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May 15, 2017

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 Reply to Complainants' Response in Opposition to Portland General Electric Company's Motion for Summary Judgment.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in blue ink that reads "V. Denise Saunders". The signature is written in a cursive, flowing style.

V. Denise Saunders
Associate General Counsel

VDS:lgh

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 REPLY TO
COMPLAINANTS’ RESPONSE IN
OPPOSITION TO PORTLAND
GENERAL ELECTRIC COMPANY’S
MOTION FOR SUMMARY
JUDGMENT**

Pursuant to OAR 860-001-0420, Portland General Electric Company (“PGE”) respectfully submits this reply to Complainants’ response in opposition to PGE’s motion for summary judgment.

I. INTRODUCTION

The core question in this case is whether Order No. 05-584 requires PGE to pay fixed prices for 15 years after a qualifying facility (“QF”) begins to deliver power under a standard contract. The answer is no. PGE has demonstrated that the language of Order No. 05-584 contains no such requirement. PGE has also demonstrated that the first standard contract approved by the Commission as consistent with Order No. 05-584 was PGE’s standard contract approved by Order No. 07-065, which was issued February 27, 2007 (“PGE’s 2007 Contract”). This contract 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.

PGE's 2007 Contract did not provide for the payment of fixed prices for 15 years following the date a QF begins to deliver power. Order No. 07-065, approving PGE's 2007 Contract, *definitively* established that a utility can comply with Order No. 05-584 without paying fixed prices for 15 years after power delivery. Put another way, Order No. 05-585 does not require 15 years of fixed prices after power deliveries begin.

PGE has pleaded the existence of Order No. 07-065 as an affirmative defense.¹ But Complainants fail to address Order No. 07-065 in either their motion for summary judgment or in their response to PGE's dispositive motion. This silence is a tacit admission that they have no response. It is an admission that the Commission has already determined that PGE complies with Order No. 05-584 when it offers a standard contract with a maximum term of 20-years measured from contract execution and limits the availability of fixed prices to the first 15 years of the contract term. The relief requested in the complaint should be denied on this basis alone.

II. DISCUSSION

A. **The Commission should reject the Complainants' assertion that PGE has violated an inchoate "policy."**

Because Order No. 05-584 contains no language requiring a utility to pay fixed prices for 15 years from power delivery, Complainants have argued their position based on policy. They argue that a policy of fixed price payments for 15 years from power delivery makes "good sense"² and is consistent with an alleged "industry understanding"³ that existed in 2005. Complainants cite to a number of cases from other states that they

¹ Docket No. UM 1805, Answer at ¶ 65 (Mar. 28, 2017).

² Docket No. UM 1805, Complainants' Motion for Summary Judgment at 2 (Apr. 24, 2017).

³ *Id.* at 18; Docket No. UM 1805, Complainants' Response to PGE's Motion for Sum. Judg. at 4-8 (May 8, 2017) (discussing alleged "custom and trade usage, which is well established in the energy industry.").

claim support this view.⁴ The Commission should reject this argument for its inherent weakness. But the Commission should also reject it because the Commission lacks the authority to impose contract requirements on PGE based on an alleged “policy” that has not been articulated in rule.

In *Megdal v. Oregon State Board of Medical Examiners*,⁵ the Oregon Supreme Court recognized that when the legislature directs an agency to establish standards by rule, and the agency has not done so, the agency lacks the authority to apply such standards on an *ad hoc* basis in an adjudicative proceeding. In *Megdal* the Court was addressing professional licensing standards and regulations. But the principles articulated in the case are generally applicable concepts regarding administrative law and the delegation of legislative power. The Court recognized that when the legislature intends for an administrative agency to promulgate rules to establish standards governing a particular area of regulation, then the agency lacks the authority to impose such standards on an *ad hoc* basis through an adjudicative process such as a contested case proceeding.⁶

The principles expressed in *Megdal* suggest that the Commission must reject Complainants’ approach. The legislature has authorized the Commission to regulate the relationship between QF’s and public utilities.⁷ But the legislature has also required that

⁴ Docket No. UM 1805, Complainants’ Motion for Summary Judgment at 20-24 (Apr. 24, 2017).

⁵ 288 Or 293, 304-320, 605 P2d 273 (1980) (Board lacked authority to revoke dentist’s license for fraudulent behavior toward insurer because Board had not previously promulgated a rule specifying such behavior to be “unprofessional behavior” and court found the legislature intended for the Board to adopt rules on the subject even though the statute did not specifically require the board to promulgate rules).

⁶ *Megdal* at 319 (concluding petitioner was entitled to relief because agency broadened standard through *ad hoc* ruling in a contested case proceeding when the legislature intended for the standard to be particularize in rule); see also *Coffey v. Bd. of Geologist Examiners*, 348 Or. 494, 498, 235 P3d 678 (2010) (finding no basis to imply that the legislature intended the agency to promulgate rules before enforcing the standard in question); *Blue Iguana, Inc. v. Oregon Liquor Control Commission*, 258 Or App 535, 541-543, 310 P3d 720 (2013) (discussing *Megdal* and progeny and noting “Oregon courts have engaged the question of when a regulatory or licensing agency, operating as it must within statutory authorization, can take enforcement action in the absence of formally promulgated administrative rules.”).

⁷ See ORS 758.505 to ORS 758.555.

the Commission adopt rules to address the terms and conditions under which a public utility, such as PGE, will purchase energy and capacity from a QF.⁸

The Commission has not promulgated any rule that requires utilities to pay fixed prices for 15 years after a QF begins power deliveries under a standard contract. Instead, the Commission issued Order No 05-584 containing certain decisions on standard contract length and ordered the utilities to file rate schedules and standard contract forms with terms and conditions that were consistent with the decisions in Order No. 05-584.⁹ PGE did so. The Commission approved PGE's compliance filing as consistent with the requirements of Order No. 05-584.¹⁰ No party has objected that this series of steps was beyond the Commission's authority. And no party timely objected that PGE's approach was inconsistent with the requirements of Order No. 05-584.

But now, Complainants want the Commission to revisit what is required under Order No. 05-584, and ask the Commission to discover an *implied* requirement to pay fixed prices for 15 years after power deliveries begin. Complainants have argued that the Commission's "policies" require the outcome they seek,¹¹ and that the outcome they seek is required by an inchoate "industry understanding."¹² What Complainants are asking the Commission to do is to apply an inchoate "policy" standard that is not express in Order

⁸ ORS 758.535(2)(a) ("The terms and conditions for the purchase of energy ... from a qualifying facility shall ... [b]e established by rule by the commission if the purchase is by a public utility").

⁹ Docket No. UM 1129, Order No. 05-584 at 19-20 and 59-60 (May 13, 2005).

¹⁰ Docket No. UM 1129, Order No. 07-065 (Feb. 27, 2007).

¹¹ Docket No. UM 1805, Complaint at ¶¶ 30, 47, 52 and 56 (alleging existence of a Commission policy of offering QF's contracts of 20 years with up to 15 years of fixed pricing from the time of operation) (Dec. 6, 2016), Complainants' Motion for Summary Judgment at 1, 3, 6, 11 (Apr. 24, 2017), Complainants' Response to PGE's Motion for Summary Judgment at 2 (May 8, 2017) (Complainants seek confirmation that "... the Commission's policy requires 15 years of fixed prices from the time of power deliveries").

¹² Docket No. UM 1805, Complainants' Motion for Summary Judgment at 18 (Apr. 24, 2016) ("The common industry understanding of how fixed prices work with respect to contract term is that the fixed-price period begins when power deliveries begin.") and Complainants' Response in Opposition to PGE's Motion for Summary Judgment at 6 (May 8, 2017) (criticizing PGE for not addressing "custom and trade usage, which is well established in the energy industry.").

No. 05-584 and which has not been adopted by rule as required by ORS 758.535(2)(a). PGE believes such an outcome would be grossly unfair and is beyond the authority of the Commission under the logic of *Megdal*.

B. There is no implied requirement to pay fixed prices for 15 years after a QF begins to deliver power.

Complainants argue Order No. 05-584 includes an *unstated* requirement to pay fixed prices for 15 years after a QF begins to deliver power.¹³ Complainants argue this unstated requirement can be implied from an “industry standard” or “trade usage” that was allegedly pervasive in the electric industry in 2005 and which allegedly required that utilities pay fixed price for 15 years after a QF begins to deliver power.¹⁴ In support of these allegations, the Complainants cannot point to any express statement by the Commission or to any express requirement in Order No. 05-584 or in any other Commission order. Instead, Complainants cite to a number of decisions in other states, which they allege support their argument for an “industry standard.”¹⁵

Complainants’ argument has numerous problems and should be rejected. First, if the 2005 Commission intended to require utilities to pay fixed prices for 15 years after a QF begins to deliver power, the Commission would have said so in Order No. 05-584. It would have been easy to do. The Commission could have stated: “standard contract prices should be fixed for 15 years after a QF begins delivering power.” Instead, the Commission stated: “standard contract prices should be fixed for only the first 15 years of the 20-year term.”¹⁶ And the Commission never states that the 20-year term should start after power deliveries (an approach that would lead to a 23 or 24 year term if commercial

¹³ Docket No. UM 1805, Complainants’ Response to PGE’s Motion for Sum. Judg. at 5-8 (May 8, 2017).

¹⁴ *Id.*

¹⁵ *Id.* at 6 (referring the reader to the cases cited in Complainants’ motion for summary judgment).

¹⁶ Docket No. UM 1129, Order No. 05-584 at 20 (May 13, 2005).

operation begins three or four years after the contract effective date). The fact that the Commission did *not* expressly require 15 years of fixed price payments after power delivery strongly suggests the Commission did not intend to impose such a requirement.

The second problem with Complainants' argument is that PGE's 2007 Contract clearly provided for a maximum 20-year term *measured from contract execution* and clearly limited the availability of fixed prices to the first 15 years of that 20-year term.¹⁷ The same three Commissioners that issued Order No. 05-584 approved PGE's 2007 Contract in February 2007.¹⁸ If these Commissioners intended for there to be an *implied* requirement to pay fixed prices for 15-years after power delivery begins, they would not have approved PGE's approach as consistent with Order No. 05-584. Complainants do not address this fatal flaw in their theory.

The third problem with Complainants' argument is that it is not clear the foreign cases cited by Complainants support their claims. Many of the cites provide no indication as to how or why the cited case supports the conclusion that the 2005 Commission intended to create an implied requirement for utilities to pay fixed prices for 15 years after the start of power delivery. Many of the cited cases address net metering or other non-PURPA transactions. Many of the cited cases were decided after 2005 and therefore do not demonstrate anything about "industry standards" in 2005. Many of the cited cases involve PacifiCorp or Idaho Power contracts in other states and merely demonstrate that PacifiCorp and Idaho Power use similar approaches in those states to the approaches they

¹⁷ See, Docket No. UM 1805, PGE's Motion for Summary Judgment at 18-21 (Apr. 24, 2017) (describing provisions of PGE's 2007 Contract).

¹⁸ Docket No. UM 1129, Order No. 07-065 (Feb. 27, 2006).

use in Oregon. And each of the cited cases arose in a context that was very different from UM 1129 and Order No. 05-584.¹⁹

Complainants also argue that a Wikipedia page on power purchase agreements provides support for their theory.²⁰ The Commission should reject this argument. First, it is not clear how the Wikipedia page supports Complainants' position. Second, there is no evidence the Wikipedia page existing in 2005 or reflects anything about "industry standards" as they existed in 2005. Third, Wikipedia content is user generated and subject to error and bias; Federal courts have warned that Wikipedia is unreliable and should not be relied on in making legal decisions.²¹

Complainants also argue that the Commission should consider "terms of art" used in Order No. 05-584,²² but the Complainants never explicitly state what "terms of art" they believe the Commission used in its order or what "technical reading" should be given to the alleged terms of art.

For all of these reasons, the Commission should reject Complainants' request to imply a requirement to pay fixed prices for 15 years after power delivery begins.

¹⁹ See Docket No. UM 1805, Complainants' Motion for Summary Judgment at 18-25 (Apr. 24, 2017).

²⁰ Docket No. UM 1805, Complainants' Response to PGE's Motion for Sum. Judg. at 6-7 (May 8, 2017).

²¹ *Campbell ex rel. Campbell v. Secretary of Health and Human Services*, 69 Fed. Cl. 775, 781 (2006) (noting that Wikipedia "reveals a pervasive and, for our purposes, disturbing series of disclaimers," including warnings that any article may, at any time, be "in a bad state" due to vandalism and may be "subject to remarkable oversights and omissions."); *Badasa v. Mukasey*, 540 F.3d 909, 910 (8th Cir. 2008) (discussing with implicit approval the BIA's rejection of Wikipedia as a reliable source and pointing to Wikipedia's own disclosures about the potential bias, errors, and omissions that may be present in any article at any time); *Li v. Holder*, 400 F. App'x 854, 857-58 (5th Cir. 2010) (expressing "disapproval of ... reliance on Wikipedia and [warning] against any improper reliance on it or similarly unreliable [I]nternet sources in the future"); *United States v. Lawson*, 677 F.3d 629, 650-51 (4th Cir. 2012) (expressing concerns about the "unreliability" of Wikipedia; court's comments arose in the context of a claim that a juror improperly conducted research on Wikipedia).

²² Docket No. UM 1805, Complainants' Response to PGE's Motion for Sum. Judg. at 7-8 (May 8, 2017).

C. PGE's 2007 Contract is highly relevant to the resolution of this case.

Complainants attempt to dismiss PGE's 2007 Contract as a superseded contract form that is irrelevant to this case. Complainants argue the language of PGE's 2007 Contract "is neither PGE's original compliance filing nor its current standard form contracts and therefore has very limited value in the broader context."²³ Complainants' arguments are not well made.

PGE's 2007 Contract has the same language regarding the 20-year term and the 15-year limit on fixed prices as the language contained in PGE's original compliance filing.²⁴ More importantly, PGE's 2007 Contract is a key document in this case because it was the first standard contract form submitted by any of the utilities that the Commission approved as consistent with the requirements of Order No. 05-584.²⁵ It therefore demonstrates an approach that the Commission *has already determined* to be consistent with Order No. 05-584.

As PGE has detailed in its motion for summary judgment, PGE's 2007 Contract provided for a standard contract term that began at contract execution, extended for a maximum of 20 years from contract execution, and limited the availability of fixed prices to the first 15 years of that contract term.²⁶ PGE's 2007 Contract did not provide for payment of fixed prices for 15 years after a QF begins to deliver power. On February 27, 2007, in Order No. 07-065, the Commission approved PGE's approach as consistent with

²³ Docket No. UM 1805, Complainants' Response to PGE's Motion for Sum. Judg. at 18 (May 8, 2017).

²⁴ *Compare*, Docket No. UM 1129, Advice No. 05-10, Compliance Filing (Apr. 13, 2005) and Docket No. UM 1129, Supp. Advice No. 06-26, Compliance Filing to Order No. 06-538 (Jan. 23, 2007).

²⁵ UM 1129, Order No. 07-065 (Feb. 27, 2007) (approving PGE's 2007 Contract); the Commission first approved PacifiCorp's contract forms as consistent with Order No. 05-584 on April 2, 2007, in Order No. 07-120; Idaho Power's contract forms were first approved on May 18, 2007, in Order No. 07-197.

²⁶ Docket No. UM 1805, PGE's Motion for Summary Judgment at 18-21 (Apr. 24, 2017).

Order No. 05-584.²⁷ This established, *as a matter of Commission precedent*, that Order No. 05-584 does not require utilities to pay fixed prices for 15 years from the date a QF begins to deliver power under a standard contract. The Commission has not modified its decisions on standard contract length since Order No. 05-584. PGE’s current standard contract continues to unambiguously provide for a contract term that begins at execution, has a maximum term of 20 years, and limits the availability of fixed prices to the first 15 years of the 20-year term.²⁸

D. PGE’s 2007 Contract is logical and consistent with the requirements of Order No. 05-584.

Complainants argue that PGE’s 2007 Contract is illogical because it limits the availability of fixed prices to less than 15 years under certain circumstances.²⁹ Specifically, Complainants note that PGE’s 2007 Contract limits the availability of fixed prices to the first 15 “contract years” of the term.³⁰ And “contract years” are defined to mean all or any part of a calendar year occurring during the contract term.³¹ As a result, if a QF executes a contract in the middle of the year, then its first “contract year” will be six months long. Complainants appear to be arguing that such a QF would only have access to fixed prices for 174 months instead of 180 months. Complainants insist that this somehow makes PGE’s 2007 Contract illogical or that the contract therefore fails to meet the Commission’s requirement that fixed prices are limited to the first 15 years of the 20-year term.³²

²⁷ UM 1129, Order No. 07-065 (Feb. 27, 2007).

²⁸ *See* Docket No. UM 1805, PGE’s Motion for Sum. Judg. at 21-25 (Apr. 24, 2017) (describing how PGE’s current rate schedule and contract forms address the 20-year term and 15-year limit on fixed prices).

²⁹ Docket No. UM 1805, Complainants’ Response to PGE’s Motion for Sum. Judg. at 15-17 (May 8, 2017).

³⁰ *Id.* at 16.

³¹ *Id.*

³² *Id.* at 16-17.

This argument is without merit. Complainants are playing linguistic games with the meaning of “15 years.” Should the 15-year limit on fixed prices be measured as 15-contract-years from execution? Or should the 15-year limit be measured as 180-months from execution, or as 5,475-days from execution? The fact that the Commission spoke in terms of years and approved PGE’s approach in Order No. 07-065, demonstrates that PGE’s approach is acceptable and that it is not necessary to address the limit on fixed prices in terms of months or days. The approved approach in PGE’s 2007 Contract limited the availability of fixed prices to the first 15 contract years of a 20-year maximum contract term. This prevented fixed prices from diverging from actual avoided costs for more than the first 15 contract years.

Complainants also argue that limiting the availability of fixed prices to the first 15 years after contract execution doesn’t really limit price divergence to 15 years. Complainants point out that forecasted avoided cost rates in a utility’s rate schedule begin diverging from actual avoided costs as soon as a rate schedule takes effect.³³ Of course, this is why a utility is allowed to update its rate schedule annually—to attempt to keep the avoided cost rates in the schedule from diverging from actual avoided cost for more than a year.³⁴ If a QF enters into a standard contract just before an annual rate update, then the fixed price under the contract has arguably already diverged from actual avoided costs for one year on the day the contract takes effect, and will continue to diverge for the first 15 years after contract execution. So in theory, it is possible that prices could diverge for as

³³ Docket No. UM 1805, Complainants’ Response to PGE’s Motion for Sum. Judg. at 9 (May 8, 2017).

³⁴ Annual updates do not address every factor affecting the calculation of avoided cost rates. All of the factors are addressed only when the Commission acknowledges a utility’s integrated resource plan. As a result, annual updates may not eliminate all divergence between forecasted rates and actual avoided costs.

long as 16 years, but this is all the more reason to begin the 15-year limit on fixed prices at contract execution.³⁵

E. PGE’s acknowledgment that the Commission has approved PacifiCorp’s approach and Idaho Power’s approach does not invalidate PGE’s approach.

Complainants assert that PGE is being inconsistent when it argues that the 15-year limit on fixed prices contained in Order No. 05-584 was intended to prevent more than 15 years of divergence between fixed prices and actual avoided costs, but then acknowledges that Order No. 05-584 allows PacifiCorp and Idaho Power to offer fixed prices for more than 15 years from contract execution.³⁶

To be clear, Order No. 05-584 limits the availability of fixed prices to the first 15 years of the 20-year term for the express purpose of limiting too much divergence from actual avoided costs.³⁷ This is best accomplished under PGE’s Commission-approved approach to the 15-year limit on fixed prices. PGE believes that the approaches adopted by the other two utilities do not make much sense, allow too much divergence between fixed prices and actual avoided costs, and are not required by Order No. 05-584.

Nevertheless, PGE has acknowledged that the Commission has *already determined* that Order No. 05-584 can be complied with using the approaches adopted by PacifiCorp or Idaho Power.³⁸ Likewise, the Commission has *already determined* that

³⁵ See also, Docket No. UM 1805, PGE’s Response to Complainants’ Motion for Sum. Judg. at 15-16 (May 8, 2017) (discussing how Complainants’ approach would result in 19 years of price divergence). If the up-to-one-year of price divergence that can occur under the rate schedule is also accounted for, Complainants’ proposed approach would result in up to 20-years of divergence between fixed prices and actual avoided costs—clearly not what the Commission intended under Order No. 05-584 which expressed concern with 20 years of divergence and therefore limited the availability of fixed prices to the first 15 years of the 20-year term. See Docket No. UM 1129, Order No. 05-584 at 20 (May 13, 2005).

³⁶ Docket No. UM 1805, Complainants’ Response to PGE’s Motion for Sum. Judg. at 11 (May 8, 2017).

³⁷ Docket No. UM 1129, Order No. 05-584 at 20 (May 13, 2005); see also Docket No. UM 1805, PGE’s Motion for Sum. Judg. at 9-13 (Apr. 24, 2017) and PGE’s Response to Complainants’ Motion for Sum. Judg. at 7-8 (May 8, 2017).

³⁸ Docket No. UM 1129, Order No. 07-120 (Apr. 2, 2007) (approving PacifiCorp Advice No. 06-019); Docket No. UM 1129, Order No. 07-197 (May 18, 2007) (approving Idaho Power Advice No. 06-10).

Order No. 05-584 can be complied with using the approach adopted by PGE.³⁹ Acknowledging the fact that the Commission has approved all three approaches does not invalidate PGE's approach. Complainants want to ignore the fact that the Commission has already approved PGE's approach. There is no reason to do so. By ignoring Order No. 07-065 in their response, Complainants are tacitly admitting they have no answer to PGE's arguments and tacitly conceding that the Commission has already approved PGE's approach. That admission is sufficient to allow the Commission to summarily dispose of the complaint in favor of PGE.

Complainants also attempt to create confusion by arguing that all three utilities use similar language in their rate schedules and that all three utilities should therefore be deemed to have the same approach to standard contract term and the 15-year limit on fixed prices. Complainants state: "The fact that all three utilities use the same language in their tariffs seriously undermines PGE's reliance on that language in its tariff as a basis for different treatment."⁴⁰ This is misleading. In order to understand how the approaches of the three utilities differ, the Commission cannot consider a utility's rate schedule and ignore its standard contract forms, it must consider each utility's rate schedule in conjunction with its standard contract forms.

In its motion for summary judgment, PGE provided a detailed account of each of the relevant portions of its rate schedule and contract forms (both the versions approved in the immediate aftermath of Order No. 05-584 and the currently effective versions).⁴¹ PGE explained how the rate schedules and contract forms work together to provide for a 20-year maximum term measured from contract execution and to limit the availability of

³⁹ Docket No. UM 1129, Order No. 07-065 (Feb. 27, 2007) (approving PGE Supp. Advice No. 06-26).

⁴⁰ Docket No. UM 1805, Complainants' Response to PGE's Motion for Sum. Judg. at 15 (May 8, 2017).

⁴¹ Docket No. UM 1805, PGE's Motion for Summary Judgment at 18-25 (Apr. 24, 2017).

fixed prices to the first 15 years of that 20-year term. PGE also provided a similar review of PacifiCorp's and Idaho Power's rate schedules and contract forms.⁴² Complainants' attempt to create confusion by focusing only on the language in each utility's rate schedule is a misdirection that does not withstand scrutiny. PGE urges the Commission to closely review PGE's 2007 Contract and rate schedule and to closely review PGE's current contracts and rate schedule. PGE is confident that such a review will demonstrate that PGE's motion for summary judgment has correctly described the language and functioning of its contracts and rate schedules.

F. PGE's executed contracts do not provide for 15 years of fixed prices after power deliveries.

The complaint alleged that two of PGE's executed contracts provide for fixed price payments for 15 years after commercial operation and that this undermines PGE's position that its contracts limit the availability of fixed prices to the first 15 years of a maximum 20-year term measured from contract execution.⁴³ These contracts are a 2010 contract with Pa'Tu Wind Farm LLC ("Pa'Tu contract") and a 2014 contract with OneEnergy Oregon Solar LLC ("OneEnergy contract").⁴⁴ In its motion for summary judgment, PGE discussed both of these contracts in detail and explained why they do not support Complainants' claims.⁴⁵

In their reply, Complainants argue that the Pa'Tu Contract extends for 20 years from the commercial operation date because the "handwritten" date inserted by Pa'Tu controls.⁴⁶ Complainants state: "It is a basic tenet of contract law that the hand-written

⁴² Docket No. UM 1805, PGE's Motion for Summary Judgment at 25-27 (Apr. 24, 2017).

⁴³ Docket No. UM 1805, Complaint at ¶¶ 24-26 (Dec. 6, 2016).

⁴⁴ *Id.* at ¶¶ 24-25.

⁴⁵ Docket No. UM 1805, PGE's Motion for Summary Judgment at 27-34 (Apr. 24, 2017).

⁴⁶ Docket No. UM 1805, Complainants' Response to PGE's Motion for Sum. Judg. at 19-20 (May 8, 2017).

insertions into a form agreement control over the printed language of the form where the two contradict each other.”⁴⁷ Complainants rely on ORS 42.270 and *Emmert v. O’Brien*.⁴⁸ The problem with this argument is that the date selected by PaTu was typed, not handwritten. More importantly, there is no contradiction in Section 2.3 of the Pa’Tu Contract.

The contract form has a blank space and instructs the QF seller to insert its selected termination date but clearly and expressly states that the effective Termination Date will be the earliest date between four options: the date inserted by the QF seller; 20 years after the contract Effective Date (the date the contract is executed); the date of a termination event under Section 9 of the contract; or the date of a termination event under Section 12 of the contract.⁴⁹ In the case of the Pa’Tu Contract, the QF seller inserted a date that was more than 20 years after the Effective Date. As a result, and consistent with the express language of Section 2.3, the effective Termination Date of the Pa’Tu Contract is the date 20 years after the Effective Date. There is no contradiction or conflict of language to be resolved through resort to ORS 42.270 or *Emmert v. O’Brien*.

The response also argues that the OneEnergy Contract is inconsistent with PGE’s position on the 15-year limit on fixed prices.⁵⁰ PGE has addressed this issue at length in its motion for summary judgment.⁵¹ PGE believes the OneEnergy Contract is properly considered a negotiated contract because it contains terms that are materially different from PGE’s standard contract form.⁵² However, assuming *arguendo* that the OneEnergy

⁴⁷ Docket No. UM 1805, Complainants’ Response to PGE’s Motion for Sum. Judg. at 19 (May 8, 2017).

⁴⁸ 72 Or. App. 752, 755 (1985).

⁴⁹ Docket No. RE 143, Informational Filing – Pa’Tu Wind Farm LLC (Sep. 19, 2014) at Section 2.3; *see also* Docket No. UM 1805, PGE’s Motion for Sum. Judg. at Att. 5 (courtesy copy of the Pa’Tu Contract).

⁵⁰ Docket No. UM 1805, Complainants’ Response to PGE’s Motion for Sum. Judg. at 19 (May 8, 2017).

⁵¹ Docket No. UM 1805, PGE’s Motion for Summary Judgment at 29-34 (Apr. 24, 2017).

⁵² *Id.* at 33; *see also, Pa’Tu Wind Farm LLC v. PGE*, Docket No. UM 1566, Order No. 12-316 at 5 (May

Contract is a standard contract, it is a single, anomalous contract that PGE has identified as a mistake.⁵³ It is not an exemplar of PGE's approach to the 15-year limit on fixed prices.

PGE has submitted testimony that the contract represents the only instance in over 90 executed contracts where PGE has agreed to language providing for 15-years of fixed prices measured from commercial operation, and PGE has provided documentary evidence that it has declared the terms of the OneEnergy Contract to be a mistake and has refused to replicate them in future contracts with OneEnergy. Complainants have offered no evidence to refute PGE's evidence. Complainants have provided no evidence that the OneEnergy Contract is anything more than an isolated, and non-representative mistake (if it is even properly considered a standard contract).

In their response, the Complainants argue for the first time that PGE has entered into 10 standard contracts that provide for fixed prices for 15 years from the commercial operation date.⁵⁴ This claim is completely unfounded. In the 10 contracts cited by Complainants, the QF sellers have selected a termination date that is 15 years from the

21, 2012) (Commission rejected QF's assertion that the substantive terms of a standard contract could be modified without resort to a negotiated, non-standard contract).

⁵³ Docket No. UM 1805, PGE's Motion for Summary Judgment at 34 (Apr. 24, 2017); Docket No. UM 1805, Declaration of Shawn Davis in Support of PGE's Motion for Summary Judgment (Apr. 24, 2017) (declaration regarding November 4, 2015 email from PGE to OneEnergy identifying the changes in the OneEnergy Contract as an error that PGE will not agree to replicate in subsequent contracts).

⁵⁴ Docket No. UM 1805, Complainants' Response to PGE's Motion for Sum. Judg. at 20 and footnote 42 (May 8, 2017) (the contracts in question are those with SORT Bioenergy LLC, Marrow Solar LLC, OE Solar 1, OE Solar 2, OE Solar 3, OE Solar 4, NorWest Energy 14, NorWest Energy 16, Energy Partners 1 and Energy Partners 2). Complainants also cite four contracts (City of Gresham, Power Resources Coop., Port of Tillamook Bay, and Minikahda Hydropower) that they claim have termination dates more than 15 years from the execution date and in which the fixed price option is the only price option selected by the QF. This is not true for all four contracts (City of Gresham selected the Mid-C Index Rate Price; Minikahda selected a term 15 years from execution; Port of Tillamook Bay and Power Resources Coop. both selected a term of 15 years and 3 months from execution), but even if it were, the fact that the QF neglected to select a market price option that will apply after the fifteenth Contract Year does not change the fact that both the executed contract and PGE's referenced Schedule 201 limit the availability of fixed prices to the first 15 Contract Years, after which a market price applies. If a QF seller failed to select its preferred market price option, this does not mean the QF is entitled to continue to receive fixed prices, it simply creates an ambiguity about which market price option will apply beginning in the sixteenth Contract Year.

scheduled commercial operation date. Complainants apparently believe (although they do not explain) that the selection of this termination date by sellers indicates that the sellers seek fixed prices for 15 years measured from the commercial operation date. But the selection of a termination date 15 years after commercial operation does not alter the provisions of PGE’s contract forms and rate schedules that limit the availability of fixed prices to the first 15 years of the 20-year contract term.

QF sellers are free to select a date that is 15 years from commercial operation, because such a date is within the maximum permitted term of 20-years from contract execution, but the mere act of selecting such a termination date does not alter the functioning of the 15-year limit on fixed prices. Complainants know this, which is why they did not cite these contracts in their complaint. The Commission should reject this unscrupulous and misleading argument.

G. The purpose of the 15-year limit on fixed prices is to ensure accurate prices, not to facilitate QF financing.

Complainants admit that the Commission intended to balance two goals when it made its decisions on standard contract length.⁵⁵ The Commission sought to set the term of a standard contract long enough to facilitate QF financing. And the Commission sought to ensure accurate prices by preventing too much divergence between fixed contract prices and actual avoided costs.

The Commission was clear that it chose to address the first goal—facilitating QF financing—by setting the maximum contract term equal to the minimum period needed to facilitate financing. The Commission decided the period needed to protect financing was

⁵⁵ See e.g., Docket No. UM 1805, Complainants’ Response to PGE’s Motion for Sum. Judg. at 8 (May 8, 2017); see also Docket No. UM 1129, Order No. 05-584 at 19 (May 13, 2005) (“We conclude that establishing an appropriate maximum term for standard contracts requires us to balance two goals.”).

20 years (and rejected arguments that the period was 15 years). The Commission expressly set the maximum contract term at 20 years to serve the goal of facilitating QF financing.⁵⁶

Then the Commission turned to its second goal—ensuring accurate prices—and it decided to prevent too much price divergence by limiting the availability of fixed prices to the first 15 years of the 20-year term. The Commission expressly adopted the 15-year limit on fixed prices to ensure accurate prices.⁵⁷ But the Complainants consistently conflate these two decisions and re-characterize the 15-year limit on fixed prices as a “15-year fixed-price period” intended to facilitate QF financing.⁵⁸ The Commission should reject Complainants’ tactic of mischaracterizing the goal of the 15-year limit on fixed prices.

H. The 20-year maximum term is crucial to the resolution of this case.

Complainants state they have not placed in front of the Commission the question of when the 20-year maximum term begins or ends and that the issue does not need to be resolved in this case.⁵⁹ This is a revealing comment. It demonstrates how Complainants are engaged in an artificial exercise of separating the 15-year limit on fixed prices from

⁵⁶ Docket No. UM 1129, Order No. 05-584 at 19 (May 13, 2005) (“... our fundamental objective is to establish a maximum standard contract term that enables eligible QFs to obtain adequate financing ... [w]e conclude that the contract term length minimally necessary to ensure most QF projects can be financed should be the maximum term for standard contracts.”).

⁵⁷ *Id.* at 20 (The Commission expressly linked the 15-year limit on fixed prices and the goal of protecting accurate prices, stating: “... we acknowledge that [the maximum standard contract term of] 20 years is a significant amount of time over which to forecast avoided costs. Indeed, divergence between forecasted and actual avoided costs must be expected over a period of 20 years. *Given our desire to calculate avoided costs as accurately as possible*, and the testimony of several parties that contract prices should not be fixed beyond 15 years, we are persuaded that standard contract prices should be fixed for only the first 15 years of the 20-year term.”) (emphasis added).

⁵⁸ *See e.g.*, Docket No. UM 1805, Complainants’ Response to PGE’s Motion for Sum. Judg. at 9 (May 8, 2017) (Complainants state: “PGE’s interpretation also undermines the Commission’s goal of allowing adequate financing, because the only way to allow 15 years of fixed-price payments is to allow the fixed-price period to begin when power deliveries begin.”).

⁵⁹ *Id.* at 22.

the 20-year maximum term. Complainants seek to separate the two issues, and then to re-characterize the 15-year limit as a requirement that fixed price *payments* must be made for 15 years from the date a QF begins making power deliveries. But Complainants' approach fails as a matter of simple math and demonstrates that Complainants' claims are at odds with Order No. 05-584.

In Complainants' view, the "15-year fixed-price period" can be considered in isolation from the 20-year maximum contract term.⁶⁰ More, the Complainants have stated they believe the maximum term of the contract is "essentially meaningless" to the question of QF financing.⁶¹ It appears Complainants reject the Commission's 2005 decision to facilitate QF financing with a maximum 20-year contract term. Instead, Complainants want to focus solely on the 15-year limit on fixed prices.

Complainants' approach is transparently flawed. It is not possible to discuss the 15-year limit on fixed prices established in Order No. 05-584 without considering the 20-year limit on contract term. The 15-year limit on fixed prices is defined in reference to the 20-year maximum term. Order No. 05-584 states: "... we [the Commission] are persuaded that standard contract prices should be fixed for only the first 15 years of the 20-year term."⁶² The 15-year period is the *first 15 years of the 20-year maximum term*. The Commission further states, "... in the event a QF opts for a standard contract with a 20-year term, the QF must take one of the market pricing option that we address later in this order for the final five years of the contract." The math is simple: 15-years of fixed prices plus 5-years of market prices equal a 20-year maximum contract term.

⁶⁰ Docket No. UM 1805, Complainants' Response to PGE's Motion for Sum. Judg. at 22 (May 8, 2017) ("Complainants have not placed this issue [the 20-year term] before the Commission.").

⁶¹ Docket No. UM 1805, Complainants' Motion for Summary Judgment at 8 (Apr. 24, 2017).

⁶² Docket No. UM 1129, Order No. 05-584 at 20 (May 13, 2005).

Complainants argue that Order No. 05-584 mandated 15-years of fixed pricing starting as many as four years *after* contract execution. If the QF elects five years of market pricing, the QF obtains a contract for 24-years (4 + 15 + 5 = 24). This is clearly not what Order No. 05-584 intended. It is no surprise the Complainants do not want to talk about it.

If the 20-year maximum term runs from contract execution to a date 20 years after contract execution (as PGE's contracts clearly do), then by definition the 15-year limit on fixed prices runs from contract execution because "standard contract prices should be fixed for only the first 15 years of the 20-year term."⁶³ This is simple math.

PGE's standard contract forms have consistently and unambiguously provided for a contract term that begins at contract execution and extends for a maximum of 20 years. PGE's first compliance filing in response to Order No. 05-584, filed on July 12, 2005, so provided.⁶⁴ PGE's compliance filing that was first approved as consistent with Order No. 05-584 in February of 2007 so provided.⁶⁵ And PGE's current standard contract form so provides.⁶⁶ The Commission has repeatedly approved this approach as consistent with Order No. 05-584 and subsequent orders.⁶⁷

⁶³ Docket No. UM 1129, Order No. 05-584 at 20 (May 13, 2005).

⁶⁴ Docket No. UM 1129, Advice No. 05-10, Compliance Filing, *Standard Contract Power Purchase Agreement* at Section 1.24 (defining "Term" as "the period beginning on the Effective Date and ending on the Termination Date."), Sections 1.7 and 2.1 (defining "Effective Date" as the date the contract is fully executed), Section 2.3 (defining the "Termination Date" as the earliest of the date inserted by the QF, 20-years from the Effective Date, or date of termination under Section 10 or Section 12.2) (Apr. 13, 2005).

⁶⁵ Docket No. UM 1129, Supp. Advice No. 06-26, Compliance Filing, *Standard Contract Power Purchase Agreement* at Section 1.30 (defining "Term" as "the period beginning on the Effective Date and ending on the Termination Date."), Sections 1.8 and 2.1 (defining "Effective Date" as the date the contract is executed by both Parties), Section 2.3 (defining the "Termination Date" as the earliest of the date inserted by the QF, 20-years from the Effective Date, or the date of a termination event under Section 10 or Section 12.2) (Jan. 23, 2007); *see also* Docket No. UM 1805, PGE's Motion for Sum. Judg. at 18-21 (Apr. 24, 2017).

⁶⁶ Docket No. 1610, PGE's Schedule 201 QF Information Compliance Filing, *Standard Renewable Off-System Variable Power Purchase Agreement* at Section 1.38 (defining "Term" as "the period beginning on the Effective Date and ending on the Termination Date."), Sections 1.8 and 2.1 (defining "Effective Date" as the date the contract is executed by both Parties), Section 2.3 (defining the "Termination Date" as the

Once it is clearly established and acknowledged that PGE provides for a maximum standard contract of 20-years measured from contract execution. It necessarily follows that fixed prices are limited to the first 15 years after contract execution because Order No. 05-584, and PGE’s Commission-approved forms and rate schedules, provide that fixed prices are available for only the first 15 year of the 20-year contract term.

Complainants’ incredible suggestion that the 20-year term is an issue that Complainants “have not placed ... before the Commission”⁶⁸ clearly demonstrates that Complainants’ analysis has no grounding in the actual language of Order No. 05-584 or in the actual language of the PGE standard contract forms.

III. CONCLUSION

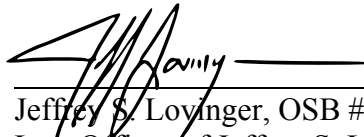
For the reasons stated above, the Commission should grant PGE’s motion for summary judgment and deny all of the relief requested in the complaint.

Dated this 15th day of May 2017.

Respectfully submitted,



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earliest of the date inserted by the QF or the date of a termination event under Section 8 or Section 11), Section 1.33 (incorporating by reference the provisions of Schedule 201), Schedule 201 at Sheet 201-1 (“The agreement will have a term of up to 20 years as selected by the QF.”) (Jul. 12, 2016); *see also* Docket No. UM 1805, PGE’s Motion for Sum. Judg. at 21-25 (Apr. 24, 2017).

⁶⁷ Docket No. UM 1129, Order No. 07-065 (Feb. 27, 2007) (approving PGE Supp. Advice No. 06-26); Docket No. UM 1610, Order No. 16-377 (Oct. 11, 2016) (approving PGE’s July 12, 2016 documents).

⁶⁸ Docket No. UM 1805, Complainants’ Response to PGE’s Motion for Sum. Judg. at 22 (May 8, 2017).