

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1805

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

Complainants,

v.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

**STAFF'S COMMENTS ON
DECLARATORY RULING OPTION**

I. INTRODUCTION

In response to Administrative Law Judge Allan Arlow's request that Public Utility Commission of Oregon Staff (Staff) file comments and recommendations as to whether the issues raised in the complaint filed by the Northwest and Intermountain Power Producers Coalition (NIPPC), Community Renewable Energy Association (CREA), and Renewable Energy Coalition (the Coalition) (collectively Complainants) can be addressed through a declaratory ruling proceeding, Staff files these comments to recommend that Complainants' issues be resolved through the complaint process rather than a declaratory ruling proceeding.

II. DISCUSSION

1. A statutory construction of ORS 756.450 provides that Complainants' issues should be resolved through the complaint process.

The Oregon Supreme Court has established the methodology for statutory construction that is used to discern the legislature's intent at the time it enacted the

statute. First, we examine the text and context of the statute in question, giving words of common usage their plain, natural, and ordinary meaning.¹ After examining the text and context of the statute, we also consider the legislative history where it appears useful to the analysis.² If the meaning of the statute is still unclear after review of the text, context, and legislative history, we apply general maxims of statutory construction to resolve the ambiguity in the statute.³

The text of Oregon Revised Statute (ORS) 756.450, the declaratory ruling statute, states that the “Commission may issue a declaratory ruling with respect to the applicability to any . . . state of facts of *any rule or statute* enforceable by the commission.”⁴ Generally, courts consult a dictionary in use at the time the statute was enacted to determine the plain and ordinary meaning of the text or term in question; however, if the term has a well-defined legal meaning, the legal meaning is applied.⁵ The terms “rule” and “statute” have the following well-defined legal meanings: 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”⁶; A “statute” is “a particular law enacted and established by the will of the legislative department of government.”⁷ Based on the legal definitions of

¹ *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 610 (1993); *State v. Gaines*, 346 Or 160, 171-72 (2009).

² *State v. Gaines*, 346 Or 160, 171-72 (2009).

³ *Id.* at 172.

⁴ ORS 756.450 (emphasis added).

⁵ *State v. Ziska*, 355 Or 799, 804-05 (2014); see *Stull v. Hoke*, 326 Or 72, 78 (1997).

⁶ ORS 183.310(9); *Black's Law Dictionary* 1496 (Revised 4th ed., 1968) (a rule means “[a]n established standard, guide, or regulation.”).

⁷ *Black's Law Dictionary* 1581 (Revised 4th ed., 1968).

“rule” and “statute,” one can conclude that the legislature did not intend for “any *rule* or *statute* enforceable by the commission” to include a Commission “order.”⁸

Next, when examining the text in the context of the remaining provisions of the declaratory ruling statute, Staff notes that the legislature included language explaining that declaratory rulings are binding rulings subject to judicial review as “*orders* in contested cases.”⁹ The legislature’s inclusion of “orders” in one provision of the statute but not in another indicates that the legislature contemplated the role of “orders” while drafting the statute, but chose not to include Commission orders with “any rule or statute” as a source of legal authority to be applied in declaratory ruling proceedings. The statutory construction directive that we are not to insert what has been omitted, but are to declare what is contained in the statute supports this conclusion.¹⁰

Finally, courts look to the provisions of related statutes to assist in determining legislative intent.¹¹ Interestingly, other statutes in ORS Chapter 756, the same chapter as the declaratory ruling statute, expressly distinguish between rules, statutes, and orders. For example, “ORS 756.180 Enforcing utility laws” discusses commission enforcement of “any *statute* administered by the commission, or any *rule*, regulation, requirement, *order*, term or condition issued thereunder . . .”¹² In construing statutes, when the legislature includes a term in one statute, but omits the term in another related statute,

⁸ ORS 183.310(6)(a) (an order means “any agency action expressed orally or in writing directed to a named person or named persons, other than employees, officers or members of an agency . . . [and] includes any agency determination or decision issued in connection with a contested case proceeding.”).

⁹ ORS 756.450 (emphasis added); see Oregon Laws 2005, ch. 638, sect. 2 (SB 489) (2005 amendments changed the language to the current “orders in contested cases” from the 1971 enacted language of “orders”).

¹⁰ ORS 174.010 (general rule for construction of statutes).

¹¹ *State v. Carr*, 319 Or 408, 411-12 (1994).

¹² ORS 756.180(1) and (2) (emphasis added); see also ORS 756.160(2) (“. . . any such laws or of the rules, regulations, orders, decisions or requirements of the commission”); ORS 756.062(1) (“. . . give effect to all the rules, orders, acts and regulations of the commission”).

courts infer that the omission was deliberate.¹³ Here, one can conclude that the legislature's express inclusion of the term "order" in a list of Commission authority in the related ORS 756.180 statute, but clear omission of "order" from the list of Commission authority to be applied in ORS 746.450, was deliberate.

As demonstrated above, the meaning of the declaratory ruling statute is clear based on a reading of the plain text and context of the statute; therefore, a discussion of the legislative history is unnecessary. Staff concludes that a declaratory ruling is an appropriate mechanism for applying Commission rules and statutes to a set of facts, but is not an appropriate mechanism for the application of Commission orders.

2. Past practice supports limiting the use of declaratory rulings to the interpretation of Commission rules and statutes.

The Commission most recently addressed the proper use of a declaratory ruling at the October 11, 2016 regular public meeting, where the issue arose as to whether a declaratory ruling or complaint was the appropriate vehicle for resolving a dispute.¹⁴ In Docket No. DR 51, Cypress Renewables LLC (Cypress) had filed a petition for a declaratory ruling confirming that Order No. 11-505 required PacifiCorp to offer QFs a non-standard contract with prices based on a renewable avoided cost price stream. Although Staff counsel and Commission counsel briefly noted that the Commission had in the past used a declaratory ruling to resolve a dispute concerning the meaning of a Commission *order*,¹⁵ both attorneys agreed that the complaint proceeding was the better

¹³ *Emerald People's Utility District v. Pacific Power & Light*, 302 Or 256, 269 (1986).

¹⁴ See *In the Matter of Cypress Creek Renewables, LLC Petition for Declaratory Ruling*, Docket No. DR 51, Order No. 16-378 (Oct. 12, 2016); October 11, 2016 Regular Public Meeting, Regular Agenda Item 2, available at http://oregonpuc.granicus.com/MediaPlayer.php?view_id=1&clip_id=126.

¹⁵ See *In the Matter of Portland General Electric Company's Petition for A Declaratory Ruling*, Docket No. DR 22, Order No. 99-627 (Oct. 14, 1999) ("A declaratory ruling proceeding is an appropriate

procedural vehicle based on the express language of the declaratory ruling statute. After back-and-forth discourse as to best practices, the Commission declined to substantively consider Cypress's declaratory ruling petition, and instead ordered that that the petition be treated as a complaint pursuant to ORS 756.500.¹⁶

As for the briefly referenced February 1999 order in which the Commission indicated that a declaratory ruling could be used to resolve disputes concerning a Commission order, Staff notes that the Commission took up the petition based on its responsibility over territorial allocation *statutes* administered by the Commission.¹⁷ Specifically, Portland General Electric Company (PGE) had filed a petition requesting a declaratory ruling that a customer, Boise Cascade (BC), was located within the service territory exclusively allocated to PGE by the Commission pursuant to ORS 758.400. To the contrary, Columbia River People's Utility District (CRPUD) alleged that the BC facility was located within CRPUD's territory. In short, the Commission issued a declaratory ruling as to the exclusive service territory allocated to PGE in Order No. 39026, explaining that "[t]his is a declaratory proceeding in which we have been requested to issue a ruling concerning the territorial allocation statutes we administer."¹⁸

Further, a declaratory ruling petition filed by the Coalition in February 2014 in Docket No. DR 48 involved issues parallel to those in the complaint filed in this docket—specifically, both involve a dispute over the Commission's PURPA policy and the

mechanism for declaring rights of a party when there are disputes about the meaning of orders the Commission has issued."); *see also* Docket No. DR 22, Order No. 99-748 (Dec. 12, 1999).

¹⁶ *In the Matter of Cypress Creek Renewables, LLC, Petition for Declaratory Ruling*, Docket No. DR 51, Order No. 16-378 (Oct. 12, 2016); *see also* October 11, 2016 Regular Public Meeting, Regular Agenda Item 2, available at http://oregonpuc.granicus.com/MediaPlayer.php?view_id=1&clip_id=126.

¹⁷ *In the Matter of Portland General Electric Company's Petition for A Declaratory Ruling*, Docket No. DR 22, Order No. 99-627 (Oct. 14, 1999).

¹⁸ *Id.*; *see also* Docket No. DR 22, Order No. 99-748 (Dec. 12, 1999).

meaning of a PURPA standard contract term. In DR 48, Staff recommended that the Commission deny the Coalition's petition for a declaratory ruling¹⁹ because the petition did not request application of a Commission rule or statute to the set of facts asserted, but instead sought interpretation of Commission orders and policies, and therefore did not meet the statutory criteria for a declaratory ruling. As a result, Staff recommended opening an investigation instead.²⁰ PacifiCorp opposed the petition on the same grounds as Staff, with the additional argument that a declaratory ruling would bind only the Commission and the party seeking relief, and thus was not the appropriate procedural vehicle for deciding broadly applicable policy issues.²¹ Ultimately, the parties to DR 48 resolved the issues and withdrew the petition prior to a Commission decision on the matter. Nonetheless, the concerns raised by Staff and PacifiCorp in DR 48 would apply in this docket should a declaratory ruling be pursued.

3. Staff recommends that the issues presented in this docket be resolved through the complaint process because it best serves the interests of the parties and the Commission.

Staff views a declaratory ruling and a complaint proceeding as serving different purposes and having different effects. "Declaratory rulings have the function of allowing an agency to determine how laws under the agency's authority apply to a given set of facts. The 'facts' considered by the agency are those supplied by the petitioner."²² In other words, declaratory rulings do not allow for fact finding as to disputed facts.²³

¹⁹ The Coalition sought a declaratory ruling that PacifiCorp's interpretation of the termination provision in its standard contract for non-intermittent QFs under 10 MW violated current commission orders.

²⁰ Docket No. 48, Staff Report at 2 (May 15, 2014 Regular Public Meeting).

²¹ Docket No. 48, Response of PacifiCorp to the Coalition's Petition for Declaratory Ruling at 3 (Mar. 3, 2014).

²² *In the Matter of Portland General Electric Company Petition for a Declaratory Ruling*, Docket No. DR 32, Order. No. 05-1064 (Oct. 5, 2005).

²³ *Id.*

Thus, if any disputed facts exist between the parties, which PGE indicated at the prehearing conference could potentially be the case, a declaratory ruling proceeding is not appropriate.

In addition, a declaratory ruling is binding only on the Commission and the petitioner, and is binding only as to the specific facts alleged in the petition.²⁴ In other words, for the resolution of the declaratory ruling to be implemented, the petitioner must prove the “assumed facts” of the declaratory ruling in a subsequent proceeding, such as a complaint, rate case, or similar proceeding. Thus, to receive a Commission decision that binds all parties, which Complainants expressly request in their comments,²⁵ Complainants would have to file a complaint after the declaratory ruling is issued to prove the facts assumed in the declaratory ruling in order to bind PGE, or in order to take enforcement action in circuit court.

Staff recommends continuing with the complaint proceeding because the Commission’s decision in a complaint proceeding is binding on all parties to the complaint, the need for subsequent Commission proceedings after the declaratory ruling is eliminated, declaratory rulings are not the best mechanism for resolution of policy issues, and the Commission’s decision as to this complaint would be precedential for those like cases should similar factual circumstances arise.

The conclusion that declaratory rulings are appropriate for the application of rules and statutes, but not orders, to assumed facts does not deny future parties a procedural

²⁴ ORS 756.450.

²⁵ Docket No. UM 1805, NIPPC, CREA, and the Coalition Comments on Declaratory Ruling Option at 1-2 (Dec. 29, 2016) (Complainants believe the issues can be resolved through either procedural vehicle “so long as the simple and straightforward questions are addressed as expeditiously as possible *and the ruling is binding upon PGE.*”).

remedy for interpreting orders; they continue to retain the options of filing a complaint, requesting an investigation, or seeking amendment or modification of an order under ORS 756.568.

III. CONCLUSION


Complainants' issues do not meet the statutory criteria for a declaratory ruling given that the issues do not turn on the proper application of a Commission rule or statute, but instead involve "two discrete legal questions having to do with the Commission's policy, as laid out in several Commission orders."²⁶ Therefore, Complainants' issues should not be taken up in a declaratory ruling proceeding, but should remain in the complaint process which will result in an expedient and conclusive resolution in a Commission order that is binding on all parties to the complaint, allows future enforcement action, if necessary, and provides precedent for future cases with similar facts.

For the above stated reasons, Staff respectfully recommends that the Complainants' issues be resolved through the Commission's complaint process.

DATED this 30th day of December, 2016.

Respectfully submitted,

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²⁶ *Id.* at 3.