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David F. White
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February 14, 2018

Via Electronic Filing

Public Utility Commission of Oregon
Filing Center
201 High St SE, Suite 100
PO Box 1088
Salem OR 97308-1088

Re: UM 1805 – Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition, Complainants vs. Portland General Electric Company, Defendant

Attention Filing Center:

Enclosed for filing in Docket UM 1805 is Portland General Electric Company's Response to Complainants' Motion to Strike.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in blue ink that reads "David F. White". The signature is written in a cursive, flowing style.

David F. White
Associate General Counsel

DFW:jlh

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1805

NORTHWEST AND INTERMOUNTAIN
POWER PRODUCERS COALITION;
COMMUNITY RENEWABLE ENERGY
ASSOCIATION and RENEWABLE
ENERGY COALITION,

Complainants,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

**PORTLAND GENERAL ELECTRIC
COMPANY’S RESPONSE TO
COMPLAINANTS’ MOTION TO
STRIKE,**

and

**PORTLAND GENERAL ELECTRIC
COMPANY’S MOTION TO WAIVE
OAR 860-001-0720(4)**

Pursuant to OAR 860-001-0420, Portland General Electric Company (PGE) moves the Public Utility Commission of Oregon (Commission) or its Administrative Law Judge (ALJ) to waive OAR 860-001-0720(4) and to accept PGE’s reply in support of its application for rehearing or reconsideration. PGE further requests that the Commission or its ALJ deny the Complainants’ motion to strike PGE’s reply.

I. RESPONSE OPPOSING MOTION TO STRIKE

On January 12, 2018, PGE filed an application for reconsideration of Order No. 17-465. Complainants filed a response and PGE filed a reply. On February 8, 2018, Complainants filed a motion to strike PGE’s reply. Complainants note that OAR 860-001-0720(4) prohibits a reply in support of an application for reconsideration unless requested by the ALJ. Complainants also note PGE did not ask the Commission to waive OAR 860-001-0720(4).

PGE acknowledges its error in not moving for waiver of OAR 860-001-0720(4) when it submitted its reply. PGE apologizes for any inconvenience caused by that error.

Counsel for PGE overlooked the limitation in OAR 860-001-0720(4) and filed a reply within seven days of the response as generally authorized by OAR 860-001-0420(5). The second part of this filing presents PGE's motion to waive OAR 860-001-0720(4). If that motion is granted, Complainants' motion to strike should be denied.

II. MOTION TO WAIVE OAR 860-001-0720(4)

PGE respectfully moves the Commission or its ALJ to waive the prohibition on replies contained in OAR 860-001-0720(4) and to accept the reply filed by PGE on February 5, 2018. It is important for the Commission to consider PGE's reply for several reasons. The reply explains how Complainants' response misconstrues PGE's position. The reply also provides new information and new law that developed *after* the application was filed. Specifically, the reply provides new information about the dispute between PGE and the NewSun Solar Projects. And the reply provides the Commission with analysis of how Order No. 18-025, issued after the application was filed, supports PGE's application and undercuts the analysis in Complainants' response. The reply also provides PGE's response to Complainants' allegations about PGE's tactics in this docket. Complainants' allegations could not have been reasonably anticipated in PGE's application and warrant a response. Finally, the reply better explains PGE's original position.

A. Legal Standard

For good cause shown, the ALJ and the Commission have the authority to waive any of the Commission's procedural rules, including the prohibition on replies contained in OAR 860-001-0720(4).¹ The reason the Commission generally prohibits replies in support of an application for reconsideration is that the Commission is statutorily required to render a decision on the application within 60 days which means the

¹ OAR 860-001-0000(2) ("For limited purposes in specific proceedings, the Commission or ALJ may modify or waive any of the rules in this division for good cause shown.").

Commission may not always have sufficient time to consider a reply.² In this case the reply was filed 24 days after the application, and the ALJ and Commission therefore have 36 days to consider all three briefs and render a decision. Given that the Commission still has adequate time to consider all three briefs, and given the value of the new and clarifying information contained in the reply, the Commission should waive the restriction and accept the reply.

The Commission has allowed a reply in support of an application for reconsideration when the Commission felt the reply better explained the applicant's original position, *even when the applicant did not seek leave to file a reply or move to waive the rule against replies.*³ The Commission has also indicated that an applicant for reconsideration may move to file a reply if it “feels its position has been wrongly construed” in a response to the application.⁴ Replies in support of procedural motions are also prohibited, but the Commission has indicated it may waive that prohibition if a reply offers a “factual or legal rationale—such as newly-discovered evidence or recently issued federal or state decision—that would justify an additional round of argument.”⁵

PGE's reply satisfies all of these factors—it addresses three ways in which the response misconstrues the application, it presents new facts and new law, and it better explains PGE's original position. As a result, the Commission should waive OAR 860-001-0720(4) and consider PGE's reply when ruling on the application.

² *In the Matter of Portland General Electric Company Application for Deferred Accounting of Excess Power Costs Due to Plant Outage*, Docket No UM 1234 at 4 (Jun. 8, 2007) (“Due to the short time frame for reconsideration proceedings under ORS 756.561, replies are often not appropriate.”).

³ *Id.* at 4 (accepting a reply in support of an application for reconsideration filed by the Industrial Customers of Northwest Utilities (ICNU) when ICNU failed to request leave to file a reply and PGE moved to strike the reply, stating: “PGE is correct that the applicable rules do not provide for ICNU's reply ... [w]e nevertheless take ICNU's reply into consideration, finding that *it better explains ICNU's original position.*”) (emphasis added).

⁴ *Re US Cellular Application for Designation as an Eligible Telecommunications Carrier*, Docket No. UM 1084, Order No. 04-599 at 2-3 (2004).

⁵ *Surprise Valley Elec. Corp. v. PacifiCorp*, Docket No. UM 1742, ALJ Ruling at 2 n. 2 (Apr. 29, 2016).

B. Complainants' Response has Misconstrued PGE's Application

Complainants' response misconstrues PGE's application in four ways.

First, it misconstrues PGE's argument about why it is necessary for the Commission to decide whether PGE's contract forms in effect when the complaint was filed actually limited the availability of fixed prices to the first 15 years following contract execution. Complainants note that PGE argues such a determination is necessary to justify the Commission's decision to order PGE to file a revised rate schedule and revised contract forms that conform to the Commission's new policy requiring 15 years of fixed prices measured from the commercial operation date.⁶ Complainants then argue the Commission's requirement to revise Schedule 201 and PGE's form contracts was well reasoned even if the Commission did not decide whether PGE's then-effective forms limited fixed prices to 15 years following execution.⁷

Complainants are correct that PGE is arguing that Order No. 17-256, as amended by Order No. 17-465, is not well reasoned because it has ordered PGE to revise its contract forms without any determination that the forms were inconsistent with the newly announced policy. But PGE is *also* arguing that the Commission's orders are not well reasoned in the absence of a determination that PGE's then-applicable forms limited fixed prices to 15 years following execution because such a determination is necessary to justify dismissal of Complainants' first and second claims for relief.⁸ Complainants' response misconstrues PGE's argument to the extent it ignores this second issue. PGE's

⁶ *Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Association v. Portland General Electric Company*, Docket No. UM 1805, Complainants' Response to PGE's Application for Reconsideration at 7 (Jan. 29, 2018).

⁷ *Id.* at 7-10.

⁸ Docket No. UM 1805, PGE's Application for Rehearing or Reconsideration at 7 (Jan. 12, 2018) (arguing it was arbitrary for the Commission to resolve the claims in the complaint without determining if PGE's then-effective contract forms limited fixed prices to the first 15 years following contract execution); *see also* Docket No. UM 1805, PGE's Reply in Support of Its Application for Rehearing or Reconsideration at 6 (Feb. 5, 2018) (providing greater clarity and stating: "... if the Commission does not determine that PGE's then-effective forms limited fixed prices to the 15 years following contract execution, then the Commission cannot conclude that Complainants' first and second claims for relief were without merit.").

reply addresses this fact and makes it clear there are two reasons why failure to determine the meaning of PGE's then-effective forms undercuts the logic of the Commission's order.⁹ To make a sound decision on PGE's application for reconsideration, the Commission should accept and consider PGE's reply because it clarifies this issue.

Second, Complainants' response misconstrues PGE's argument when the response argues that PGE seeks interpretation of every executed contract and that this would require joining all counter-parties to every PGE standard contract.¹⁰ As PGE explains in its reply, PGE only seeks an interpretation of the generic language in its previously effective contract forms.¹¹ It is not necessary to join any specific counter-party to any specific executed contracts for the Commission to determine the meaning of the generic language in the contract forms. The Commission has the authority and expertise to interpret the generic terms and conditions of PGE's standard contract forms.¹²

Third, Complainants' response misconstrues PGE's position on the Commission's new policy requiring fixed prices for 15 years measured from the commercial operation date (COD). Complainants' response characterizes Order No. 17-256 as clarifying an existing policy requiring 15 years of fixed prices measured from COD.¹³ But PGE noted in its application for reconsideration and elaborated in its reply that the Commission's

⁹ Docket No. UM 1805, PGE's Reply in Support of Its Application for Rehearing or Reconsideration at 6-7 (Feb. 5, 2018).

¹⁰ Docket No. UM 1805, Complainants' Response to PGE's Application for Rehearing or Reconsideration at 14-16 (Jan. 29, 2018).

¹¹ Docket No. UM 1805, PGE's Reply in Support of Its Application for Rehearing or Reconsideration at 8 (Feb. 5, 2018).

¹² See *Portland General Electric Company v. Pacific Northwest Solar LLC*, Docket No. UM 1894, Order No. 18-025 at 7 (Jan. 25, 2018) (Discussing interpretation of standard QF contract terms, the Commission states: "The interpretation of PURPA contracts is critical to the discharge of our regulatory responsibilities. ... We believe our role and expertise in state and federal PURPA policy makes this an appropriate issue for primary jurisdiction.")

¹³ Docket No. UM 1805, Complainants' Response to PGE's Application for Rehearing or Reconsideration at 8 (Jan. 29, 2018).

decision to require fixed prices for 15 years from scheduled COD *on a going forward basis* established a new policy requirement.¹⁴

Finally, Complainants' response mischaracterizes the record in this case and argues that PGE has been overly litigious and is responsible for turning this case into a "procedural nightmare."¹⁵ As PGE explains in its reply, it was Complainant, not PGE who was responsible for the vast majority of the process in this case.¹⁶ The Commission should allow PGE's reply if for no other reason than to rebut and correct Complainants' mischaracterization of PGE's actions and motivations in this proceeding.

C. The Reply Provides Additional Factual and Legal Rationale Supporting the Application for Rehearing or Reconsideration

PGE's reply should be allowed because it provides relevant factual and legal information that arose *after* PGE filed its application. Among other things, the application argues that it is important for the Commission to interpret PGE's previously effective contract forms because the NewSun Solar Projects have filed suit in the United States District Court for the District of Oregon and are seeking an interpretation of this issue in that court.¹⁷ After PGE filed its application for reconsideration in this docket, PGE filed a complaint with the Commission against the NewSun Solar Projects seeking interpretation of when the 15-year period begins under the NewSun Solar PPAs.¹⁸ And the NewSun Solar Projects have moved to stay that Commission case in favor of the federal case.¹⁹

¹⁴ Docket No. UM 1805, PGE's Application for Rehearing or Reconsideration at 7 n. 23 (Jan. 12, 2018) ("PGE believes the Commission's requirement to offer fixed prices for 15 years measured from COD is a *new* policy not a clarification of an existing policy because the Commission acknowledged in Order No. 17-256 at page 3 that Order No. 05-584 did not specify the date on which the 15-year fixed price period begins."); Docket No. UM 1805, PGE's Reply in Support of Its Application for Rehearing or Reconsideration at 4 (Feb. 5, 2018) (characterizing the policy requiring fixed prices for 15 years measured from scheduled COD as a new policy).

¹⁵ Docket No. UM 1805, Complainants' Response to PGE's Application for Rehearing or Reconsideration at 2-6.

¹⁶ Docket No. UM 1805, PGE's Reply in Support of Its Application for Rehearing or Reconsideration at 10-12 (Feb. 5, 2018).

¹⁷ *Id.* at 9 and n. 31.

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 9 n. 31.

This is important information for the Commission to consider in this docket as the Commission decides whether to grant PGE's application for reconsideration. Granting reconsideration and rendering a determination as to the meaning of PGE's previously-effective contract forms in this docket is now more important than ever as it will allow the Commission to exercise its expertise and primary jurisdiction over the interpretation of the generic language of PGE's standard contract forms and prevent the development of differing interpretations in state or federal court.

The reply also explains how Commission Order No. 18-025 in Docket No. UM 1894, issued after the application was filed, has an important bearing on this case and rebuts much of the legal analysis in Complainants' response.²⁰ Order No. 18-025 was issued on January 25, 2018. It affirmed that the Commission has primary subject matter jurisdiction to interpret the terms of PGE's standard contracts. PGE's February 5, 2018 reply explains the importance of this new decision in the context of the dispute over when the 15-year fixed price period begins to run.²¹ Complainants' response incorrectly argues that the Commission may lack the jurisdiction to interpret the terms of PGE's standard contract forms.²² And the response argues that PGE has not cited to authority for its assertion that the Commission can interpret the forms.²³ But Order No. 18-025, which was issued after the application was filed (but before the response), is a new legal decision that clearly contradicts Complainants' arguments. The reply explains the relevance of Order No. 18-025 to the Commission's decision on PGE's application for reconsideration,²⁴ and the reply should be allowed for that reason.

²⁰ *Id.* at 7-8.

²¹ *Id.*

²² Docket No. UM 1805, Complainants' Response to PGE's Application for Rehearing or Reconsideration at 10-11 (Jan. 29, 2018).

²³ *Id.* at 12.

²⁴ Docket No. UM 1805, PGE's Reply in Support of its Application for Rehearing or Reconsideration at 7-8 (Feb. 5, 2018).

III. COPIES OF CONTRACT FORMS

On February 5, 2018, the ALJ issued a bench request for copies of PGE's standard contract forms in effect in July 2017. PGE has provided copies of those forms as requested. PGE also provided copies of prior versions of PGE's rate schedule and standard contract form when PGE filed its motion for summary judgment on April 24, 2017. PGE notes that Section IV(E) through Section IV(G) on pages 15 to 25 of PGE's motion for summary judgment explains how PGE's standard contract forms have consistently limited fixed prices to the first 15 years following contract execution.

IV. CONCLUSION

The Commission has adequate time—more than 30 days—to consider the application, response, and reply before it must render a decision. The reply presents relevant new law and information that arose after the application was filed. And the reply addresses several ways in which the Complainants' response misconstrued PGE's application for reconsideration. The reply also better explains PGE's original position. For all of these reasons, the Commission or its ALJ should grant waiver of OAR 860-001-0720(4), accept PGE's reply as part of the record, and deny Complainants' motion to strike.

DATED this 14th day of February, 2018.

Respectfully submitted,



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