

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1805**

NORTHWEST AND INTERMOUNTAIN	)	<b>COMPLAINANTS’ RESPONSE TO</b>
POWER PRODUCERS COALITION,	)	<b>PORTLAND GENERAL ELECTRIC</b>
COMMUNITY RENEWABLE ENERGY	)	<b>COMPANY’S APPLICATION FOR</b>
ASSOCIATION and RENEWABLE ENERGY	)	<b>REHEARING OR RECONSIDERATION</b>
COALITION,	)	<b>AND APPLICATION TO AMEND ORDER</b>
	)	<b>NO. 17-465</b>
Complainants,	)	
	)	
v.	)	
	)	
PORTLAND GENERAL ELECTRIC	)	
COMPANY,	)	
	)	
Defendant.	)	
	)	
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**I. INTRODUCTION AND SUMMARY**

The Northwest and Intermountain Power Producers Coalition (“NIPPC”), the Community Renewable Energy Association (“CREA”), and Renewable Energy Coalition (“REC”) (collectively “Complainants”) hereby submit their response to Portland General Electric Company’s (“PGE”) Application for Rehearing or Reconsideration and Application to Amend the Public Utility Commission of Oregon’s (“Commission” or “OPUC”) Order No. 17-465. For the reasons explained herein, the Commission should deny PGE’s Application.

The Commission’s collective orders in this proceeding have now fully resolved the central issue presented in the complaint by clarifying the Commission’s policy that the fixed-price term offered by Oregon utilities is the 15-year period after the qualifying facility (“QF”) begins delivering energy, and that in so ruling the Commission did not intend to provide any

binding interpretation of any standard contract form or executed version of the same offered by PGE prior to this proceeding. The Commission's clarification in Order No. 17-465 was needed for the reasons explained in Complainants' clarification and rehearing filing. The Commission's policy is now clear, and PGE's compliance filing contract will completely preclude PGE from causing any further disputes with individual QFs who sign such agreements in the future.

Parties with executed forms previously offered by PGE are now free to adjudicate individual contract disputes with PGE in the appropriate forum, just as they should be under basic notions of due process. There is no basis to reopen this proceeding to litigate the meaning of every past contract form PGE has offered to QFs since 2005, which would in fact be an attempt by PGE to impact the interpretation of executed versions of those forms. Doing so would conscript Complainants to litigating individual contract rights in a wide-ranging proceeding well beyond the scope of their complaint, while simultaneously requiring the Commission to somehow join all of the necessary parties to a wide-ranging declaratory judgment proceeding that could impact the rights of every counter party that ever executed such forms. PGE itself objected to such an unwieldy proceeding in the early stages of this case. It would be doubly unwise for the Commission to expend its scarce resources – given the Commission's current workload – to attempt to interpret past contract forms in any sort of authoritative fashion because the Commission's jurisdiction to do so is doubtful, at best.

## **II. BACKGROUND**

Complainants wish to express their strong frustration with PGE's litigious approach in this proceeding, which exemplifies its negotiations and business practices with qualifying facilities. As the Commission recognized in Order Nos. 17-256 and 17-465, the Commission

adopted a policy in 2005 in Docket No. UM 1129 that a QF has the right to a 15 year fixed price contract. Idaho Power, PacifiCorp, Staff, qualifying facilities and industrial customers (and potentially even PGE) understood that meant a QF would be provided for 15 years of fixed prices that commence when the QF transmits power to the utility. Subsequently, in UM 1610, UM 1725 and UM 1734, the utilities, Staff and qualifying facilities again litigated the proper contract term eligible for a QF again, and the Commission re-affirmed that it would be 15 years of fixed prices. Each of these proceedings included multiple rounds of testimony, issues lists, settlement conference-workshops, and briefs, compliance filings, comments on compliance filings, as well as hearings, reconsideration requests and other pleadings. This represents considerable expense to qualifying facilities and their advocates, while the utilities recover from ratepayers all their costs to litigate against their competitors: independent power producers.

After four different proceedings confirming the Commission's 15 year fixed price policy, the Complainants opened this fifth proceeding because they became aware that PGE recently began informing qualifying facilities that they would not receive fifteen years of fixed prices, but something less than that. The Complainants expected this proceeding to be quick because the legal issue was simple. As ALJ Arlow succinctly and cogently explained that the issue was "a straightforward question" of whether the fixed prices "term begin on the date that the contract is executed or upon the date that the QF begins to deliver its net output to the utility?" There was no need for discovery or testimony to be filed, and yet a case that was filed in 2016 is still being litigated into 2018.

Despite this straightforward question, the proceeding has been a procedural nightmare with 40 substantive pleadings, two public meetings, numerous rulings and procedural motions,

and no less than *five* Commission orders with a *sixth* order still to come. The Complainants have listed all of the major pleadings and events on below as a graphic illustration of only part of the effort that has gone into rectifying PGE’s interpretation of the Commission’s 15-year policy.

<b>Events</b>	<b>Date</b>
NIPPC-CREA-REC Complaint	12/6/16
PGE’s Motion to Strike	12/16/16
PGE’s Motion to Make More Definite and Certain	12/16/16
PGE’s Motion Requesting More Time to Answer	12/16/16
Prehearing Conference in Salem	12/22/16
PGE’s Comments on Declaratory Ruling Option	1/5/17
Staff’s Comments on Declaratory Ruling Option	12/30/16
NIPPC-CREA-REC Comments on Declaratory Ruling Option	12/29/16
ALJ Ruling on Declaratory Ruling Option	1/19/17
NIPPC-CREA-REC Joint Response to PGE's Motion to Strike, Motion to Make More Definite and Certain, and Motion Requesting More Time to Answer	1/24/17
PGE's Reply to NIPPC-CREA-REC Response to PGE's Motions to Strike, Make More Definite and Certain, and Requesting More Time to Answer	1/31/17
Telephone Scheduling Conference	3/3/17
ALJ Conference Memorandum Ordering Joint Statements of Fact	3/3/17
PGE-NIPPC-CREA-REC Joint Statements of Fact	3/10/17
PGE’s Answer	3/28/17
NIPPC-CREA-REC Motion for Summary Judgment	4/24/17
PGE Motion for Summary Judgment	4/24/17
NIPPC-CREA-REC Response to PGE Motion for Summary Judgment	5/8/17
PGE Response to NIPPC-CREA-REC Motion for Summary Judgment	5/8/17
Renewable NW Reply to PGE’s Motion for Summary Judgment	5/15/17
PGE’s Reply to NIPPC-CREA-REC Response to PGE’s Motion for Summary Judgment	5/15/17
NIPPC-CREA-REC Reply to PGE Response to NIPPC-CREA-REC Motion for Summary Judgment	5/15/17
NIPPC-CREA-REC Motion for Official Notice	5/30/17

PGE's Response to NIPPC-CREA-REC Motion for Official Notice	6/14/17
Commission Order No. 17-256 Dismissing Complaint and Clarifying Policy	7/13/17
PGE Compliance Filing	7/20/17
Staff Report for September 12 Public Meeting	9/7/2017
NewSun Solar Projects Petition to Intervene Out of Time	9/8/17
NewSun Solar Projects Joint Motion for Clarification and Application for Reconsideration	9/8/17
NIPPC-CREA-REC Petition for Clarification and Application for Reconsideration	9/11/17
NIPPC-CREA-REC Comments regarding PGE Compliance Filing	9/11/17
PGE Response to NIPPC-CREA-REC Comments regarding PGE Compliance Filing	9/11/17
Commission Public Meeting regarding Compliance Filing	9/12/18
Commission Order 17-346 Accepting PGE Compliance Filing	9/14/17
PGE Objection to NewSun Solar Projects Joint Petition to Intervene Out of Time	9/18/17
PGE Request to Stay Response to Petitioners' Joint Motion for Clarification and Application for Rehearing or Reconsideration and Complainants' Petition for Clarification and Application for Rehearing or Reconsideration until Petitioners' Joint Petition to Intervene Out of Time is Resolved	9/19/17
NewSun Solar Projects Joint Response to PGEs Request for Stay	9/20/17
NIPPC-CREA-REC Response to PGE's Expedited Request	9/20/17
ALJ Ruling: Responsive Pleadings Stayed	9/20/17
Staff Report for September 26, 2017 Public Meeting	9/22/17
NIPPC-CREA-REC Second Comments on Compliance Filing	9/25/17
Commission Public Meeting regarding Compliance Filing	9/26/17
ALJ Ruling: Errata Issued, Petition to Intervene Still Pending	9/26/17
Commission Order No. 17-373 Adopting Staff's Recommendation	9/28/17
NewSun Solar Projects Joint Reply to PGE's Objection to Joint Petition to Intervene	10/2/17
NIPPC-CREA-REC Motion to Set a Schedule for PGE's Response and Complainants' Reply	10/6/17
NewSun Solar Projects Response to NIPPC-CREA-REC Motion to Set Schedule	10/9/17
ALJ Ruling: Questions Certified to Commission	10/12/17

PGE Response to NIPPC-CREA-REC Motion to Set a Schedule	10/13/17
PGE's Motion for Leave to File Sur-Reply and Sur-Reply to NewSun Reply in Support of Joint Petition	10/16/17
Commission Ruling Order No. 17-418 Petition to Intervene Denied and Application Stricken	10/16/17
ALJ Ruling: Disposition: Motion for Leave to File Sur-Reply and Sur-Reply Dismissed	10/17/17
PGE's Response in Opposition to NIPPC-CREA-REC Petition for Clarification and Application for Rehearing or Reconsideration	10/24/17
Order No. 17-465 Petition to Amend Order No. 17-25 Granted; Application for Rehearing or Reconsideration Denied	11/13/17
PGE's Application for Rehearing or Reconsideration	1/12/18

The Commission needs to put an end to PGE's efforts to circumvent the Commission's direction as well as exhaust the parties with relentless and never ending legal pleadings and arguments. Despite the unexpected expense and efforts, the Complainants have achieved their goals. Accordingly, PGE's Application and its attempt to expand this docket in a manner PGE itself previously opposed should be denied, and this docket should be closed.

Finally, the Complainants urge the Commission to more carefully and deliberatively draft future orders to limit a utility's discretion to creatively interpret them. PGE's interpretation of the 15 year fixed price issue is only one of a long list of other disputes that qualifying facilities have with PGE; however, the vast majority of qualifying facilities do not have the resources (or the willingness to offend their monopsony energy purchaser) to litigate any issues. Proceedings like this one are a cautionary tale that, even if PGE has lost in terms of its interpretation of Commission policy, PGE and the Commission still send a strong message to all qualifying facilities of the costs, risks and time necessary to obtain Commission resolution of even the most straightforward of questions.

### III. ARGUMENT

#### A. The Commission's Orders Are Well Reasoned and Need No Further Clarification

PGE's primary legal argument appears to be that Order No. 17-256 could not lawfully order PGE to file revised standard contract forms without first finding that the then-effective version of the contract form (effective in July 2017) limited the fixed prices to 15 years after the Effective Date.<sup>1</sup> According to PGE, therefore, the Commission must now render an affirmative interpretation that the contract forms in effect at the time the complaint was filed unambiguously limited the fixed prices to 15 years after the Effective Date. In PGE's incorrect view, failure to interpret prior forms leaves the Amended Order No. 17-256 lacking in substantial reason to order revision to those previously effective forms.

PGE's legal argument is wrong. The substantial reason test applied by the Oregon courts, if PGE were to appeal, merely requires "a rational explanation of how the facts found lead to the legal conclusions on which the order is based."<sup>2</sup> This rule exists to facilitate meaningful judicial review of the agency's order.<sup>3</sup> Notably, this rule does not require the Commission to "discuss every reason, issue or bit of evidence produced" in the case.<sup>4</sup> In this case, the courts would analyze both final orders (Order No 17-256 and Order No. 17-465) to ascertain whether those orders collectively supply a rational explanation for the following substantive actions:

(1) clarifying the Commission's policy on the availability of fixed prices for QFs, and (2)

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<sup>1</sup> PGE Reconsideration Application at 6-7.

<sup>2</sup> BWK, Inc. v. Dep't of Admin. Servs., 231 Or. App. 214, 229, 218 P.3d 156 (2009).

<sup>3</sup> See 1000 Friends of Oregon v. LCDC, 237 Or. App. 213, 226-27, 239 P.3d 272 (2010) (remanding order where reasoning was inadequate for judicial review).

<sup>4</sup> Publishers Paper Co. v. Davis, 28 Or. App. 189, 200, 559 P.2d 891, 897 (1977).

requiring PGE to file revised standard contracts that are consistent with that policy on a going-forward basis.

PGE does not dispute that the Commission supplied a rational explanation for clarifying that its policy requires fixed prices for 15 years after power deliveries rather than the Effective Date of a contract.<sup>5</sup> Nor could it. The Commission cogently explained that “[s]tandard contracts, whether prepared by PGE, Idaho Power or PacifiCorp, all contain QF performance benchmark event dates that must be achieved before the QF can offer power to the utility.”<sup>6</sup> It is logical therefore that “[t]he 15-year period of fixed prices is, of necessity, tied to these benchmarks;” and “[p]rices paid to a QF are only meaningful when a QF is operational and delivering power to the utility.”<sup>7</sup> From these uncontestable facts, the order reasonably explains “that, to provide a QF the full benefit of the fixed price requirement, the 15-year term must commence on the date of power delivery.”<sup>8</sup> PGE makes no challenge to the logic of this conclusion.

The only issue in dispute is whether the Orders collectively exhibit a rational basis to require PGE to file revised standard contract forms consistent with that clarified policy. On this point, the Commission’s Amended Order No. 17-256 provides:

**In this decision, we do not address any existing executed contracts or PGE's current or existing standard contracts.** ~~Having found that PGE's past standard contracts have not been in violation of our orders, we shall not require that existing executed contracts be revised.~~ However, PGE should promptly file revisions to Schedule 201 which shall include a revised standard contract PPA

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<sup>5</sup> See Order No. 17-256 at 4.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.



with language consistent with our requirement that the 15-year term of fixed prices commences when the QF transmits power to the utility.<sup>9</sup>

The Commission also explained that in addressing the overall policy question, it had “neither examined nor addressed the specific terms and conditions of any past QF contract, either in standard form or executed agreement.”<sup>10</sup> Acknowledging the complexity and difficulty with such an endeavor, the Commission further explained, “[w]e recognize that the actual terms of PGE’s standard contract forms have varied over time, and we did not undertake a review of all those forms prior to rendering our decision.”<sup>11</sup>

However, in Order No. 17-256, the Commission had also noted PGE’s argument throughout this proceeding that each of its standard contract forms, including the forms in effect at the time of the filing of the complaint, “unambiguously provided for a maximum term of 20-years measured from contract execution and unambiguously limited the availability of fixed prices to the first 15-years of that term.”<sup>12</sup> It further noted that PGE’s interpretation of its then-effective standard contract forms was what prompted the filing of the complaint to obtain Commission determination of the correct policy.<sup>13</sup> The order demonstrates that PGE’s interpretation of its then-effective standard contract form was a cause of disagreement, and at least in PGE’s view the form contained ambiguities that lent itself to disputes.

Ordering PGE to file revised contracts consistent with the clarified policy therefore made perfect, logical sense. It was entirely appropriate for the Commission to order PGE to revise the language in the forms upon which PGE relied in its arguments in this case to avoid any future

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<sup>9</sup> Order No. 17-465 at 4 (alteration in Commission’s order).

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Order No. 17-256 at 3.

<sup>13</sup> Id. at 2.

confusion or disputes over the meaning of contracts executed after Order No. 17-256. The Commission can, and must, order PGE to remove any ambiguities PGE itself perceives in those standard contract forms because otherwise the monopoly utility could exploit such alleged ambiguities in its contracting practices with individual QFs. As the Commission noted in the Amended Order No. 17-256, “[b]ecause we approved PGE's standard contract filings that **may have** limited the availability of fixed prices to the first fifteen years measured from contract execution, PGE cannot be found to have been in violation of our orders.” Order No. 17-465 at 4 (bold font in order). However, there was no need for the Commission to affirmatively rule on whether the previously available contract form is better interpreted in favor of PGE or the QFs. Any such ruling necessarily would impact the rights of nonparties who executed such forms. Instead, the existence of the dispute itself warranted clarification of PGE’s policy and an order that PGE revise the contract forms offered on a going-forward basis in a manner that all parties, *including* PGE, agree is consistent with the clarified policy.

In sum, the Commission’s orders supply all of the necessary facts and reasoning to require PGE to file revised forms, and PGE’s argument to the contrary is misplaced.

**B. The Complaint Conferred No Jurisdiction on the Commission to Issue a Declaratory Judgment on the Meaning of Contract Forms or Executed Versions of the Same, Especially Without Joining All Necessary Parties to Such Litigation**

PGE asks the Commission to interpret, on a wholesale basis, dozens to hundreds of executed contracts without joining the counterparties to those agreements to this proceeding. PGE itself previously objected to such a proceeding, which would obviously be an administrative nightmare that would require identifying and joining numerous previously unnamed parties. Put simply, the Commission’s limited resources and time are far better spent on matters other than a

wide-ranging and open-ended docket to adjudicate the meaning of all of PGE’s contracts offered over the past decade, particularly because the Commission’s jurisdiction to do so has already been questioned and the validity of a final order on the matter would therefore be in question from the start.

Indeed, the Commission’s jurisdiction is a question for the courts regardless of what any party argues before the Commission.<sup>14</sup> The courts have traditionally recognized that the Commission’s jurisdiction does not normally extend to resolution of contract disputes.<sup>15</sup>

The Commission has also recognized this limitation. In *Wah Chang*, a dispute arose over a retail rate contract, which was subject to ongoing Commission jurisdiction over the rates in a manner distinguishable from utility contracts with a supplier like a QF.<sup>16</sup> The Commission explained, “we acknowledge that the determination of parties' rights under a contract is generally a common law issue that falls within a circuit court's general jurisdiction.”<sup>17</sup> In that case, “however, Wah Chang attempt[ed] to modify the rate it [wa]s required to pay as a retail customer of a regulated utility. Such matters are within the exclusive jurisdiction of this Commission.”<sup>18</sup> In contrast, the Commission has declined jurisdiction over a contract dispute between a utility

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<sup>14</sup> Diack v. City of Portland, 306 Or. 287, 293, 759 P.2d 1070 (1988). Thus, the fact that the complaint alleges that the Commission may have jurisdiction over interpretation of executed contracts when a QF files a complaint requesting that interpretation is not binding. See Complaint at ¶¶ 9-10. Additionally, in the time since the filing of the complaint, rulings in this proceeding have limited the applicability of the Commission’s declaratory ruling statute, as discussed herein.

<sup>15</sup> See Perla Dev. Co. v. PacifiCorp, 82 Or. App. 50, 53-54, 727 P.2d 149 (1986).

<sup>16</sup> Wah Chang v. PacifiCorp, OPUC Docket No. UM 1002, Order No. 09-343 at 10 (Sept. 2, 2009).

<sup>17</sup> Id. at 12.

<sup>18</sup> Id.

and QF, acknowledging the questionable basis for such jurisdiction.<sup>19</sup> PGE’s Application does not identify the statute that would confer jurisdiction on the Commission to engage in a far-ranging declaratory judgment proceeding to adjudicate the contract rights of nonparties who have executed its standard contract forms.

The Commission has jurisdiction under ORS 756.450 to interpret a “rule or statute enforceable by the commission” in a declaratory manner. In this case, however, Administrative Law Judge (“ALJ”) Allan Arlow already ruled that the Commission’s declaratory ruling statute does not apply here because it does not even reach to interpretation of the Commission’s own orders.<sup>20</sup> Accordingly, under ALJ Arlow’s unappealed ruling, the Commission likewise lacks statutory authority to issue declaratory rulings on the meaning of contract forms approved by those orders, much less executed contracts based on the approved contract forms. In contrast, a trial court does have jurisdiction to provide a legally binding declaratory judgment construing a contract “either before or after there has been a breach thereof.”<sup>21</sup> The Commission has no similar grant of statutory authority.

In some cases, the Commission may obtain statutory jurisdiction, under ORS 756.500(1), through a complaint filed “against any person whose business or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or regulation of which is conferred upon the commission.” The complaint must “state all grounds of complaint on which the complainant seeks relief or the violation of any law claimed to have been committed by the

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<sup>19</sup> See Re Central Irrigation District, OPUC Order No. 10-495 at 1 (Dec. 10, 2010).

<sup>20</sup> ALJ Ruling at 3 (Jan. 19, 2017).

<sup>21</sup> ORS 28.030.

defendant.”<sup>22</sup> But the jurisdiction over such a complaint is necessarily limited to the claims raised in that complaint.

The complaint in this case alleged PGE’s practices violate the Commission’s policies and orders, and it contained no breach of contract claims against PGE. The First Claim alleged that “PGE’s *current* position is not consistent with the Commission’s policy and has obvious detrimental impacts on the ability of QFs to negotiate a contract with PGE that is consistent with Commission policy.”<sup>23</sup> The Second Claim also alleged that “PGE’s refusal to follow Commission policy that all QFs can obtain 15 years of fixed prices commencing on the Commercial Operation Date is arbitrary, and unjustly harms those QFs who PGE asserts are entitled to 15 years of fixed prices from the Effective Date.”<sup>24</sup> These limited claims in the complaint conferred no jurisdiction on the Commission to render binding contract interpretations even to the extent that ORS 756.500 could be construed to allow for such jurisdiction.

The limited nature of the complaint, and any jurisdiction that might exist under ORS 756.500, is further confirmed by subsequent filings. The only jointly agreed issue in the case was: “Has PGE violated any statute, rule or Commission order regarding when the 15-year fixed price period begins under QF standard contracts?”<sup>25</sup> The Joint Issues Statement even states that “[t]his proceeding does not seek any declarations interpreting or otherwise declaring the rights of the parties to PGE’s executed standard contracts.”<sup>26</sup> Because the proceeding did not regard interpretation of PGE’s executed standard contracts, the issue of the meaning of previously

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<sup>22</sup> ORS 756.500(3).

<sup>23</sup> Complaint at ¶ 50 (emphasis added); see also id. at ¶¶ 40-45 (regarding PGE’s current practices).

<sup>24</sup> Id. at ¶ 56.

<sup>25</sup> Joint Issues Statement, at Attach. A at 2 (Mar. 10, 2017).

<sup>26</sup> Id.

available contract forms should not have been addressed either.

Ultimately, the Commission resolved the complaint's claims by determining that Order No. 05-584 was somewhat ambiguous as to the 15-year term issue.<sup>27</sup> However, the Commission clarified its policy in Order No. 05-584 to explicitly require standard contracts to provide for 15 years of fixed prices that commence when the QF transmits power to the utility.<sup>28</sup> Complainants are satisfied with this result. Thus, there was no need to provide a binding interpretation of contract forms to resolve the complaint to complainants' satisfaction. Having not filed the complaint or any counter claims, PGE has no standing to now use the complaint and ORS 756.500 on rehearing to expand the Commission's jurisdiction to PGE's own benefit.

Furthermore, even where contract jurisdiction exists, a judgment will not generally bind a nonparty.<sup>29</sup> Oregon law generally requires that a person be joined in an action as a necessary party if that person "claims an interest relating to the subject of the action and is so situated that the disposition in that person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest," among other reasons.<sup>30</sup> The necessary party is an indispensable party, requiring dismissal of the action, if such party cannot be joined and, among other factors, judgment cannot be modified so as not to impact that parties' interests.<sup>31</sup> For example, in one case, the Oregon Court of Appeals held that the "trial court should have acted on

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<sup>27</sup> See Order No. 17-465 at 4.

<sup>28</sup> Order No. 17-256 at 4.

<sup>29</sup> Couch v. Couch, 170 Or. App. 98, 103, 11 P.3d 255 (2000).

<sup>30</sup> ORCP 29A.

<sup>31</sup> ORCP 29B.

its own motion” to join a party to an assignment agreement in an action to determine the meaning of a “necessarily interrelated” sale agreement.<sup>32</sup>

PGE itself made very similar arguments in this proceeding. PGE explained: “[o]f particular concern to PGE are ambiguous assertions that the relief requested will involve the interpretation of previously executed standard contracts. The complaint fails to identify the contracts to be interpreted or the language to be interpreted.”<sup>33</sup> According to PGE, the Commission cannot interpret “previously executed standard contracts . . . because Complainants lack standing to seek adjudication of the private rights of contract represented by the executed contracts and because Complainants have failed to join indispensable parties (the QF counterparties to the executed contracts).”<sup>34</sup> The same must also be true of interpretation of contract forms on which those indispensable parties’ executed contracts are based. PGE’s own arguments are therefore fatal to its proposed rehearing proceeding, which would necessarily affect the rights of nonparties.

Indeed, PGE openly acknowledges its intent to bind nonparties on rehearing. PGE asserts that it hopes the rehearing procedure will limit the need (or more correctly the right of) counterparties to go to court “by providing PGE and its counter-parties with better certainty regarding what PGE’s form contracts required with regard to the fixed price period.”<sup>35</sup> But at the same time the Commission’s prior order denying the NewSun Solar Projects’ request to intervene on rehearing appears to limit the right of such counterparties to the contracts from now

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<sup>32</sup> Waxwing Cedar Prods. v. C & W Lumber Co., 44 Or. App. 167, 170-71, 605 P.2d 719 (1980); see also Herald Pub. Co. v. Klamath News Pub. Co., 116 Or. 62, 68-69, 240 P. 244 (1925).

<sup>33</sup> PGE’s Comments on Declaratory Ruling Option at 2 (Jan. 5, 2017).

<sup>34</sup> Id. at 4.

<sup>35</sup> PGE Reconsideration Application at 6.

becoming parties during any rehearing.<sup>36</sup> The untenable result is that PGE intends to bind its contractual counterparties without allowing them to even be parties to the proceeding.

In light of the jurisdictional and due process limits in play here, the Commission's orders appropriately clarified its policy and directed PGE to offer contracts in the future consistent with that policy. Individual QFs with executed contracts may now resolve individual disputes with PGE in the appropriate forum. That process is preferable to PGE's proposal for an unwieldy proceeding that would, if possible at all, require the Commission to somehow identify, locate, and join dozens to hundreds of necessary parties. In fact, a proceeding with all parties to every executed contract with PGE would necessarily lead to extensive delays in final adjudication for individual parties and likely compromise the viability of individual projects that need assurance of their contractual rights to complete financing and construction. The Commission should be aware that such delays inure to PGE's benefit and undermine the rights of QFs.

In sum, the Commission should decline to inappropriately assert jurisdiction on rehearing to adjudicate the contract rights of nonparties.

### **C. PGE's Application Contains Material Misstatements**

PGE's Application contains a number of misstatements that must be corrected. First, PGE states that it "provided detailed analysis of the various generations of its standard contract forms,"<sup>37</sup> suggesting that the Commission already has a complete record to adjudicate all previously effective contract forms.

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<sup>36</sup> Order No. 17-418 at 2 (stating, "ORS 756.525(2) allows a party to file a petition to intervene prior to the conclusion of the taking of evidence").

<sup>37</sup> PGE Reconsideration Application at 3.



In reality, however, PGE's prior filings omitted critical terms of previously effective contract forms, including, as pointed out by the NewSun Solar Projects, the description of RPS Attribute ownership in the renewable standard contract approved by Order No. 15-289. In fact, PGE did not submit the renewable contract forms in effect between the issuance of Order No. 14-435 on December 16, 2014, and the issuance of Order No. 16-377 on October 11, 2016.<sup>38</sup> While the NewSun Solar Projects' application for rehearing and reconsideration submitted the renewable standard contract approved by Order No. 15-289 and supplied information demonstrating it was highly distinguishable from the contract forms PGE addressed in its briefing in this proceeding,<sup>39</sup> PGE convinced the Commission to strike that filing and the contract form attached to it from the record.<sup>40</sup> The Commission would need to reopen and reconstitute the record to accomplish PGE's objective.

Second, PGE asserts "Complainants and NewSun Solar both appeared to acknowledge that the Commission had ruled that PGE's currently effective contract forms limited fixed prices to 15 years measured from contract execution."<sup>41</sup> This is a significant overstatement of Complainants' arguments. Although Complainants were certainly confused by the initial Order No. 17-256, they never argued that the order affirmatively ruled in PGE's favor as to the standard contract forms in effect in July 2017. Instead, Complainants and the NewSun Solar

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<sup>38</sup> See PGE's Motion for Summary Judgment (April 24, 2017) (including six attachments that do not include these forms).

<sup>39</sup> See NewSun Solar Projects' Motion for Clarification and Application for Rehearing at 18-29, and Attachments (Sept. 8, 2017).

<sup>40</sup> See Order No. 17-418 at 3.

<sup>41</sup> PGE Reconsideration Application at 4.

Projects argued that Order No. 17-256 was ambiguous and needed to be clarified because PGE was already relying upon it to strong-arm QFs on an individual basis.<sup>42</sup>

Third, PGE also asserts, incorrectly, that: “[d]etermining the meaning of PGE’s standard contract forms is not strictly or solely an exercise in contract interpretation or in the application of contract law. Rather, PGE’s standard contract forms are regulatory compliance documents that have been created and maintained by PGE in response to the requirements of the Commission’s regulatory orders.”<sup>43</sup> PGE appears to analogize a long-term QF contract to contracts it enters into with retail customers, such as in the *Wah Chang* case cited above.

In fact, however, federal and state law is very clear that a long-term QF contract is governed by common law contract principles and the Commission has no ongoing regulatory authority over the rates and terms of such agreements.<sup>44</sup> Indeed, the standard contract itself states that it remains in effect even if PURPA is repealed, further undermining the Commission’s ongoing regulatory authority and underscoring the lack of any need for ongoing regulatory

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<sup>42</sup> See Complainants Clarification and Rehearing Application, at 2 (Sept. 11, 2017) (explaining “the Order is vague and ambiguous as to whether it intends to provide a binding interpretation of the numerous different versions of Portland Electric Company’s (‘PGE’) standard contract form”).

<sup>43</sup> PGE Reconsideration Application at 10-11.

<sup>44</sup> See Oregon Trail Elec. Consumers Coop., Inc. v. Co-Gen Co., 168 Or. App. 466, 473-474 & n. 6, 482-84, 7 P.3d 594 (2000). Complainants understand that the Commission recently issued an order finding personal and primary jurisdiction over a contract dispute filed by Portland General Electric Company against a QF. Re Complaint of PGE v. Pacific Northwest Solar, LLC, Docket No. UM 1894, Order No. 18-025 (January 25, 2018). Based on the pleadings filed in UM 1894, it appears that the Commission’s exercise of jurisdiction is inconsistent with at least three prior Oregon court decisions addressing the merits of QF disputes with utilities, the only time the Commission has exercised jurisdiction over a utility complaint against a QF, and only the second identified example of a court or commissions finding primary jurisdiction over a utility contract complaint against a QF in the country with all other jurisdictions addressing the question finding that a state commission does not have primary jurisdiction over a post-contract execution PURPA contract dispute.

oversight.<sup>45</sup> The Commission lacks the authority to revise, or creatively interpret, the terms of executed QF contracts to achieve PGE’s objective of reducing “millions of dollars of additional payments to QF counter-parties” under those contracts.<sup>46</sup> PGE’s request is a not-so-subtle invitation for the Commission to violate federal and state law by retroactively adjusting the long-term rates in QF contracts. The Commission should decline the invitation.

**D. The Premise of “Changed Circumstances” Underlying PGE’s Application is Wrong**

PGE also asserts that circumstances have changed and now warrant Commission interpretation of the standard contract form in effect at the time of the filing the UM 1805 complaint (effective in July 2017) because the NewSun Solar Projects “filed a case against PGE in the United States District Court for the District of Oregon seeking a determination of the 15-year fixed price question.”<sup>47</sup>

First, PGE’s assertions of changed circumstances appear disingenuous. The NewSun Solar Projects attempted to intervene in this proceeding before the Commission’s issuance of Order No. 17-465, but PGE successfully objected to their involvement. Additionally, PGE

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<sup>45</sup> See PGE's Schedule 201 Qualifying Facility Information Compliance at § 15 (July 12, 2016) (containing PGE’s 2016 Renewable Standard Contract, which provides: “In the event the Public Utility Regulatory Policies Act (PURPA) is repealed, this Agreement shall not terminate prior to the Termination Date, unless such termination is mandated by state or federal law.”).

<sup>46</sup> See PGE Reconsideration Application at 1.

<sup>47</sup> PGE Reconsideration Application at 2; see *id.* at 7 (arguing that the NewSun federal court complaint is a “material change in circumstances” that creates “an immediate need for Commission interpretation and ruling on the question” of the 15-year fixed price period); *id.* at 10 (“there has been a fundamental change in the underlying circumstances and that change represents good cause for further examination of an issue essential to the decision. Specifically, NewSun has filed suit in the United States District Court for the District of Oregon and NewSun is seeking an interpretation of whether the 15-year fixed price period begins to run at contract execution or at COD”).

appears to have known of its disagreement with NewSun Solar Projects for some time now. There is no changed circumstance as to a dispute with the NewSun Solar Projects.

In any event, PGE fails to mention that the NewSun Solar Projects did not execute the version of the standard contract form in effect in July 2017. As noted above, the NewSun Solar Projects executed a contract form that arose from the prior generation of renewable contract forms. In their attempted intervention, the NewSun Solar Projects argued that form had materially different terms and conditions than other forms, including the renewable form in effect in July 2017. Interpreting the version of the form in effect in July 2017 would not allow PGE to avoid litigation over PGE’s unreasonable interpretation of numerous different executed versions of previously effective contract forms. As noted above, addressing PGE’s concern would require the Commission to address all prior forms and executed contracts – something PGE itself has argued the Commission cannot do without joining all parties to such contracts.


**IV. CONCLUSION**

For the reasons explained above, the Commission should deny PGE’s Application.

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Dated this 29th day of January 2018.

Respectfully submitted,

A handwritten signature in cursive script that reads "Irion Sanger".

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Producers Coalition

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Association

Of Attorneys for Renewable Energy Coalition