



expeditiously as possible and the ruling is binding upon PGE. Thus, Complainants respectfully request Administrative Law Judge (“ALJ”) Allan Arlow set a procedural schedule either through a complaint or declaratory ruling that permits expedited resolution via legal pleadings, which could include a motion for summary judgment. Specifically, the Complainants recommend that the ALJ adopt the process in UM 1799 that provides for prompt pleadings that address the disputed legal questions.

## II. LEGAL STANDARD

Oregon Revised Statute (“ORS”) 756.450 authorizes “any interested person” to petition the Commission for a declaratory ruling with respect to “any rule or statute enforceable by the commission.” According to the statute, declaratory rulings are binding between the Commission and the petitioner on the state of facts alleged. In 1999, the Commission determined declaratory rulings were also, “an appropriate mechanism for declaring rights of a party when there are disputes about the meaning of orders the Commission has issued.”<sup>1</sup>

ORS 756.500 authorizes “[a]ny person” to file a complaint against a regulated utility. Like the declaratory rulings statute, the complaint statute does not require that a complainant meet stringent standing requirements occasionally required in court proceedings. ORS 756.500(2) expressly states, “[i]t is not necessary that a complainant have a pecuniary interest in the matter in controversy or in the matter complained of . . . .”

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<sup>1</sup> Re Petition of Portland General Electric Company for a Declaratory Ruling Pursuant to ORS 756.450, Docket No. DR 22, Order No. 99-627 at 3 (Oct. 14, 1999).

### III. COMMENTS

Despite PGE's efforts to confuse the two questions presented by Complainants, the scope of the Complaint remains limited to these questions and is clear. Complainants submit that either a complaint or a declaratory ruling could quickly reaffirm the Commission's policy and bind PGE to conform its business practices accordingly. As such, Complainants do not prefer either process, and instead request the Commission permit expeditious resolution to prevent PGE from its ongoing practices which are inconsistent with Commission policy, and, therefore, harming QFs.

#### 1. The Scope of the Complaint is Clear and Simple

Complainants seek confirmation of two discrete legal questions having to do with the Commission's policy, as laid out in several Commission orders. First, whether the Commission requires utilities to offer QFs standard contracts that provide 15 years of fixed pricing available from the date of power deliveries, which is often the date of the facility's commercial operation. Second, whether PGE's standard contracts are consistent with that policy. The Complaint alleges that PGE's standard contract is consistent with the Commission's policy, but that PGE's business practices have not uniformly complied with that policy.

PGE recently argued the Commission's policy permits an interpretation that its standard contract only allows 15 years of fixed pricing from the date of execution rather than operation.<sup>2</sup> This is a change from PGE's past practice of permitting QFs to receive

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<sup>2</sup> Re Idaho Power Co., Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, Docket No. UM 1725, PGE's Response in Opposition to Motion for Clarification at 5 (Apr. 29, 2016) ("Clearly, the

15-years of fixed prices from commercial operation, as defined in the standard contract. PGE's interpretation means that very few QFs would ever obtain 15 years of fixed pricing, which the Commission has determined they need to obtain financing, because the Commission allows QFs to sign a contract up to four years prior to becoming operational. Thus, PGE's interpretation would result in QFs obtaining as little as eleven years of fixed prices. Complainants, therefore, request the Commission reaffirm its policy and require PGE to conform its business practices to allow 15 years of fixed pricing from the date of power deliveries rather than from the date of contract execution.

To be clear, Complainants are not seeking to revisit any individual QF contracts executed between PGE and any individual QF. Complainants are also not seeking an amendment to any of PGE's executed contracts. Instead, the Complainants are seeking for the Commission to instruct PGE to stop representing to QFs that its standard contract only provides 15 years of fixed prices from the date of contract execution. As such, Complainants are not requesting that the Commission reform or otherwise impose wholesale contract interpretation on PGE's previously executed standard contracts. Similarly, Complainants are not seeking changes to any prior Commission orders, but, rather, confirmation of the Commission's existing policies. Complainants simply want PGE to conform its business practices to the Commission's existing policy, which can occur with the language in its existing standard contracts.

Importantly, the issues in the Complaint are questions of Commission policy, not fact. There are no factual disputes to be resolved in the Complaint. The only factual

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Commission's policy, as applied to PGE, does not require utilities to pay fixed rates for more than 15 years measured from the date of execution.”).

issues raised in the Complaint are merely illustrative of PGE's pattern and practice of inconsistently interpreting Commission policy to allow some QFs to obtain 15 years of fixed prices and others not. The examples provided in the Complaint demonstrate that PGE's existing contract has been filled out to permit 15 years of fixed prices from commercial operation. In short, the facts presented simply demonstrate a live dispute about the Commission's policy and the interpretation of the standard contracts that both parties openly acknowledge. The legal dispute is ready for resolution.

## **2. Either Procedural Vehicle Can Resolve this Dispute**

Complainants believe these issues can be resolved by either a declaratory ruling or a complaint, and do not have a preference regarding the procedural vehicle, so long as the issues are addressed quickly without undue delay or unnecessary complexity, and the final order is binding upon PGE.

Complainants filed a complaint, rather than a request for a declaratory order, because the Commission staff ("Staff") had previously suggested that a complaint was the proper procedural vehicle to require PGE to conform its business practices to the Commission's policy requiring 15 years of fixed prices. Complainants mainly relied upon Staff's recommendations and PacifiCorp's arguments opposed to using declaratory rulings in previous proceedings.

For example, in DR 48, the Coalition requested a declaratory ruling regarding PacifiCorp's standard contract and the Commission's policy on Public Utility Regulatory

Policies Act (“PURPA”) contract terminations.<sup>3</sup> PacifiCorp argued in DR 48 against using a declaratory ruling to resolve a dispute about a PURPA standard contract term. Staff was supportive on the merits of the Coalition’s claim, but took the position that a declaratory ruling was not the appropriate way to resolve a disputed interpretation of the Commission’s PURPA policy and the standard contract, because it required interpretation of orders and policies rather than interpretation of a statute or rule.

Likewise, in DR 51, Cypress Creek requested a declaratory ruling regarding the Commission’s PURPA policy that the Commission decided to address as a complaint instead.<sup>4</sup> At the Public Meeting discussing the procedural options outlined by Staff, Chair Hardie stated that because the facts were not really in dispute, the same legal issue could be resolved “either way” and that resolution via a complaint would have a broader precedential effect.<sup>5</sup> Chief ALJ Michael Grant noted, “. . . [t]he reason there is indifference among all the attorneys here is that it is basically the same process and the same effect either way.”<sup>6</sup> Chair Hardie explained that, by opening a complaint, parties “. . . will have a legal issue teed up for decision that everyone will read at the end of the day and everyone will know, based on the broad set of facts that currently exist in the petition for declaratory relief, those same uncontested facts will be in an order that will be

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<sup>3</sup> Re Renewable Energy Coalition Petition for Declaratory Ruling, Docket No. DR 48, Staff Report at 1 (May 8, 2014); Re Renewable Energy Coalition Petition for Declaratory Ruling, Docket No. DR 48 PacifiCorp Response at 1 (Mar. 3, 2014).

<sup>4</sup> Re Cypress Creek Renewables, LLC Petition for Declaratory Ruling, Docket No. DR 51, Order No. 16-378 at 1, Appendix A at 2 (Oct. 12, 2016).

<sup>5</sup> Public Meeting at 16:40 (Oct, 11, 2016). Chief ALJ, Mike Grant, actually finished Chair Hardie’s statement by offering “broad precedential effect”.

<sup>6</sup> Id. at 17:50.

equally binding on everyone.” This is the process and result Complainants seek.<sup>7</sup>

Complainants believe that declaratory rulings can also interpret Commission policy. In the past, the Commission has taken the position that declaratory rulings are appropriate to determine the “. . . rights of a party when there are disputes about the meaning of orders the Commission has issued.”<sup>8</sup> Staff has explained at least once in the past that, “A subject is appropriate for declaratory ruling where the facts of the matter are clear, and where the petitioner has established an unambiguous connection between the facts and a statute, rule, or prior Commission decision.”<sup>9</sup> Additionally, ORS 758.525 may provide the Commission with a statutory basis to conduct a declaratory ruling on these issues, because it addresses contract terms and the requirement to purchase energy from QFs.

However, Complainants do not request the Commission provide declaratory relief over the objections of Staff and/or PGE. Complainants note that complaints may have broader precedential effect, and, therefore, specifically request that, should a declaratory

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<sup>7</sup> The Commission’s complaint statute is broad enough to address this dispute without the need to name individual parties. PGE contends that it is uncertain as to whether Complainants have standing. See, PGE’s Motions at 7. Neither the Commission’s complaint statute, nor its declaratory ruling statute requires stringent Article III standing under the U.S. Constitution. See Kellas v. Dep’t. of Corrections, 145 P.3d 139, 140, 341 Or. 471 (2006) (under Oregon law, standing is conferred by statute, even where statute confers standing on “any person”). Moreover, individual QFs may not want to be named in a complaint for fear of retaliation during future contract negotiations or implementation. Thus, requiring additional standing requirements may have a chilling effect on complaints, which would be contrary to the public interest.

<sup>8</sup> Re Petition of Portland General Electric Company for a Declaratory Ruling Pursuant to ORS 756.450, Docket No. DR 22, Order No. 99-627 at 3 (Oct. 14, 1999).

<sup>9</sup> Re Oregon Telecommunications Association Petition for Declaratory Ruling on the Use of Virtual NPA/NXX Calling Patterns, Docket No. DR 31, Order No. 02-542 at Appendix A at 4 (Aug. 8, 2002).

ruling route prevail, PGE must be willing agree to act consistently with any ruling resulting from the declaratory relief in the same manner it would be required to do so if addressed as a complaint.

Complainants' primary concern with respect to procedural options is the expeditious resolution of the issues presented in the Complaint. PGE has signaled its desire to delay the resolution of the two simple questions presented by Complainants in expressing an interest an evidentiary hearing with discovery, and potentially filing additional motions, counter claims, challenges to Complainants' standing, etc.<sup>10</sup> All of these actions simply add unnecessary delay, complexity, and confusion associated with two simple legal issues that are ripe for resolution.

**3. A Template for Expeditious Resolution of these Issues Has Already Been Established by the Commission**

Complainants recommend establishing a schedule similar to that in UM 1799. Specifically, that the Commission set a date by which Complainants and PGE can jointly file an issues list and stipulated set of facts, and the filing of motions for summary judgment.

Additionally, given PGE's apparent preference for a protracted proceeding that will result in delaying the resolution of the two questions, Complainants respectfully request authorization to respond to PGE's motions and seek resolution of all procedural motions on an expedited basis. This may be necessary in the event that PGE is not

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<sup>10</sup> Complainants note that delay helps PGE and harms QFs that are currently negotiating or have already entered into contracts by creating ambiguity over the terms available to obtain appropriate financing, specifically whether they are entitled to a full 15 years of fixed pricing. QFs that are currently negotiating may also be harmed should PGE require them to formally or informally agree to take less than 15 years of financing to finalize their PPAs.



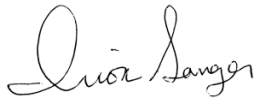
willing to agree to the issues already identified in the Complaint, and may continue to seek to complicate the case by claiming it does not understand the requested legal relief, wishes to use procedural arguments to avoid addressing the merits, or requests the right to conduct discovery and file testimony on the purely legal issues raised in the Complaint.

#### IV. CONCLUSION

For the reasons described above, the Complainants respectfully request that ALJ Arlow set a schedule similar to that of UM 1799 that will permit the expeditious filing of a motion for summary judgment to resolve this dispute through a complaint or declaratory ruling that binds PGE.

Dated this 29th day of December 2016.

Respectfully submitted,



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