indeed, PacifiCorp implicitly acknowledges the Commission has jurisdiction by suggesting the matter should be resolved in docket UM 1610. It would appear that instead of having the dispute move to a court PacifiCorp's real intent is to delay resolution of the dispute by sweeping it into a larger generic proceeding. CREA strongly opposes establishing a precedent of further delay because delay frustrates development of QF projects. Additionally, as REC demonstrates in its Reply, the Commission has repeatedly determined in Phase 1 of docket UM 1610 that the policy determinations made therein regard *prospective* application of new policies to new QF contracts and are *not* retroactive changes to policies applicable to existing contracts. PacifiCorp appears to suggest the Commission should violate PURPA by retroactively changing its policy applicable the executed contracts at issue. *See Or. Trail Elec. Consumers Co-op, Inc.*

v. Co-Gen Co., 168 Or. App. 466, 482-84, 7 P.3d 594, 605-06 (Or. App. 2000). PacifiCorp is free to make whatever arguments it wants in docket UM 1610 with regard to *prospective* rules for *future* standard contracts, but such arguments have no bearing on the contractual interpretation at issue in REC's Petition. Deferral to docket UM 1610 is unwarranted.

Additionally, while PacifiCorp also appears to suggest REC or affected QFs should file a complaint at the Commission, there is no need for a protracted complaint proceeding. There is no factual dispute and thus no need for discovery. Nor is there a need for an evidentiary hearing. A declaratory ruling is the speediest and most adequate mechanism to resolve the issue of the meaning of the contract and the Commission's orders mandating it. CREA strongly supports the quickest resolution of QF disputes possible, and in this case a declaratory ruling is the best option.

B. The Unambiguous Terms of PacifiCorp's Contract Support Granting the Petition.

The purpose of the standard contract is to allow small QFs to enter into a PURPA agreement without the need to expend substantial resources on attorneys who might be able to divine hidden meanings. In this case, the plain reading of the contract warrants granting the requested declaratory ruling. Section 11.3.1 of PacifiCorp's standard contract states that PacifiCorp may not terminate the contract for a delay default "unless PacifiCorp *is in* a resource deficient state during the period Commercial Operation is delayed." *Petition for Declaratory Ruling* at Exhibit A at page 18 of 32 (emphasis added). The obvious purpose behind this limitation is that PacifiCorp will be minimally harmed by the delay default if PacifiCorp is in a resource sufficient state during the delay. *See In re Staff's Investigation*, OPUC Order No. 06-538 at 25-27. Yet PacifiCorp argues that this provision allows it to terminate if the rate schedule in the tariff attached to the contract reflects that the deficiency period rates are in effect at the

time that PacifiCorp seeks to terminate the agreement. The problem with PacifiCorp's argument is that the contract and Schedule 37 say no such thing.

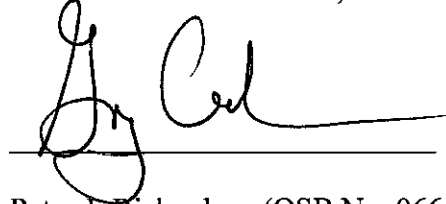
Nor is there any logical reason to distinguish between termination rights based upon PacifiCorp's projected resource position at the time of contract execution. If PacifiCorp is resource sufficient at the time of the default, there is minimal harm to PacifiCorp. To the extent that PacifiCorp or its customers might incur damages associated with the delay, Section 11.4.1 of the standard contract provides a mechanism to collect reasonable replacement cost damage amounts (if any exist). *See Petition for Declaratory Ruling* at Exhibit A at page 19 of 32. PacifiCorp asks for a right to terminate for punitive purposes, or perhaps to clear out some contracts and limit its PURPA obligations. The Commission should reject PacifiCorp's position.

IV. CONCLUSION

For the reasons set forth herein and in the filings by REC, the OPUC should substantively consider the Petition and expeditiously issue a declaration that PacifiCorp's standard contract provides no basis for PacifiCorp to terminate the contract for a delay default occurring during a time when PacifiCorp is resource sufficient.

DATED this 18th day of March, 2014.

RICHARDSON ADAMS, PLLC

A handwritten signature in black ink, appearing to read "P. Richardson", is written over a horizontal line.

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Of Attorneys for the Community Renewable
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of March, 2014, a true and correct copy of the within and foregoing **COMMENTS OF COMMUNITY RENEWAL ENERGY ASSOCIATION IN DOCKET DR 48** was served as follows:

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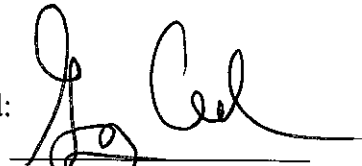
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