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Denise Saunders
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October 24, 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 Response to Complainants' Petition for Clarification and Application for Rehearing or Reconsideration.

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 style.

Denise Saunders
Associate General Counsel

VDS: lh

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1805

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

Complainants,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

**PORTLAND GENERAL ELECTRIC
COMPANY’S RESPONSE IN
OPPOSITION TO COMPLAINANTS’
PETITION FOR CLARIFICATION
AND APPLICATION FOR
REHEARING OR
RECONSIDERATION OF ORDER
NO. 17-256**

Portland General Electric Company (“PGE”) respectfully submits this response in opposition to the petition for clarification and application for rehearing or reconsideration filed September 11, 2017, by Northwest and Intermountain Power Producers Coalition (“NIPPC”), Community Renewable Energy Association (“CREA”) and Renewable Energy Coalition (“REC”) (collectively, “Complainants”).¹

A. INTRODUCTION

Complainants argue that the Public Utility Commission of Oregon’s (“Commission”) decision in Order No. 17-256 is ambiguous, overbroad and poorly reasoned. They ask the Commission to abandon its conclusion that PGE’s Commission-approved standard contract forms limit the availability of fixed prices to the first 15 years measured from contract execution. And they ask the Commission to reverse its decision

¹ PGE files this response pursuant to OAR 860-001-0420(4), OAR 860-001-0720(4), and the September 20, 2017 ruling in this docket staying PGE’s deadline to file a response.

granting PGE's motion for summary judgment and dismissing the complaint. Instead, Complainants want the Commission to declare that Order No. 17-256 grants the relief requested by the complaint and that the Commission has not reached any conclusions regarding PGE's previously effective standard contract forms.

In effect, Complainants ask the Commission to grant their motion for summary judgment and to deny PGE's motion for summary judgment. In support of these requests, Complainants seek to re-litigate issues and arguments Complainants raised during summary judgment and that the Commission has already considered and rejected. Complainants take this approach even though last year CREA and REC argued that a request for reconsideration filed by PGE, PacifiCorp and Idaho Power should be denied because reconsideration "Is Not an Opportunity to Simply Re-Litigate Losing Arguments."² In that case, REC's counsel Mr. Sanger and CREA's counsel Mr. Adams wrote: "the burden on reconsideration requires a party to do more than simply re-argue the same position it lost in the underlying proceeding."³

But now, Complainants ask the Commission to modify Order No. 17-256 based on the same arguments Complainants made during the summary judgment stage of this proceeding. Specifically, Complainants seek to re-litigate their argument about the "RPS Attributes" language found in some of PGE's previous standard contract forms. And Complainants seek to re-litigate their argument that an alleged "industry understanding" dictates that a fixed price period should begin when a QF achieves commercial operation. The Commission should reject this attempt to re-litigate the issues it has already decided through summary judgment.

² Docket No. UM 1610 (Phase II), CREA and REC's Response to Application for Reconsideration by Idaho Power, PGE and PacifiCorp at 6 (Jul. 26, 2017).

³ *Id.*

The Commission should also reject Complainants' assertion that Order No. 17-256 is unclear, ambiguous and poorly reasoned. The Order explained the Commission's reasoning and that reasoning is sound. The Order did not interpret any specific, executed contracts. And the Order clearly held that all of PGE's Commission-approved standard contract forms limit the availability of fixed prices to the first 15 years measured from contract execution.

II. BACKGROUND

This proceeding arises out of a complaint filed against PGE by NIPPC, CREA and REC.⁴ The complaint alleged that Order No. 05-584 required PGE to maintain standard contract forms with fixed prices for 15 years measured from the date a QF achieves commercial operation.⁵ Complainants further alleged that PGE's standard contract forms, including PGE's previously effective standard contract forms, provide for fixed prices for 15 years measured from commercial operation.⁶ And Complainants asserted that in 2016, PGE began to take the allegedly illegal position that PGE's standard contract forms limit the availability of fixed prices to the first 15 years measured from contract execution.⁷

The complaint asserted that "PGE's current policy" violates the "Commission policy" established by Order No. 05-584.⁸ The complaint asked the Commission to declare that PGE's standard contract forms require fixed prices for 15 years measured

⁴ Docket No. UM 1805, Complaint (Dec. 6, 2016).

⁵ *Id.* at 1 (citing to Order No. 05-584 to support the statement: "The Commission's policy is that 15 years of fixed pricing commences when the QF achieves operation.") and at ¶¶ 17, 18, 21, 47, 48, 56.

⁶ *Id.* at 2 ("PGE's standard contracts have contained blank spaces that can be filled in with terms that specify that the QF's net output will be sold under fixed prices for 15 years after the QF's operation.") and at ¶¶ 22-27, 31, 32, 42, 51, prayer for relief ¶ 2 (alleging that various of PGE's previously effective contract forms or executed contracts based on the same provide for fixed prices for 15 years from commercial operation).

⁷ *Id.* at ¶¶ 28, 39-41, 50, 56, prayer for relief at ¶ 1.

⁸ *Id.* at ¶¶ 40, 50, 52, prayer for relief at ¶ 1.

from commercial operation, not measured from contract execution, unless the QF has inserted language that demonstrates a contrary intent.⁹ The complaint further asked the Commission to order PGE to stop taking the allegedly illegal position that its standard contract forms limit the availability of fixed prices to the first 15 years measured from contract execution.¹⁰ In the alternative, the complaint asked the Commission to order PGE to file new standard contract forms clearly stating that fixed prices are available for 15 years measured from commercial operation.¹¹

PGE answered the complaint and denied these allegations.¹² The parties filed a joint statement of facts and issues.¹³ Each party then filed competing motions for summary judgment. PGE argued that it has not “taken a new position” but that from the time it first made a compliance filing in response to Order No. 05-584 until its last compliance filing before the complaint was filed, PGE’s standard contract forms, which were approved by the Commission, have consistently limited the availability of fixed prices to the first 15 years measured from contract execution.¹⁴ PGE also argued that Order No. 05-584 did not set a date from which the 15-year fixed price period must run.¹⁵ PGE then provided the Commission with a detailed explanation of how the language in

⁹ Docket No. UM 1805, Complaint at prayer for relief ¶ 2 (Dec. 6, 2016).

¹⁰ *Id.* at prayer for relief ¶ 1.

¹¹ *Id.* at prayer for relief ¶ 3.

¹² Docket No. UM 1805, PGE’s Answer (Mar. 28, 2017).

¹³ Docket No. UM 1805, PGE’s and Complainants’ Joint Statement of Facts and Issues (Mar. 10, 2017).

¹⁴ Docket No. UM 1805, PGE’s Response in Opposition to Complainants’ Motion for Summary Judgment at 8-9 (May 8, 2017); Docket No. UM 1805, PGE’s Reply to Complainants’ Response in Opposition to PGE’s Motion for Summary Judgment at 19-20 (May 15, 2017).

¹⁵ Docket No. UM 1805, PGE’s Motion for Summary Judgment at 26 (Apr. 24, 2017) (“... Order No. 05-584 clearly limits the standard contract term to 20 years and clearly limits fixed prices to the first 15 years of the 20-year term, but does not specify when the 20-year contract term begins.”).

the various iterations of its standard contract form functions to limit the availability of fixed prices to 15 years measured from contract execution.¹⁶

Complainants' filed a motion for summary judgment and argued that Order No. 05-584 and PGE's standard contract forms should be interpreted in light of an alleged "industry understanding" that the fixed price period under a QF contract should begin when the QF achieves commercial operation.¹⁷ Complainants also argued that a provision addressing "RPS Attributes" in the renewable version of PGE's standard contract forms in effect from December 2014 until October 2016 (the "2017 Renewable Forms") suggests that PGE voluntarily changed its past practices and provided for 15 years of fixed prices from commercial operation under those contact forms (at least until the RPS Attributes language was altered by PGE's compliance filing made July 12, 2016).¹⁸

Complainants made these arguments at length in their summary judgment briefing. PGE responded to these arguments at length in its summary judgment briefing. As part of that response, PGE explained exactly how the language of the 2015 Renewable Forms worked to limit fixed prices to 15 years from contract execution. Thus, the Commission was aware of this issue and there is no reason to believe the Commission failed to understand the parties' arguments.

In Order No. 17-256, the Commission granted PGE's motion for summary judgment and dismissed the complaint.¹⁹ The Commission agreed with PGE that Order

¹⁶ Docket No. UM 1805, PGE's Motion for Summary Judgment at 18-25 (Apr. 24, 2017); *see also* Docket No. UM 1805, PGE's Response in Opposition to Complainants' Motion for Summary Judgment at 12-14 (May 8, 2017) (providing detailed explanation of how renewable standard contract form in effect from December 2014 through October 2016 addressed standard contract term and limited fixed prices to the first 15 years measured from contract execution).

¹⁷ Docket No. UM 1805, Complainants' Motion for Summary Judgment at 18-26 (Apr. 24, 2017).

¹⁸ *Id.* at 26-30.

¹⁹ Docket No. UM 1805, Order No. 17-256 at 1 ("In this order, we grant the motion for summary judgment of ... PGE ... and dismiss the complaint filed by ... [C]omplainants.").

No. 05-584 did not specify when the 15-year fixed price period must begin.²⁰ And the Commission concluded that PGE’s Commission-approved standard contract forms limit the availability of fixed prices to the first 15 years measured from contract execution.²¹ Given these determinations, the Commission logically concluded that PGE was not in violation of any Commission order and the Commission dismissed the complaint. This disposed of the proceeding.

The Commission then decided *sua sponte* to clarify its policy and require, on a going forward basis, that utilities offer fixed prices for 15 years measured from the date a QF begins to transmit power to the utility.²² On July 20, 2017, PGE made a compliance filing modifying its standard contract forms to provide for fixed prices for 15 years measured from the QF’s scheduled commercial operation date.²³ On September 12, 2017 the Commission approved PGE’s compliance filing subject to further review.²⁴ On September 26, 2017, the Commission confirmed that PGE’s compliance filing is consistent with the requirements of Order No. 17-256.²⁵

III. PETITION FOR CLARIFICATION

Complainants argue that Order No. 17-256 is vague, ambiguous and so poorly reasoned that it fails the Oregon Supreme Court’s “substantial reason” test.²⁶

²⁰ Docket No. UM 1805, Order No. 17-256 at 3 (“When we concluded that QFs should receive 15 years of fixed prices under standard contracts in Order No. 05-584, we did not specify the date on which that 15-year term begins.”)

²¹ *Id.* at 3 (“... we approved PGE’s standard contract filings that limited the availability of fixed prices to the first fifteen years measured from contract execution”).

²² *Id.* at 4 (“We take this opportunity, however, to clarify our policy in Order No. 05-584 to explicitly require standard contracts, on a going-forward basis, to provide for 15 years of fixed prices that commence when the QF transmits power to the utility.”).

²³ Docket No. UM 1805, PGE Compliance Filing (Schedule 201) in compliance with Order No. 17-256 (Jul. 20, 2017).

²⁴ Docket No. UM 1805, Order No. 17-346 (Sep. 14, 2017).

²⁵ Docket No. UM 1805, Order No. 17-373 (Sep. 28, 2017).

²⁶ Docket No. UM 1805, Complainants’ Petition for Clarification and Application for Rehearing or Reconsideration at 2 and 10 (Sep. 11, 2017).

Complainants argue that the Commission should clarify that Order No. 17-256 does not interpret any executed standard contracts or any previously effective standard contract forms.²⁷ And Complainants want the Commission to “clarify” that the Order grants the complaint in part.²⁸ But that is much more than a request for clarification, it is a request to reverse the decisions in the order and, effectively, to deny PGE’s motion for summary judgment and grant Complainants’ motion for summary judgment. For the reasons discussed below, the Commission should deny Complainants’ petition for clarification.

A. Order No. 17-256 Did Not Interpret Executed Standard Contracts.

It is clear that Order No. 17-256 does not interpret any specific executed standard contract. There is no reason to believe the Commission intended the Order to interpret any executed contract. Complainants stated that the complaint does not seek interpretation of any executed contract.²⁹ PGE took the position that the proceeding should not involve interpretation of any executed contract because no QF counter-party to any executed contract was a party to the proceeding.³⁰ And the parties filed a stipulated issue list indicating that this proceeding does not involve interpretation of any executed contract.³¹

²⁷ Docket No. UM 1805, Complainants’ Petition for Clarification and Application for Rehearing or Reconsideration at 3 (Sep. 11, 2017).

²⁸ *Id.* at 11.

²⁹ Docket No. UM 1805, Complainants’ Response to PGE’s Motion to Strike, Motion to Make More Definite and Certain, and Motion for More Time to Respond at 8 (Jan. 24, 2017) (“... Complainants do not seek Commission interpretation of any previously executed contracts ...”); *see also* Docket No. UM 1805, Complainants’ Joint Comments on Declaratory Ruling Option at 4 (Dec. 29, 2016) (“To be clear, Complainants are not seeking to revisit any individual QF contracts executed between PGE and any individual QF.”).

³⁰ Docket No. UM 1805, PGE’s Answer at ¶ 63 (Mar. 28, 2017) (“To the extent the Complaint seeks a declaration of the meaning or requirements of any of PGE’s executed standard contracts, the Complaint fails to join indispensable parties.”).

³¹ Docket No. UM 1805, PGE’s and Complainants’ Joint Statement of Facts and Issues at Attachment A, ¶ 9 (Mar. 10, 2017).

Most importantly, Order No. 17-256 does not state that it is interpreting any fully executed standard contract. Rather, the Order holds: “Because we approved PGE’s standard contract filings that limit 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.”³² This statement refers to PGE’s Commission-approved “standard contract filings.” This is a reference to PGE’s standard contract forms. It cannot be a reference to PGE’s executed standard contracts because the Commission does not approve executed contracts.

In Order No. 05-584, the Commission considered whether it should review and approve both standard contract forms and executed contracts.³³ PacifiCorp and Idaho Power Company recommended that the Commission review and approve each individual executed contract.³⁴ Idaho Power Company noted that the Idaho Public Utility Commission reviews and approves each executed contract.³⁵ But the Oregon Commission rejected this approach and decided that it would review and approve all standard contract forms but that it would not review or approve individual, executed contracts.³⁶ As a result, when the Commission states in Order No. 17-256 that it has *approved* PGE’s standard contract filings, the Commission must be referring to PGE’s standard contract forms and not to any executed standard contracts.

³² Docket No. UM 1805, Order No. 17-256 at 3 (Jul. 13, 2017).

³³ Docket No. UM 1129, Order No. 05-584 at 55-56 (May 13, 2005).

³⁴ *Id.* (“Idaho Power and PacifiCorp recommend that each QF power purchase contract be filed with the Commission and approved on an individual basis.”).

³⁵ *Id.* (noting that Idaho Power indicated that the Idaho Commission had approved executed contracts for the past twenty years).

³⁶ *Id.* (The Commission rejected PacifiCorp and Idaho Power’s proposal to review and approve every executed contract and decided that only the standard contract *forms* would be approved, the Commission noted: “[I]n this Order, we have directed utilities to file QF power purchase standard contract forms. Those forms will be pre-approved for compliance with all standards set forth in this Order or still applicable orders.”); *see also* Docket No. UM 1129, Order No. 07-360 at 10-11 (Aug. 20, 2007) (Commission reiterates its decision not to require Commission approval of individual executed contracts).

In addition to the above statement on page 3 of the Order, Complainants are concerned about the following statement on page 4 of the Order: “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 revisited.”³⁷ Complainants suggest this sentence may indicate the Commission is interpreting executed contracts.³⁸ But the sentence is clearly making a distinction between “PGE’s past standard contracts” and “existing executed contracts.” The sentence is using the phrase “PGE’s past standard contracts” to refer to the class of documents that the Commission already decided are not in violation of the Commission’s orders. On page three of the Order, the Commission already decided that PGE’s Commission-approved standard contract filings (i.e., PGE’s standard contract forms) were not in violation of the Commission’s orders. As a result, the sentence on page four is stating that because the Commission has already determined that PGE’s past standard contract forms do not violate Commission orders, the Commission will not require that existing executed contracts be revised.³⁹

For the reasons discussed above, there is no need to clarify that Order No. 17-256 does not interpret executed contracts. However, if the Commission decides to clarify this point, PGE recommends the following clarifying statements:

- Order No. 17-256 does not interpret any executed standard contract.

³⁷ Docket No. UM 1805, Order No. 17-256 at 4 (Jul. 13, 2017).

³⁸ Docket No. UM 1805, Complainants’ Petition for Clarification and Application for Rehearing or Reconsideration at 2 (Sep. 11, 2017).

³⁹ There are other instances where the Commission refers to PGE’s standard contract forms using the shorter, less precise phrase “PGE’s standard contract.” For example, in the second paragraph on page 3 of Order No. 17-256, the Commission refers to PGE’s “first standard contract approved by the Commission in Order No. 07-065” Again, the Commission approves standard contract forms not executed contracts, and Order No. 07-065 approved a specific set of PGE’s standard contract forms. So the Commission sometimes refers to PGE’s standard contract forms as PGE’s standard contracts. Complainants do the same at many points in their complaint and their summary judgment briefing. For example, on page three of the complaint, the Complainants allege: “PGE’s Commission-approved standard contracts allow QFs to select a full 15 years of fixed prices” This is clearly a reference to PGE’s Commission-approved standard contract forms.

- The first sentence in the last paragraph of the “Resolution” section of Order No. 17-256 is clarified to mean: “Having found that PGE’s past standard contract forms have not been in violation of our orders, we shall not require that existing executed standard contracts be revised.”

B. Order No. 17-256 Concluded that PGE’s Previously Effective Standard Contract Forms Limited the Availability of Fixed Prices to the First Fifteen Years Measured From Contract Execution.

Complainants’ ask the Commission to clarify that Order No. 17-256 does not interpret PGE’s previously effective standard contract forms. The Commission should deny this request. As discussed below, the complaint alleged that PGE’s previously effective standard contract forms could be completed to provide for 15 years of fixed prices measured from commercial operation. Complainants’ clarified that they sought a ruling that the generic language underlying PGE’s executed contracts provides for 15 years of fixed prices measured from commercial operation. PGE argued for summary judgment and dismissal of the complaint on the basis that Order No. 05-584 did not specify when the 15-year fixed price period must begin and on the basis that PGE’s previously effective standard contract forms and currently effective forms had all consistently limited the availability of fixed prices to the first 15 years measured from contract execution. The Commission clearly concluded that PGE was correct, that Order No. 05-584 did not specify when the 15-year fixed price period must begin, and that PGE’s Commission-approved standard contract forms—both previously effective and then effective forms—limited fixed prices to 15 years from contract execution.

1. The complaint alleged PGE’s previously effective standard contract forms provided for fixed prices for 15 years measured from commercial operation.

This proceeding is a contested case proceeding initiated through a complaint and limited to the issues raised in the complaint. The complaint repeatedly alleges that PGE’s

previously effective standard contract forms allowed for fixed prices for 15 years measured from commercial operation. Critically, the complaint argues that PGE’s previously effective standard contract forms demonstrate that PGE’s policy before 2016 was to offer fixed prices for 15 years measured from commercial operation.

For example, the complaint alleges: “PGE’s Commission-approved standard contracts allow QFs to select a full 15 years of fixed prices ... for 15 years after the QF’s operation.”⁴⁰ And that: “PGE has agreed to make minor modifications to make even clearer specification in its standard contracts that the 15-year fixed price period commences when the QF begins commercial operation.”⁴¹ The complaint then points to two executed standard contracts based on previously effective standard contract forms as alleged examples that PGE’s “standard contracts” provide for 15 years of fixed prices from commercial operation.⁴² The complaint is clearly alleging that PGE’s previously effective standard contract forms provided for, or allowed for, fixed prices for 15 years measured from commercial operation.

The complaint alleges this position even more clearly in paragraphs 31 and 32, where it identifies PGE’s previously effective standard contract form filed on December 16, 2014, and argues that “RPS Attribute” language in Section 4.5 of the previously effective standard contract form “unambiguously demonstrated that the QF will receive the fixed renewable prices for 15 years after achieving operation – not just for 15 years after execution of the contract.”⁴³ There is no question that the complaint alleges that

⁴⁰ Docket No. UM 1805, Complaint at 2 (Dec. 6, 2017).

⁴¹ *Id.* at 2-3.

⁴² *Id.* at ¶¶ 24-26.

⁴³ *Id.* at ¶¶ 31-32.

PGE's previously effective standard contract forms allowed for 15 years of fixed prices measured from contract execution.

The complaint further alleged that beginning in 2016, PGE changed its policy (but not its previously effective standard contract forms) and began to improperly take the position that its standard contract forms limited the availability of fixed prices to the first 15 years after contract execution.⁴⁴ Based on the express language and allegations in the complaint, the Commission had to determine the meaning of PGE's previously effective standard contract forms in order to resolve the complaint.

2. Complainants sought a ruling that the generic language underlying PGE's executed contracts provided for fixed prices for 15 years measured from commercial operation.

In their petition for clarification the Complainants assert that "[b]oth the Complainants and PGE specifically asked the Commission not to attempt to provide a binding interpretation of ... prior standard contract forms"⁴⁵ This is inaccurate.

As discussed above, the complaint clearly alleges that PGE's previously effective standard contract forms allowed for 15 years of fixed prices measured from commercial operation. Paragraph 10 of the complaint also suggested that Complainants sought interpretation of executed standard contracts.⁴⁶ As a result, PGE filed a motion to clarify whether the complaint sought interpretation of executed contracts.⁴⁷ In response, Complainants stated that they did not seek interpretation of any executed standard contract. But Complainants were careful to note that they did seek an interpretation of the

⁴⁴ Docket No. UM 1805, Complaint at 3 and at ¶¶ 28, 41, 50 (Dec. 6, 2017).

⁴⁵ Docket No. UM 1805, Complainants' Petition for Clarification and Application for Rehearing and Reconsideration at 2 (Sep. 11, 2017).

⁴⁶ See Docket No. UM 1805, Complaint at ¶ 10 (Dec. 6, 2016) (asserting that to the extent the complaint requires "interpretation of contractual obligations incurred prior to the filing of this complaint ... the Commission possesses primary or concurrent jurisdiction over interpretation of such contracts.").

⁴⁷ Docket No. UM 1805, PGE's Motion to Strike, Motion to Make More Definite and Certain, and Motion for More Time to Respond (Dec. 16, 2017).

generic language or standard contract forms on which PGE's executed contracts are based.

The Complainants stated: “[We] do not seek Commission interpretation of any previously executed contracts, *but only the generic contract terms approved by the Commission.*”⁴⁸ The Complainants further clarified that they sought an interpretation of the generic language of the standard contract forms when they wrote:

The closest the Complaint comes to requiring interpretation of any specific contract to issue the relief requested is the paragraph in the prayer addressing existing contracts (Prayer Par. 2), which simply requests a statement of Commission policy that could be applied in future case[s] to any dispute that remains after this case as to the proper interpretation of any existing contracts, stating:

Declaring that PGE's standard contract, as interpreted in the regulatory context from which it arose, requires payment by PGE at fixed prices for 15 years after the QF's operation date rather than merely 15 years after the time of contract execution, unless express language is inserted by the QF that demonstrates a contrary intent;

This would set an easily applicable rule going forward but not necessarily an interpretation of any specific individual contract.⁴⁹

In other words, what Complainants sought was a ruling that the generic or standard language of PGE's currently effective and previously effective contract forms requires PGE to pay fixed prices for 15 years measured from commercial operation unless the QF has inserted express language in a previously executed contract that demonstrates a contrary intent.

⁴⁸ Docket No. UM 1805, Complainants' Response in Opposition to PGE's Motion to Strike, and Motion to Make More Definite and Certain, and Motion Requesting More Time to Respond at 8 (Jan. 24, 2017) (emphasis added).

⁴⁹ *Id.* at 18.

The fact that Complainants sought a ruling on the meaning of the generic language of PGE’s previously effective standard contract forms is further demonstrated by the Complainants’ statement that the complaint raised the following legal issue:

Do PGE’s standard contracts require 15 years of fixed prices from the time of power deliveries, unless express language *has been inserted* by the QF that demonstrates a contrary intent?⁵⁰

Complainants use of the past tense is telling. Complainants sought a ruling that PGE’s standard contract forms used as the basis for executed contracts provide for 15 years of fixed prices measured from commercial operation, unless express language *has been inserted* by the QF counter-party to an executed contract. Complainants were not seeking a final, binding interpretation of any specific, executed contract. And Complainants conceded it is possible that specific, executed contracts might include express language inserted by the QF that would lead to a contrary result. But Complainants were seeking a ruling that the generic or standard language of PGE’s standard contract forms—both current forms and previously effective or supersede forms—require fixed prices for 15 years from commercial operation.

3. PGE argued that all of its previously effective standard contract forms limited the availability of fixed prices to the first 15 years measured from contract execution.

Regardless of what Complainants sought, it is clear that PGE’s motion for summary judgment argued that all of PGE’s Commission-approved standard contract forms limit the availability of fixed prices to the first 15 years measured from contract execution.⁵¹ The Commission agreed and held that PGE’s commission-approved standard

⁵⁰ Docket No. UM 1805, PGE’s and Complainants’ Joint Statement of Facts and Legal Issues at Attachment C, page 5 (Mar. 10, 2017) (emphasis added).

⁵¹ See e.g., Docket No. UM 1805, PGE’s Motion for Summary Judgment at 17-27 (Apr. 24, 2017); See also, Docket No. UM 1805, PGE’s and Complainants’ Joint Statement of Facts and Issues, at Attachment B, ¶ 143 (Mar. 10, 2017) (“Since PGE’s July 22, 2005, filing of Advice No. 05-10 in compliance with

contract filings limit the availability of fixed prices to the first 15 years measured from contract execution.⁵²

If Order No. 17-256 only addressed PGE’s then-effective standard contract forms, as Complainants suggest, the Commission would not have written that it has “approved PGE’s standard contract *filings*”—plural. The standard contract forms that were in effect when Order No. 17-256 was issued were submitted for review and approval as a single filing made by PGE on July 12, 2016 in Docket No. UM 1610.⁵³

Given what the parties were arguing in their motions for summary judgment, there is no way that the Commission could have granted either motion for summary judgment without deciding whether PGE’s previously effective standard contract forms limited fixed prices to 15 years from contract execution. Order No. 17-256 concluded that all of PGE’s then effective *and previously effective* standard contract forms limit the availability of fixed prices to the first 15 years measured from contract execution.⁵⁴ There is no ambiguity on this point and therefore no need to clarify the Order. Complainants themselves argued the complaint seeks an interpretation of the generic language of PGE’s standard contract forms. PGE clearly placed the interpretation of its previously effective standard contract forms at issue through its motion for summary judgment. The Commission granted PGE’s motion for summary judgment. And the language of Order

Order No. 05-584 in Docket No. UM 1129, PGE has publicly indicated in both its Schedule 201 and its QF standard contracts that PGE offers to pay fixed prices under QF standard contracts for the initial 15 years of a maximum 20 year QF standard contract and that PGE will pay a market-based price for the last five years of a maximum 20-year QF standard contract.”).

⁵² Docket No. UM 1805, Order No. 17-256 at 3 (Jul. 13, 2017) (“Because we approved PGE’s standard contract filings [i.e., PGE’s standard contract forms] that 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.”).

⁵³ See Docket No. 1601, PGE’s Schedule 201 Qualifying Facility Information Compliance Filing (July 12, 2016) (filing consisted of Schedule 201 and eight standard contract forms).

⁵⁴ See Footnote 52 *supra*.

No 17-256 makes it clear that the Commission interpreted *all* of PGE’s then effective and previously effective standard contract forms.

C. The Commission’s Holding is Well-Reasoned and Satisfies the “Substantial Reason” Test of *Drew* and *NW Natural*.

Complainants argue that Order No. 17-256 is so poorly reasoned that it does not meet the “substantial reason” test of *Drew v. Psychiatric Sec. Review. Board*, 322 Or. 491, 909 P.2d 1211 (1996) (“*Drew*”) and *NW Nat. Gas Co. v. Pub. Util. Common*, 195 Or. App. 547, 99 P.2d 292 (2004) (“*NW Natural*”).⁵⁵ Complainants assert that the Commission has not adequately explained the reasons supporting its conclusion that PGE’s Commission-approved standard contract forms limit the availability of fixed prices to the first 15 years measured from contract execution.⁵⁶ As discussed below, PGE believes the Commission’s Order is well reasoned and meets the “substantial reason” requirements articulated in *Drew* and *NW Natural*.

Order No. 17-256 explains the basis for the Commission’s decision. In the Order, the Commission concludes: “Because we approved PGE’s standard contract filings that 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.”⁵⁷ In support of this conclusion, the Commission notes PGE’s argument that “its first standard contract approved by the Commission in Order No. 07-065 specified the date of execution of the standard contract as the 15-year fixed price start date.”⁵⁸ The Commission also notes PGE’s argument that its subsequent standard contract filings “unambiguously provided

⁵⁵ Docket No. UM 1805, Complainants’ Petition for Clarification and Application for Rehearing or Reconsideration at 10 (Sep. 11, 2017).

⁵⁶ *Id.*

⁵⁷ Docket No. UM 1805, Order No. 17-256 at 3 (Jul. 13, 2017).

⁵⁸ *Id.*

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.”⁵⁹

In its motion for summary judgment, in its response to Complainants’ motion for summary judgment, and in its reply in support of its motion for summary judgment, PGE provided the Commission with a detailed explanation of how the language of its standard contract forms—including its previously effective standard contract forms—works to limit the availability of fixed prices to the first 15 years measured from contract execution.⁶⁰ PGE also provided the Commission with a detailed recitation of the facts associated with the compliance filing for each of its standard contract forms and detailed how each set of standard contract forms addressed maximum contract term and the 15 year limit on fixed prices.⁶¹ Order No. 17-256 recites a number of these points in support of the Commission’s conclusion that PGE’s standard contract filings have limited the availability of fixed prices to the first fifteen years measured from contract execution. This is enough to satisfy the “substantial reason” test described by the Oregon Supreme Court in *Drew* and *NW Natural*.

Complainants want the Commission to engage in a more detailed analysis. Complainants assert that the Commission “must cite the critical provisions of each contract it interprets and which language the Commission finds to control the matter in dispute.”⁶² But there is no such requirement articulated in *Drew* or *NW Natural*. The

⁵⁹ Docket No. UM 1805, Order No. 17-256 at 3 (Jul. 13, 2017).

⁶⁰ See Docket No. UM 1805, PGE’s Motion for Summary Judgment at 18-25 (Apr. 24, 2017); Docket No. UM 1805, PGE’s Response in Opposition to Complainants’ Motion for Summary Judgment at 8-10 and 12-14 (May 8, 2017); Docket No. UM 1805, PGE’s Reply in Support of Its Motion for Summary Judgment at 19-20 (May 15, 2017).

⁶¹ Docket No. UM 1805, PGE’s and Complainants’ Joint Statement of Facts and Issues at Attachment B (Mar. 10, 2017).

⁶² Docket No. UM 1805, Complainants’ Petition for Clarification and Application for Rehearing and Reconsideration at 10 (Sep. 11, 2017).

Commission’s decision must demonstrate the reasoning that leads the agency from the facts to the conclusions it draws from those facts.⁶³

In this case, the Commission noted with approval two sets of facts – (1) that PGE’s standard contract form approved by Order No. 07-065 specified the date of execution of the standard contract as the 15-year fixed price start date; and (2) that PGE’s subsequent standard contract filings all provided for a maximum term of 20 years measured from contract execution and limited the availability of fixed prices to the first 15-years of that term.⁶⁴ The Commission then noted that it had approved those standard contract forms as consistent with Commission orders.⁶⁵ Finally the Commission noted that Order No. 05-584 does not specify what date should act as the trigger for the 15 year fixed price period.⁶⁶ From these facts, the Commission clearly reasoned that PGE is not in violation of the Commission’s orders. This may be a less detailed analysis than Petitioners would prefer, but it is sufficient to satisfy the “substantial reasoning” requirements of *Drew* and *NW Natural*.

PGE believes it is unnecessary for the Commission to further clarify its reasoning in concluding that PGE’s Commission-approved standard contract forms limit the availability of fixed costs to the first 15 years measured from contract execution.

D. Complainants Have Not Advanced Any New Arguments in Favor of Their Position.

In a single paragraph of their petition for clarification, Complainants assert that language regarding “RPS Attributes” in “the standard contract form that was available for renewable QFs between the issuance of Order No. 14-435 on December 16, 2014, and the

⁶³ *Drew*, 322 Or. at 500.

⁶⁴ Docket No. UM 1805, Order No. 17-256 at 3 (Jul. 13, 2017).

⁶⁵ *Id.*

⁶⁶ *Id.*

issuance of Order No. 16-377 on October 11, 2016” somehow changed PGE’s longstanding approach to the timing of the 15-year fixed price period.⁶⁷ Complainants provide no analysis or argument as to why RPS Attributes language in a limited subset of PGE’s standard contract forms in effect from December 2014 through October 2016 should change the conclusion that PGE’s contract forms limit fixed prices to 15 years measured from contract execution. Complainants’ unsupported argument should be rejected.

PGE suspects that Complainants simply seek to reiterate and re-litigate the argument they made in their motion for summary judgment regarding a provision addressing “RPS Attributes” in some of PGE’s previously effective standard contract forms. Complainants already had an opportunity to fully brief and argue this point, and they did so.⁶⁸ PGE responded to these arguments as part of PGE’s response in opposition to Complainants’ motion for summary judgment.⁶⁹ The Commission has already considered the issue and rejected Complainants’ arguments and adopted PGE’s position as evidenced by the fact that the Commission granted PGE’s motion for summary judgment and rejected Complainants’ motion for summary judgment. This issue should not be re-litigated.

As PGE argued in its motion for summary judgment, PGE’s first set of standard contract forms approved by the Commission as fully compliant with Order No. 05-584 was approved on February 27, 2007, in Order No. 07-065. As PGE explained in detail in its motion for summary judgment, the standard contract forms approved by Order No. 07-

⁶⁷ Docket No. UM 1805, Complainants’ Petition for Clarification and Application for Rehearing or Reconsideration at 10 (Sep. 11, 2017).

⁶⁸ Docket No. UM 1805, Complainants’ Motion for Summary Judgment at 26-30 (Apr. 24, 2017).

⁶⁹ Docket No. UM 1805, PGE’s Response in Opposition to Complainants’ Motion for Summary Judgment at 12-14 (May 8, 2017).

065 clearly provided for a maximum contract term of 20 year measured from contract execution and the standard contract forms clearly limited the availability of fixed prices to the first 15 years of the contract term that begins at contract execution.⁷⁰

As PGE further explained in its motion for summary judgment, its reply in support, and its stipulated facts and issues, all of PGE's subsequent standard contract forms continued to provide for a standard contract term that begins at contract execution.⁷¹ And all of PGE's subsequent standard contract forms incorporated by reference the terms and conditions of PGE's Schedule 201 which has consistently and clearly stated that the maximum term of a standard contract is 20 years and that fixed prices are available for the first 15 years of the contract term.⁷²

These facts have been true for all versions of PGE's standard contract forms approved by the Commission between Order No. 05-584 and Order No. 17-256. PGE argued as much in its briefing during the summary judgment phase of the proceeding. PGE provided the Commission with copies of or citations to every version of PGE's standard contract forms that have been filed and approved by the Commission during the interim between Order No. 05-584 and Order No. 17-256.⁷³ The Commission has ample evidence and facts upon which to conclude, as it did in Order No. 17-256, that all of PGE's standard contract forms approved by the Commission between Order No. 05-584

⁷⁰ See Docket No. UM 1805, PGE's Motion for Summary Judgment at 15-21 (Apr. 24, 2017).

⁷¹ *Id.* at 21-25; Docket No. UM 1805, PGE's Reply to Complainants' Response in Opposition to PGE's Motion for Summary Judgment at 19 (May 15, 2017); Docket No. 1805, PGE's and Complainants' Joint Stipulated Facts and Issues, Attachment B (*see e.g.*, ¶¶ 143-144) (Mar. 10, 2017).

⁷² *Id.*

⁷³ See Docket No. UM 1805, PGE's Motion for Summary Judgment at Attachments 1 through 6 (Apr. 24, 2017) (courtesy copies of key standard contract forms attached to motion for summary judgment for easy reference); Docket No. UM 1805, PGE's and Complainants' Joint Statement of Facts and Issues at Attachment B (Mar. 10, 2017) (Attachment B is an 18 page list of all of the key facts related to PGE's standard contract forms and Schedule 201 forms as they were filed and approved by the Commission between Order No. 05-584 and Order No. 17-256, including details regarding how every set of standard contract forms addressed the 15 year fixed price period).

and Order No. 17-256 limit the availability of fixed prices to the first 15 years measured from contract execution.

This is equally true of the renewable standard contract forms available between December 2014 and October 2016. Those standard contract forms provided for a maximum contract term of 20-years beginning at contract execution. They defined the contract “Term” as “the period beginning on the Effective Date and ending on the Termination Date.”⁷⁴ They defined the “Effective Date” as the date both parties execute the contract.⁷⁵ They allowed the QF to select a Termination Date,⁷⁶ but they incorporated by reference all of the terms of PGE’s Schedule 201,⁷⁷ and the rate schedule clearly required a seller to select a contract term that does not exceed 20 years.⁷⁸

By their express provisions, PGE’s renewable standard contract forms in effect from December 2014 through October 2016 provided for a contract term that began at contract execution and extended for a maximum of 20 years from contract execution. The contract form required PGE to pay the Contract Price for all QF net output delivered to PGE.⁷⁹ And the contract form defined “Contract Price” as the applicable price specified in Schedule 201.⁸⁰ The expressly incorporated terms of Schedule 201 provided that fixed prices are available only during the first 15 years of the contract term, after which market

⁷⁴ Docket No. UM 1610, PGE’s Application in Compliance with OPUC Order No. 15-130, *Standard Renewable Off-System Variable Power Purchase Agreement* at Section 1.38 (May 27, 2015).

⁷⁵ *Id.* at Sections 1.8 and 2.1.

⁷⁶ *Id.* at Section 2.3.

⁷⁷ *Id.* at Section 1.33.

⁷⁸ Docket No. UM 1610, PGE’s Application in Compliance with OPUC Order No. 15-130, Schedule 201 at Sheet No. 201-1 (May 27, 2015) (“The agreement will have a term of up to 20 years as selected by the QF”).

⁷⁹ Docket No. UM 1610, PGE’s Application in Compliance with OPUC Order No. 15-130, *Standard Renewable Off-System Variable Power Purchase Agreement* at Section 4.2 (May 27, 2015).

⁸⁰ *Id.* at Section 1.6.

prices apply for the “up to five years” remaining in the contract term.⁸¹ There is no ambiguity in PGE’s contract forms. PGE’s Commission-approved forms provide for a maximum 20-year term measured from the date the contract is fully executed and limit fixed prices to the first 15 years of that term. For further discussion of this issue, the Commission should refer to pages 12 through 14 of PGE’s response in opposition to Complainants’ motion for summary judgment.

E. There is No Reason to Provide the Complainants an Opportunity to Re-Litigate or Re-Argue the Issues Already Addressed During Briefing on Summary Judgment.

Complainants state: “If the Commission intended to address prior versions of the standard contracts even though Complainants urged the Commission not to do so, then the Complainants request that they be provided an opportunity to brief these previous versions and the Commission issue an order that actually explains the reasons for its decision.” This request should be rejected.

The Complainants sought a ruling from the Commission to the effect that the generic language underlying PGE’s executed standard contracts provides for fixed prices for 15 years from commercial operation.⁸² In other words, Complainants sought a ruling that PGE’s standard contract forms—both currently effective and previously effective forms—required fixed prices for 15 years measured from commercial operation. In addition, PGE argued in its motion for summary judgment that *all* versions of PGE’s standard contract forms consistently limited the applicability of fixed prices to the first 15

⁸¹ Docket No. UM 1610, PGE’s App. in Comp. with Order No. 15-130, Schedule 201 at 201-12 (May 27, 2015) (“The Renewable Fixed Prices Option ... is available for a maximum term of 15 years. Prices will be established at the time the Standard PPA is executed ... Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price ... for all years up to five in excess of the initial 15.”).

⁸² See Footnotes 48 and 49 *supra*.

years measured from contract execution.⁸³ PGE provided the Commission with detailed explanations of how the language of its various standard contract forms limits fixed prices to 15 years after contract execution.⁸⁴ Complainants had ample opportunity to respond and in fact did respond by arguing that PGE's interpretation of its various standard contract forms was inconsistent with Order No. 05-584 and inconsistent with an alleged common understanding in the electric industry regarding when a fixed price term should begin to run.⁸⁵

It is simply inaccurate for Complainants to suggest that they were unaware that PGE was arguing that its previously effective standard contract forms limited the availability of fixed prices to the first 15 years measured from contract execution and it is inaccurate to suggest that Complainants had no opportunity to respond to that argument. The issues were exhaustively briefed through summary judgment proceedings and decided by the Commission. There is no basis to re-litigate those issues through a petition for clarification.

F. Order No. 17-256 Should not be Clarified to Indicate that the Complaint was Granted in Part Against PGE.

In their petition for clarification, the Complainants argue that the Commission should clarify that Order No. 17-256 grants the relief requested in paragraph three of the prayer for relief on page 16 of the complaint.⁸⁶ This request should be denied. Order No. 17-256 is clear. The Commission concluded that PGE's Commission-approved standard contract forms limit the availability of fixed prices to the first 15 years measured from

⁸³ See Footnotes 14 and 60 *supra*.

⁸⁴ See Footnotes 16 and 60 *supra*.

⁸⁵ See Docket No. UM 1805, Complainants' Response in Opposition to PGE's Motion for Summary Judgment at 5-8 (May 8, 2017).

⁸⁶ Docket No. UM 1805, Complainants' Petition for Clarification and Application for Rehearing or Reconsideration at 11 (Sep. 11, 2017).

contract execution.⁸⁷ The Commission also concluded that Order No. 05-584 did not specify when the 15-year fixed price period must begin to run.⁸⁸ Given these facts, the Commission concluded that PGE could not be found to be in violation of Commission orders and the Commission granted PGE’s motion for summary judgment and dismissed the complaint.⁸⁹

This was sufficient to dispose of the proceeding. However, the Commission decided *sua sponte* to clarify its policy under Order No. 05-584 “to explicitly require standard contracts, *on a going-forward basis*, to provide for 15 years of fixed prices that commence when the QF transmits power to the utility.”⁹⁰ In effect, the Commission, on its own motion, rectified the fact that Order No. 05-584 never specified a date on which the 15-year fixed price period must begin, and then the Commission ordered PGE to make a compliance filing to bring its standard contract forms into compliance with the Commission’s newly articulated requirement that PGE offer fixed prices for 15 years measured from when the QF transmits power to the utility.⁹¹

This is not the same thing as granting the relief requested by Complainants in paragraph three of the prayer for relief in the complaint. The Complainants were clear that they believed that Order No. 05-584 required PGE to offer fixed prices for 15 years measured from commercial operation, and Complainants specifically indicated to the Commission that they did not request that the Commission amend its policy established

⁸⁷ Docket No. UM 1805, Order No. 17-256 at 3 (Jul. 13, 2017).

⁸⁸ *Id.*

⁸⁹ *Id.* at 1 and 3.

⁹⁰ *Id.* at 4 (emphasis added).

⁹¹ At its September 26, 2017 Regular Public Meeting, the Commission concluded that the language of Order No. 17-256 stating that on a going-forward basis “the 15-year term must commence on the date of power delivery” was not intended to be taken literally as prescribing the precise trigger date for the 15 year period; at the same meeting, the Commission approved PGE’s July 20, 2017 compliance filing which uses the scheduled commercial operation date as the new trigger for the 15-year fixed price period.

by Order No. 05-584 but that it re-affirm the policy it had already adopted.⁹² Paragraph three of the prayer for relief in the complaint therefore asked the Commission to order PGE to file revised standard contract forms based on the Commission's orders and "policy" in effect when the complaint was filed. The Commission explicitly found that Order No. 05-584 as it existed when the complaint was filed did not specify that the 15 year fixed price period begins when the QF delivers power.⁹³ There was therefore no basis for granting any of the relief requested in the complaint, including the relief requested in paragraph three of the prayer for relief, and the Commission granted PGE's motion for summary judgment and dismissed the complaint.⁹⁴

The Commission then changed, on a going-forward basis, the operative impact of Order No. 05-584 by "clarifying" that Order No. 05-584 was to be understood from July 13, 2017 forward as requiring fixed prices for 15 years measured from when a QF transmits power to the utility. As PGE pointed out in its motion for summary judgment, in a technical sense the Commission does not place binding obligations on PGE or the other utilities through the adoption of QF "policies."⁹⁵ Rather, the Commission issues a

⁹² Docket No. UM 1805, Complaint at 1, 3 (Dec. 6, 2016) (Addressing the Commission's "well-established policy" the Complainants assert: "The Commission's policy is that 15 years of fixed pricing commences when the QF achieves operation [citing Order No. 05-584]. ... Complainants respectfully request the Commission reaffirm its policy ... to pay 15 years of fixed prices after the QF begins delivering its net output to the utility ... [t]he Commission ... only needs to confirm that Commission policy ... require[s] PGE to pay 15 years of fixed prices after the QF begins delivering its net output."); Docket No. UM 1805, Complainants' Response to PGE's Motion to Strike, Motion to Make More Definite and Certain, and Motion for More Time to Respond, at 9 (Jan. 24, 2017) ("The Complainants do not request the Commission amend its policy, but to re-affirm its already adopted policy.").

⁹³ Docket No. UM 1805, Order No. 17-256 at 3 (Jul. 13, 2017) ("When we concluded that QFs should receive 15 years of fixed prices under standard contracts in Order No. 05-584, we did not specify the date on which that 15-year term begins. ... Due to this fact, Oregon utilities have filed, and we have approved, standard QF contracts that have used, as the triggering event, both the date of contract execution and the date of power delivery.").

⁹⁴ *Id.* at 1 ("In this order, we grant the motion for summary judgment of ... PGE ... and dismiss the complaint ...").

⁹⁵ See Docket No. UM 1805, PGE's Motion for Summary Judgment at footnote 1 (pointing out that in a technical sense the Commission has not adopted "policies" for standard contracts, but rather approved a series of standard contract forms through a series of orders); see also Docket No. UM 1805, PGE's Reply

series of orders that require the utilities to file standard contract forms and QF rate schedules or to take other QF-related action, the utilities then make a compliance filing, and the Commission then approves (or rejects) the compliance filing.

In response to Order No. 05-584 and a series of subsequent orders, PGE made compliance filings containing standard contract forms that limited the availability of fixed prices to the first 15 years measured from contract execution. The Commission approved those compliance filings and standard contract forms as consistent with its orders.

The Commission has now issued a new order—Order No. 17-256—that acknowledges that its previous orders did not require that PGE offer fixed prices for 15 years measured from commercial operation. But new Order No. 17-256 provides that PGE will be required to offer fixed prices for 15 years from commercial operation on a going-forward basis and directs PGE to file new standard contract forms that so provide. This is not the same thing as affirming that Order No. 05-584 required PGE to offer fixed prices for 15 years measured from commercial operation and ordering PGE to modify its standard contract forms accordingly. As a result, the Commission has not granted the relief requested in paragraph three of the prayer for relief in the complaint and the Commission was correct to grant PGE’s motion for summary judgment and to dismiss the complaint.

to Complainants’ Response in Opposition to PGE’s Motion for Summary Judgment at 2-5 (May 15, 2017) (arguing that there is no inchoate “policy” regarding when the 15-year fixed price period begins to run but only the requirements of the Commission’s orders on this point).

G. Order No. 17-256 Does Not Engage in “Utility Type” Regulation Over QFs or Interpret Any Executed Contract.

Complainants state: “to the extent the Commission’s order constitutes ‘utility type’ regulation over qualifying facilities it is pre-empted by PURPA.”⁹⁶ Complainants do not develop the point any further. There is no reason to conclude that Order No. 17-256 involves a determination that constitutes “utility type” regulation. In Order No. 17-256, the Commission did not exercise “post-contractual, utility type price modification authority.”⁹⁷ Order No. 17-256 did not involve the post-contractual modification of prices; in fact the Commission was not even engaged in the interpretation of any executed contracts. Rather, the Commission was called upon to consider and interpret the meaning of a series of standard contract forms which it had ordered PGE to file and which it had previously reviewed and approved.

Complainants also state: “And to the extent the Commission would interpret common law contract issues, it would be treading into areas where it has no special knowledge and where its remedial authority may be limited.”⁹⁸ The Complainants took a very different view in their complaint, where they stated: “To the extent the Complaint requires interpretation of contractual obligations incurred prior to the filing of this complaint ... the Commission possesses primary or concurrent jurisdiction over the interpretation of such contracts.”⁹⁹ In any event, the question is moot because the Commission did not interpret any *executed* contracts in Order No. 17-256, rather the Commission concluded that all PGE standard contract *forms* approved by the

⁹⁶ Docket No. UM 1805, Complainants’ Petition for Clarification and Application for Rehearing or Reconsideration at 11 (Sep. 11, 2017).

⁹⁷ *Id.*

⁹⁸ *Id.* at 11.

⁹⁹ See Docket No. UM 1805, Complaint at ¶ 10 (Dec. 6, 2017) (citing *Boise Cascade Corp. v. Bd. Of Forestry*, 935 P.2d 411, 416-20, 325 Or. 185 (1997); *Reinwald v. Dep’t of Emp’t*, 939 P.2d 86, 88-89, 148 Or. App. 75 (1997)).

Commission between Order No. 05-584 and Order No. 17-256 limit the availability of fixed prices to the first 15 years measured from contract execution.

H. Conclusion—There is No Need to Clarify Order No. 17-256.

For the reasons discussed above, there is no need to clarify Order No. 17-256. The Order clearly does not seek to interpret any executed contract. The Order clearly does hold that all of PGE’s standard contract forms approved by the Commission between Order 05-584 and Order 17-256 limit the availability of fixed prices to the first 15 years measured from contract execution.

IV. APPLICATION FOR REHEARING OR RECONSIDERATION

Complainants’ September 11, 2017 filing includes a section that is slightly more than one-page long and which is labeled: “Application for Rehearing or Reconsideration.”¹⁰⁰ This section states: “Complainants agree with the argument made in the NewSun Solar Projects’ application for rehearing or reconsideration (‘NewSun Application’) as to the version [of] PGE’s standard contract form for renewable QFs that was approved by Order No. 15-289 ... Complainants adopt and incorporate by reference the same arguments made by the NewSun Solar Projects without repeating all of those detailed arguments in this filing.”¹⁰¹

On September 8, 2017, ten qualifying facilities (the “NewSun Solar Projects” or “Petitioners”) filed a joint petition to intervene out of time in this proceeding. On the same day, Petitioners filed a motion for clarification and an application for rehearing or reconsideration of Order No. 17-256. Petitioners have ten executed PGE standard contracts; they would like the standard language in those contracts to be interpreted as

¹⁰⁰ Docket No. UM 1805, Complainants’ Petition for Clarification and Application for Rehearing or Reconsideration at 12-13 (Sep. 11, 2017).

¹⁰¹ *Id.* at 12.

meaning that PGE must pay fixed prices for 15 years measured from commercial operation. So Petitioners sought to become parties to this proceeding well after the final taking of evidence, well after the Commission issued its dispositive order, and one business day before the running of the statutory 60-day period for challenging the Commission's decision. Petitioners sought to re-argue Complainants' points about the "RPS Attributes" language and the alleged "Industry Standard" providing that fixed prices begin at commercial operation.

On September 18, 2017, PGE filed objections to the joint petition to intervene out of time. PGE argued that the Commission *cannot* grant Petitioners party status because the statute authorizing interventions does not allow for intervention at this late stage of a proceeding. PGE also argues that the Commission *should not* grant Petitioners party status because their intervention would unreasonably broaden the issues in the proceeding, burden the record, and delay the proceeding all in contravention of the standards to be considered when granting intervention under OAR 860-001-0300(6). On October 16, 2017, the Commission issued Order No. 17-418 denying the Petitioners' joint petition to intervene out of time and striking Petitioners application for rehearing or reconsideration.¹⁰²

A. The Application for Reconsideration Should Be Denied Because It Does Not Meet the Requirements of OAR 860-001-0720(2).

Complainants purport to have applied for rehearing or reconsideration of Order No. 17-256 by filing a roughly one-page application on the last day of the 60-day statutory period to file an application for rehearing or reconsideration.¹⁰³ Complainants'

¹⁰² Docket No. UM 1805, Order No. 17-418 at 1 (Oct. 16, 2017).

¹⁰³ See Docket No. UM 1805, Complainants' Petition for Clarification and Application for Rehearing or Reconsideration at 12 (Sep. 11, 2017).

application for rehearing or reconsideration patently fails to meet the requirements of OAR 860-001-0720(2) which provide that the application *must* specify:

- (a) The portion of the challenged order that the applicant contends is erroneous or incomplete;
- (b) The portion of the record, laws, rules, or policy relied upon to support the application;
- (c) The change in the order that the Commission is requested to make;
- (d) How the applicant's requested change in the order will alter the outcome; and
- (e) One or more of the grounds for rehearing or reconsideration in section (3) of this rule.

Complainants' roughly one-page application for rehearing or reconsideration fails to meet the required specifications. Complainants' application for rehearing or reconsideration should be rejected.

Complainants argue that they are adopting and incorporating by reference the arguments made by Petitioners in their September 8, 2017 filing with the Commission. But the Petitioners' September 8, 2017 filing was not an effective application for rehearing or reconsideration and it has been stricken from the record.

By statute, an application for rehearing or reconsideration must be filed *by a party* within 60 days of the date the Commission served the order being challenged.¹⁰⁴ The 60-day statutory deadline to challenge Order No. 17-256 ran on September 11, 2017. Petitioners filed an application for rehearing or reconsideration on September 8, 2017, but they were not parties at the time, and they were not parties before the September 11, 2017 deadline passed. This means that it was not possible for Petitioners to file an effective application for rehearing or reconsideration before the September 11, 2017 deadline. Ultimately, the Commission denied Petitioners' request to intervene out of time and

¹⁰⁴ ORS 756.561.

struck from the record Petitioners' joint motion for clarification and application for rehearing and reconsideration.¹⁰⁵

Complainants were parties on September 11, 2017—the last day for a party to file an application for rehearing or reconsideration. But Complainants filed a completely inadequate one-page application that relied on adopting by reference Petitioners' ineffective September 8, 2017 application. The Commission should not allow Petitioners' stricken and statutorily ineffective application for rehearing and reconsideration to become an effective application simply because Complainants' purport to adopt it through a patently inadequate application for rehearing or reconsideration filed on the last day of the 60-day statutory period. Allowing Complainants to do so would allow Complainants to improperly avoid the limitations of ORS 756.561 and the requirements of OAR 860-001-0720.

There is no provision under the Commission's rules or Oregon law that allows a party to a proceeding to make a timely and effective application for rehearing or reconsideration by adopting by reference the stricken arguments of a non-party. Moreover, It would prejudice PGE if the Commission allows Complainants to ignore the requirements of OAR 860-001-0720 and to adopt by reference an imprecisely defined portion of a document filed by a non-party because PGE cannot determine with precision what parts of Petitioners' filing the Complainants' intend to adopt as their own argument in Complainants' September 11, 2017 filing.¹⁰⁶

¹⁰⁵ Docket No. UM 1805, Order No. 17-418 at 3 (Oct. 16, 2017).

¹⁰⁶ The first paragraph of Complainants' roughly one-page application for rehearing or reconsideration suggests that Complainants intent to incorporate by reference some, but not all, of Petitioners' arguments; however, Complainants never clearly specify precisely which of Petitioners' arguments they are purporting to adopt by reference.

If Complainants had wanted to file an effective application for rehearing or reconsideration, they had plenty of time to prepare their own application that complied with the requirements of OAR 860-001-0720 and ORS 756.561. The Commission can and should deny Complainants' request for rehearing or reconsideration on the grounds that the Complainants did not file a request that complied with the Commission's rules before the end of the 60-day period to file an application.

B. The Application for Reconsideration Should Be Denied for Failure to Satisfy OAR 860-001-0720(3) – Reconsideration Is Not an Opportunity to Simply Re-Litigate Losing Arguments.

If the Commission decides to entertain Complainants' application, the Commission should deny the application on the grounds that it does not satisfy any of the elements of OAR 860-001-0720(3) which requires that the applicant show that there is:

- (a) New evidence that is essential to the decision and that was unavailable and not reasonably discoverable before issuance of the order;
- (b) A change in the law or policy since the date the order was issued relating to an issue essential to the decision;
- (c) An error of law or fact in the order that is essential to the decision; or
- (d) Good cause for further examination of an issue essential to the decision.

In their stricken and ineffective application for rehearing or reconsideration, *Petitioners* suggest but do not clearly state that their arguments raise an error of law or fact or raise good cause.¹⁰⁷ However, it appears to PGE that the argument on rehearing or reconsideration that Complainants wish to incorporate by reference is an argument that a certain generation of renewable standard contract forms in effect from December 2014 through October 2016 should be interpreted differently than PGE's other standard

¹⁰⁷ Docket No. UM 1805, *Petitioners' Motion for Clarification and Application for Rehearing and Reconsideration* at 16 (Sep. 8, 2017).

contract forms because of a provision in the contract forms addressing “RPS Attributes.”¹⁰⁸ It appears to PGE that this is the exact same argument that Complainants first raised in their complaint¹⁰⁹ and argued in their motion for summary judgment.¹¹⁰ The Complainants have already argued that the “RPS Attributes” provision in the renewable standard contract forms available from December 2014 to October 2016 should be interpreted as making fixed prices available for 15 years measured from commercial operation. And PGE has already explained why this is not the case.¹¹¹

The Commission has repeatedly held that a desire to re-argue points already argued at an earlier stage of the proceeding is not *good cause* for further examination of an issue essential to the decision. In Order No. 97-232, the Commission denied a request for rehearing or reconsideration after concluding that “[t]he arguments [the applicant] makes in the application for reconsideration are similar to those made previously in his briefs, and [therefore] do not satisfy the requirements of ORS 756.561 and OAR 860-014-0095 [now OAR 860-001-0720] for reconsideration.”¹¹²

In Order No. 00-308, the Commission denied an application for rehearing or reconsideration filed by the Industrial Customers of Northwest Utilities (“ICNU”).¹¹³ The Commission noted that ICNU claimed to rely on an error of law or fact, but the Commission concluded that ICNU “merely reiterates its prior argument and its

¹⁰⁸ Docket No. UM 1805, Complainants’ Petition for Clarification and Application for Rehearing or Reconsideration at 12 (Sep. 11, 2017); Docket No. UM 1805, Petitioners’ Motion for Clarification and Application for Rehearing and Reconsideration at 18-24 (Sep. 8, 2017).

¹⁰⁹ Docket UM 1805, Complaint at ¶¶ 31-32 (Dec. 6, 2016) (alleging the existence of the “RPS Attributes” language and arguing that it demonstrates that the QF will receive fixed prices for 15 years from commercial operation).

¹¹⁰ Docket No. UM 1805, Complainants’ Motion for Summary Judgment at 26-30 (Apr. 24, 2017).

¹¹¹ Docket No. UM 1805, PGE’s Response in Opposition to Complainants’ Motion for Summary Judgment at 12-14 (May 8, 2017).

¹¹² Docket No. UE 92, Order No. 97-232 at 1 (Jan. 23, 1997).

¹¹³ Docket No. UM 954, Order No. 00-308 (Jun. 9, 2000).

disagreement with our decision and its underlying reasoning ... and provides no new legal or historical basis for review.”¹¹⁴ The fact that an applicant believes the Commission decided a question incorrectly is not “an error of law or fact in the order that is essential to the decision.”¹¹⁵ The Commission also noted that ICNU had introduced new matters that were beyond the scope of reconsideration because they were beyond the scope of the underlying proceeding.¹¹⁶ The Commission therefore denied ICNU’s application for rehearing or reconsideration.

In Order No. 92-1769, the Commission denied applications for rehearing or reconsideration filed by the Citizens’ Utility Board and by two ratepayers. The Commission noted that the applicants were reiterating arguments already made before the Commission issued the order being challenged and the Commission denied the applications for rehearing or reconsideration noting that the applicants failed to “offer any new or persuasive arguments for granting a rehearing or reconsideration of the final order.”¹¹⁷

Where the Commission is aware of the facts and the law, but simply reaches a different conclusion than that favored by the applicant for rehearing or reconsideration, there is no actionable *error of law or fact* and there is no *good cause* for rehearing or reconsideration. Because Petitioners are not raising a new argument but rather seeking to reiterate and re-litigate an issue already raised and decided, the application for rehearing or reconsideration should be denied for failure to satisfy OAR 860-001-720(3).

¹¹⁴ Docket No. UM 954, Order No. 00-308 at 4-5 (Jun. 9, 2000).

¹¹⁵ *Id.* at 5.

¹¹⁶ *Id.*

¹¹⁷ Docket No. UC 196, Order No. 92-1769 (Dec. 15, 1992).

In Docket No. UM 1610, Complainants CREA and REC, through their counsel Mr. Adams and Mr. Sanger, argued in a joint brief opposing an application for rehearing or reconsideration filed by PGE that: “Reconsideration is Not an Opportunity to Simply Re-Litigate Losing Arguments” and stated “the burden on reconsideration requires a party to do more than simply re-argue the same position it lost in the underlying proceeding.”¹¹⁸ As far as PGE can tell, by purporting to incorporate Petitioners’ arguments by reference, the Complainants are simply trying to re-litigate a losing argument that they already made during the scheduled time for summary judgment. The Commission should reject their attempt to do so and deny the application.

C. Other Problems with Complainants’ Application for Rehearing or Reconsideration.

There are many other problems with the argument that *Petitioners* make in their stricken and ineffective application for rehearing or reconsideration. For example, Petitioners suggest that Section 4.5 of the 2015 renewable standard contract form should be construed against the drafter.¹¹⁹ Petitioners then argue that Section 4.5 should be construed against PGE.¹²⁰ But in fact, the language of Section 4.5 was developed as part of a workshop process and actually proposed by Mr. Adams representing CREA. If there is going to be any construing the language against the drafter, it should be construed against Complainants.

In their roughly one-page application for rehearing and reconsideration, Complainants argue that numerous renewable QFs that are planned in Oregon signed the renewable 2015 standard contract form and it would be particularly unjust to conclude

¹¹⁸ Docket No. 1610, CREA and REC Response to Application for Reconsideration at 6 (Jul. 26, 2016).

¹¹⁹ Docket No. UM 1805, Petitioners’ Motion for Clarification and Application for Rehearing and Reconsideration at 18 (Sep. 8, 2017).

¹²⁰ *Id.*

that they are only entitled to fixed prices for 15 years measured from contract execution.¹²¹ But many of those QFs, like Petitioners' QF projects, signed their contract with PGE when it was well known that PGE's interpretation of its standard contract forms was that they limited the availability of fixed prices to first 15 years measured from contract execution.

For example, at least six of Petitioners ten QF projects executed their standard contracts with PGE after PGE filed its April 29, 2016 response in opposition to a motion for clarification in Docket No. UM 1725. In that response in opposition, PGE made it absolutely clear that PGE believed its then-current standard contract form—the standard contract form that Petitioners and Complainants are calling the 2015 Renewable Standard Contract Form—limited the availability of fixed prices to the first 15 years measured from contract execution.¹²²

In other words, many of the QFs that Complainants allege could be harmed by Order No. 17-256, including some or all of the Petitioners,¹²³ knew when they signed their contracts that PGE intended those contracts to limit the availability of fixed prices to the first 15 years measured from contract execution. If those QFs did not want to be bound to such terms, and if they believed that the Commission's orders compelled a different result, then they should have filed a complaint with the Commission *before*

¹²¹ Docket No. UM 1805, Complainants' Petition for Clarification and Application for Rehearing or Reconsideration at 12 (Sep. 11, 2017).

¹²² Docket No. UM 1725, PGE's Response in Opposition to Motion for Clarification filed by CREA and REC at 5-6 (Apr. 29, 2016) ("PGE's standard contracts and associated tariff Schedule 201 have always limited the payment of fixed rates to the first 15 years of a contract term. ... Clearly, the 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. From the time it was first proposed in response to Order No. 05-584 through the present day, Schedule 201 has always limited fixed rate payments to the first 15 years of the contract term.").

¹²³ It is possible that all Petitioners knew of PGE's position when they executed their contracts. In this brief, PGE is simply pointing out that at least six of the Petitioners' contracts were entered into after PGE made statements on the public record in UM 1725 regarding how the generic language of its standard contract forms limited the availability of fixed prices to the first 15 years following contract execution.

executing a contract that they knew PGE intended would limit the availability of fixed price to the first 15 years measured from contract execution.

Because PGE has not been presented with an application for rehearing or reconsideration from Complainants that actually contains the precise arguments Complainants intend to make, PGE respectfully reserves its right to respond further in the event the Commission decides to allow Complainants' request for rehearing and reconsideration to move forward notwithstanding that it failed to meet the requirements of OAR 860-001-0720 and notwithstanding the fact that the period for filing an effective application for rehearing or reconsideration has now passed. If the Commission allows Complainants' to adopt Petitioners' stricken and ineffective arguments by reference, PGE respectfully request that the Commission order Complainants to specify exactly what language and what portions of Petitioners' stricken September 8, 2017 application for rehearing and reconsideration Complainants are adopting by reference and asserting on their own behalf.

V. CONCLUSION

For the reasons discussed above, Complainants' petition for clarification and application for rehearing or reconsideration should be denied.

Dated this 24th day of October 2017.



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