

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1805

NORTHWEST AND INTERMOUNTAIN)	
POWER PRODUCERS COALITION,)	
COMMUNITY RENEWABLE ENERGY	)	REPLY TO PORTLAND GENERAL
ASSOCIATION and RENEWABLE	)	ELECTRIC COMPANY’S RESPONSE
ENERGY COALITION,	)	IN OPPOSITION TO NORTHWEST
	)	AND INTERMOUNTAIN POWER
Complainants,	)	PRODUCERS COALITION,
	)	COMMUNITY RENEWABLE
v.	)	ENERGY ASSOCIATION and
	)	RENEWABLE ENERGY
PORTLAND GENERAL ELECTRIC	)	COALITION’S MOTION FOR
COMPANY,	)	SUMMARY JUDGMENT
)	
Defendant.)	
_____)	

I. INTRODUCTION

Northwest and Intermountain Power Producers Coalition (“NIPPC”), Community Renewable Energy Association (“CREA”), and Renewable Energy Coalition (“Coalition”) (collectively “Complainants”) respectfully request that Oregon Public Utility Commission (“Commission”) Administrative Law Judge (“ALJ”) Allan Arlow reject Portland General Electric’s (“PGE’s”) misguided arguments about Order No. 05-584 and awkward interpretations of its own standard contracts. Complainants have demonstrated that there are no genuine issues of material fact, and that they are entitled to judgment as a matter of law because Complainants’ interpretation is the only one that gives effect to *all* of the Commission’s orders and policies on the 15-year period for fixed

prices.¹ Thus, Complainants' motion for summary judgment should be granted, and the Commission should issue a final ruling that confirms: 1) the Commission's policy requires 15 years of fixed prices from the time of power deliveries; and 2) PGE's standard contracts comply with that policy.

II. ARGUMENT

PGE's Response raises arguments that are unsupported, inconsistent, and ultimately unpersuasive. More significantly, however, the underlying premise behind PGE's entire interpretation simply does not make any sense. PGE asks the Commission to accept that, when the utilities made their compliance filings pursuant to Order No. 05-584, that the Commission and other parties understood that PGE was going to offer 11 to 12 years of fixed prices while Idaho Power Company ("Idaho Power") and PacifiCorp were going to offer a full 15 years of fixed prices, and that nobody objected to that unique interpretation. This would mean that the Commission simply chose not to address that point on the record, and that the parties in support of longer contract terms (Staff, QF parties, industrial customers, and the Oregon Department of Energy ("ODOE")) decided not to challenge it.² Had PGE's interpretation been as clear as PGE claims, it would have

¹ ORCP 47.

² After the Commission issued Order No. 05-584 requiring standard contracts, the Commission opened another phase of UM 1129 to address all three utilities' standard contract provisions. This second litigated phase had an issues list of almost one hundred issues and disputes regarding contract terms on both major and minor disputed contract provisions. See Re Investigation Related to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129, Corrected Ruling (Nov. 29, 2005). None of which included whether PGE should be allowed to have a 11 or 12 year fixed-price contract. There were literally hundreds of pages of testimony and briefing on the issue of 15 year contract terms in the UM 1129 alone and the Complainants are not aware that any of this include even a cursory reference to PGE's unique interpretation.

been objected to on the record or at least discussed in UM 1129, UM 1610, UM 1734, and UM 1725, because at a bare minimum it is inconsistent with Order No. 05-584's directive to file substantially similar standard contracts. Other than a strained reading of its *prior* standard contract, PGE offers no evidence that anyone (including PGE) was even *aware* of PGE's newly articulated position until PGE recently began informing QFs in power purchase agreement negotiations.

PGE also suggests that, when the Commission issued Order No. 05-584 stating that "prices should be fixed for only the first 15 years of the 20-year term", the Commission *intended* for that fixed-price period to begin upon contract execution. This means that the Commission either did not notice that PacifiCorp and Idaho Power chose to begin their fixed-price period upon power deliveries, or found that approach consistent with PGE's, despite an established Commission policy that the three utilities should have consistent major contract terms and conditions.

In addition to the myriad of faults in PGE's arguments the Complainants' identified in previous pleadings, PGE has two additional problems here. First, this would have been inconsistent with PGE's other argument that the Commission's goal to limit price divergence *requires* PGE to limit price divergence by starting fixed-price "payments" from contract execution. The Commission could not have meant that price divergence *required* the fixed-price term to start at contract execution, if Idaho Power and PacifiCorp were allowed radically different contract terms. Second, to believe PGE's "plain meaning" argument, that the Commission intended the contract term to begin upon execution, one must accept the notion that PGE was the *only* party to understand the Commission's true intent, and that everybody else (including PacifiCorp, Idaho Power,

Staff, ODOE, and the QF parties) unknowingly misinterpreted the Commission's orders for over a decade.³ PGE relentlessly argues that its interpretation is consistent with the plain language, despite the fact that PGE appears to be the only party that may have understood that meaning.

Complainant's interpretation, on the other hand, makes sense. When the Commission issued Order No. 05-584, it intended the fixed-price period to begin with power deliveries, because that is consistent with the way PPAs had been handled in the past. And because all three utilities used nearly identical language to update their tariffs and standard contracts in UM 1129, neither the Commission nor the parties realized that PGE may have misunderstood the Commission's directive. Or PGE may have understood the Commission's policy as well, but has recently articulated a new position. Complainants' interpretation is the only way to give meaning to all aspects of the Commission's orders, including those that reaffirmed the 15-year period in UM 1610, UM 1725, and UM 1734.

Finally, PGE continues its penchant for procedural tedium and raises two new evidentiary arguments. First, that Complainants have failed to provide evidence as to how PGE's executed standard contracts support their position. Second, that Complainants have failed to provide evidence as to how PGE's standard form contracts support their position. Both of these arguments are misguided, and addressed in detail

³ See e.g., PGE's Response at 12-13 (explaining the conclusion from Staff's attorney that "PGE may have completed and executed these contract so that the fifteen-year fixed-price term starts from the effective date of the contract rather than the QF's [commercial operation date]" and that "this cannot be known from the form of the contract reviewed and approved by the Commission" is incorrect).

below.

A. PGE’s Position on the 15-Year Fixed-Price Period is Inconsistent with PGE’s Own Arguments

Taken as a whole, PGE’s arguments that it has not violated Order No. 05-584 would mean that both PacifiCorp and Idaho Power have. PGE claims that the Commission does not have a policy requiring 15 years of fixed-price payments from commercial operation, and thus, that PGE has not violated Order No. 05-584. But PGE also argues that Order No. 05-584, which expressly adopted Public Utility Regulatory Policies Act (“PURPA”) policies, set the maximum term for the utilities’ standard contracts at 20 years.⁴ PGE cannot have it both ways. If the Commission has a policy setting the maximum term at 20 years from contract execution, then PacifiCorp and Idaho Power’s standard contracts necessarily violate the Commission’s maximum term policy.

PGE explains that PacifiCorp and Idaho Power have standard contract terms that actually start upon execution, but also allow up to 20 years from when power deliveries begin.⁵ To begin with, this interpretation is inconsistent with the other utilities’ testimony on contract term and their contract language.⁶ PGE states, however, that “each

⁴ Id. at 2 (“The Commission decided: (1) the maximum term of a standard contract is 20 years; (2) standard contract prices should be fixed for only the first 15 years of the 20-year term; and (3) a QF that opts for a 20-year contract must accept market prices for the final five years of the contract”).

⁵ Id. at 5 (“In response to Order No. 05-584, PacifiCorp and Idaho Power proposed approaches with standard contract terms that ran from contract execution for a maximum of 20 years after the scheduled initial delivery date (PacifiCorp) or the QF’s operation date (Idaho Power).”).

⁶ See e.g., Re Investigation into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, PacifiCorp’s Phase II Opening Testimony at PAC/1000, Griswold/6 (May 22, 2015) (“For example, assume a QF’s scheduled commercial operation date is January 1, 2017 . . . and the QF has selected a 20-year contract

utility proposed a different approach regarding when the standard contract term ends and when the 15-year limit on fixed prices runs” without acknowledging that the math on this does not add up. Thus, by arguing that PGE has not violated the Commission’s directive on the 15-year fixed-price period, PGE implies that PacifiCorp and Idaho Power were violating the Commission’s directive to set the maximum contract term at 20 years.

Complainants counter that Order No. 05-584 expressly set out a policy requiring 15 full years of fixed-price payments, which can only be obtained if the fixed-price period begins when power deliveries begin. All three utilities’ power purchase agreements are consistent with this policy, and it is PGE’s recently articulated interpretation of its own contract that has violated Order No. 05-584 by telling QFs that it will not pay a full 15 years of fixed prices.

Moreover, Order No. 05-584 explained that it was not necessary that “particular terms be identically worded across all standard contract forms, so long as the meaning of each term is consistent with the present or past decisions.”⁷ PGE attempts to distinguish between each utility’s standard contract rather than acknowledging that it has a unique interpretation and that the other two utilities’ have effectively the same interpretation as nearly everyone else in the power industry. PGE’s characterization of “three clearly

term. The QF’s 15-year fixed price term begins January 1, 2017, and ends December 31, 2031.”); PacifiCorp’s Compliance Filing at PPA at 2.4, Schedule 37 at 2 (Section 2: Term; Commercial Operation Date” states the contract will terminate “no later than 20 years after the Scheduled Initial Delivery Date” and Schedule 37 states, “Fixed Avoided Cost Prices are available for a contract term of up to 15 years and prices under a longer-term contract (up to 20 years)”).

⁷ Re Investigation Related to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129, Order No. 05-584 at 41 (May 13, 2005).

different approaches to the 15-year limit on fixed prices” is a stretch.⁸ In reality, PGE’s interpretation of both the 15-year fixed-price period and the 20-year overall contract term are inconsistent with the other utilities’ contracts and compliance filings as well as its own contract.

B. PGE’s Position on the Purpose of Order No. 05-584 is Not Supported by Any of the Commission’s Orders involving the 15-Year Fixed-Price Period and is Inconsistent with Order Nos. 16-129 and 16-130

PGE reads too much into Order No. 05-584 with respect to price divergence and conveniently ignores that the Commission has repeatedly undermined what PGE claims was the Commission’s goal. PGE repeats its argument that the 15-year period is intended “to limit the divergence between forecasted costs and actual avoided costs to 15 years” without acknowledging that this argument hinges on PGE’s assumption that the Commission intended the contract term to begin upon execution.⁹ But PGE has already conceded that the Commission never expressly stated that the contract term should begin upon execution, and that the Commission has never required that of any utility. Thus, PGE should address why the Commission would have allowed both PacifiCorp and Idaho Power to offer fixed prices from commercial operation if it intended to limit price divergence *from contract execution* as PGE suggests. PGE hasn’t offered an explanation, because there is not one.

Although PGE never directly acknowledges that its interpretation precludes QFs from obtaining a full 15 years of fixed-price payments, and therefore undermines the

⁸ PGE’s Response at 9.

⁹ PGE’s Motion for Summary Judgment at 26 (“Order No. 05-584 . . . does not specify when the 20-year contract term beings”).

Commission's other goal of allowing QFs to establish adequate financing, PGE vaguely suggests that 11 years of payments is a more faithful interpretation of Order No. 05-584 than allowing up to 19 years of price divergence.¹⁰ This is misguided. PGE ignores the inconvenient fact that the fixed-price period will "lock-in" rates and limit price divergence to 15 years no matter when that 15-year period begins.

What PGE does focus on is the Company's portrayal of the Commission's process, which is mainly irrelevant and does not tell the full story. PGE's claims that the compliance filings were "thoroughly" reviewed is inapt because this precise interpretation issue was never raised and that it is difficult to read PGE's standard contract and rate schedule in the way that PGE claims it reads, especially when there are such similar terms and conditions as the other two utilities.

Moreover, PGE ignores that the other utilities' approach has been more than merely acknowledged, because both PacifiCorp and Idaho Power have specifically requested the authority to reduce their QF contract terms. In UM 1734, PacifiCorp requested a three-year contract term and, in UM 1725, Idaho Power requested a two-year contract term. In both cases, the Commission determined there was no reason to change its existing policy on QF standard contract terms.¹¹ More significantly, the Commission required PacifiCorp and Idaho Power to continue offering a full 15 years of fixed

¹⁰ PGE's Response at 16.

¹¹ See Re PacifiCorp, dba Pacific Power, Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap, Docket No. UM 1734, Order No. 16-130 at 5 (Mar. 29, 2016); Re Idaho Power Company, Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, Docket No. UM 1725, Order No. 16-129 at 6-8 (Mar. 29, 2016).

payments from power deliveries rather than something shorter.

If PGE's view were correct, and its interpretation to the 15-year fixed-price period was intended by the Commission (or even understood by the Commission, PacifiCorp, or Idaho Power), then when the other utilities requested a shortened contract term, the Commission could have allowed those utilities to shorten their contract terms. The Commission could have accomplished this by allowing them to begin offering their fixed-price payments upon contract execution, or allowed their contract terms to start at power deliveries, but specify that the term with fixed prices would be 11 years long. Notably, in UM 1725 and UM 1734, the Commission found that most QFs generally need 15 years of fixed prices, not that only PacifiCorp and Idaho Power's QFs need 15 years, but QFs selling to PGE need some lesser term. Simply put, if the Commission found 11 or 12 years of fixed-price payments acceptable for PGE, then it would not have required PacifiCorp and Idaho Power to continue to offer 15 years just last year and could have allowed them to offer 11 or 12 years of payments.

In the end, Order Nos. 16-129 and 16-130 directly contradict PGE's attempts to argue that the Commission has allowed PGE to have a different "approach" to the 15-year limit on fixed prices, that its interpretation is consistent with the "plain and ordinary" meaning of the Commission's intent, or that it is a more faithful interpretation of Order No. 05-584's goal limiting price diversion at 15 years from contract execution.

C. Despite PGE's Claims, Complainants Have Met Their Burden of Proof and Are Entitled to Judgment as a Matter of Law

PGE also raises two evidentiary arguments that warrant a brief response. First, PGE suggests that Complainants have not presented any evidence explaining how the

PaTu and OneEnergy contracts support their arguments. Second, PGE claims that Complainants have not presented any evidence explaining how PGE's standard contract supports their claims. Both arguments are incorrect and addressed below.

1. PGE's Executed Contracts with PaTu and OneEnergy Are Merely Illustrative Examples of How PGE's Contracts Could Be Filled Out to Allow a Full 15 Years of Fixed-Price Payments

PGE claims that there is no evidence explaining how the PaTu and OneEnergy contracts support Complainants' argument. PGE also notes that it provided a very thorough explanation of each contract in its own Motion/Response. Despite PGE's claims, Complainants have addressed these two previously-executed contracts.¹² Complainants did not provide another lengthy explanation interpreting the contract primarily for two reasons. First, the plain meaning of the contracts demonstrate that they provide a full 15 years of fixed-price payments. Second, Complainant's have repeatedly argued that PGE's previously executed standard contracts need not be interpreted in this proceeding to determine the issues raised by Complainants. These two examples are merely illustrative as to how PGE could use its existing standard form contract to more clearly provide a full 15-years of fixed prices.

PGE's contract with PaTu illustrates how PGE can allow a full 20-year term from the commercial operation date rather than upon the effective date by filling in the blank spaces accordingly. Similarly, PGE's contract with OneEnergy illustrates how PGE can allow 15 years of fixed prices from commercial operation date rather than upon the

¹² See Complaint at 9; see also Complainants' Motion for Summary Judgment at 29-30, n. 79,80 (citing PGE's Answer at ¶¶ 24-25 (Mar. 28, 2017)) (explaining how PGE's contracts have been filled out in a way that removes any potential ambiguity by QFs).

effective date by likewise filling in the blank spaces on its contract accordingly.

Complainants have offered evidence of this issue and reiterate the argument that PGE's standard form contract allows for a full 15-years of fixed prices, should PGE choose to allow QFs to fill out the blanks accordingly.

To be clear, however, the Complainants are not arguing that any standard contracts need to be filled out in the manner of the PaTu and OneEnergy contracts to obtain 15 years of fixed-price payments. As repeatedly explained by the Complainants, the plain meaning and intent of PGE's standard contracts allow a QF to merely fill in the blanks and obtain 15 years of fixed prices.

2. PGE's Various Standard Contract Forms Demonstrate PGE's Inconsistent Positions and Business Practices, But Need Not Be Interpreted to Resolve the 15-Year Issue

Next, PGE claims that there is no evidence explaining how PGE's standard form contracts support Complainants' argument that "PGE's standard contract forms are ambiguous" ¹³ This is incorrect for several reasons. First, Complainants do not argue that PGE's standard contracts are ambiguous. Within the proper context, which normally distinguishes between the contract's effective date and the beginning of the contract term, there is no ambiguity. PGE's argument, on the other hand, appears to suggest that its contracts had a latent ambiguity, which was not clear until PGE clarified its position and raised an alternative interpretation of the Commission's policy.

Second, Complainants have offered evidence as to how PGE's standard contract forms support their position. PGE states that "Complainants do not bother to review the

¹³ PGE's Response at 4.

actual language of PGE’s standard contract forms, or provide any analysis or evidence showing how the contracts can be used in the way Complainants assert they can be used.”¹⁴ Yet, Complainants’ Motion for Summary Judgment states, “[s]imply put, because PGE’s contracts do not expressly specify when the fixed-price period begins, and allows for a date to be filled in, the current contracts can be used in a way that adheres to the Commission’s policy.”¹⁵ Next, Complainants demonstrate how this issue was directly confronted by Staff in UM 1725, after PGE offered its position on the Commission’s 15-year policy, and Staff supported Complainants’ position—noting that one of PGE’s standard contract forms directly contradicted PGE’s position. The Complainants position is supported by the plain language of the contract provisions.

Finally, just as with the PaTu and OneEnergy contracts, Complainants are not asking the Commission to interpret any of PGE’s older standard form contracts. These older form contracts are merely illustrative of PGE’s inconsistent views on the Commission’s policy and business practices. In short, PGE’s current standard form contract can be filled out to unambiguously provide a full 15-years of fixed-price payments, as required by the Commission’s policy.

III. CONCLUSION

PGE has failed to offer any issues of material fact or present any legal arguments that require a hearing, thus, Complainants are entitled to judgment as a matter of law. PGE has merely repeated its inconsistent arguments that, taken together, just do not make any sense. The Complainants have offered the only legally cognizable resolution to this

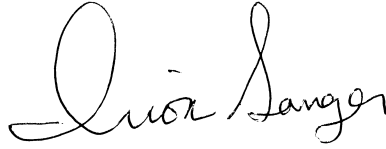
¹⁴ Id. at 12.

¹⁵ Complainants’ Motion for Summary Judgment at 26.

case. Thus, the Commission should grant Complainants' motion for summary judgment.

Dated this 15th day of May 2017.

Respectfully submitted,

A handwritten signature in black ink that reads "Irion Sanger". The signature is written in a cursive style with a large initial "I".

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