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**V. Denise Saunders**  
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January 5, 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 are Portland General Electric Company's Comments and Recommendations regarding Declaratory Ruling.

Thank you in advance for your assistance.

Sincerely,

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

V. Denise Saunders  
Associate General Counsel

VDS:bop

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 COMMENTS AND  
RECOMMENDATIONS REGARDING  
THE APPROPRIATENESS OF  
ADDRESSING THE ISSUES RAISED  
IN THE COMPLAINT THROUGH A  
DECLARATORY RULING**

Administrative Law Judge (“ALJ”) Allan Arlow has directed the parties and Commission Staff to file comments and recommendations regarding “the appropriateness of addressing the issues raised in the complaint via a declaratory ruling.”<sup>1</sup> Portland General Electric Company (“PGE”) respectfully submits these comments and recommendations in response.

**I. INTRODUCTION**

On December 6, 2016, Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition (collectively, “Complainants”) filed a complaint against PGE pursuant to ORS 756.500.

On December 16, 2016, PGE filed timely motions to strike, to make more definite and certain, and for more time to respond (“PGE’s Motions”). PGE filed these motions because the

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<sup>1</sup> Docket No. UM 1805, Prehearing Conference Memorandum at 1 (Dec. 22, 2016).

complaint improperly combines multiple claims in violation of ORCP 16 B<sup>2</sup> and because the complaint is so vague PGE cannot determine the precise nature of Complainants' claims. Of particular concern to PGE are ambiguous assertions that the relief requested will involve the interpretation of previously executed standard contracts. The complaint fails to identify the contracts to be interpreted or the language to be interpreted.

On December 22, 2016, ALJ Arlow conducted a prehearing conference. During the conference ALJ Arlow directed the parties and Commission Staff to file comments and recommendations regarding the appropriateness of addressing the issues raised in the complaint via a declaratory ruling.

## II. COMMENTS

### A. Appropriateness of Declaratory Ruling.

Commission Staff conducted an analysis based on statutory interpretation of ORS 756.450 and concluded “that a declaratory ruling is an appropriate mechanism for applying Commission rules and statutes to a set of facts, but is not an appropriate mechanism for the application of Commission orders.”<sup>3</sup> Staff has concluded that “Complainants’ issues do not meet the statutory criteria for a declaratory ruling given that the issues do not turn on the proper application of a Commission rule or statute, but instead involve ‘two discrete legal questions having to do with the Commission’s policy, as laid out in several Commission orders.’”<sup>4</sup> Complainants indicate no preference for either procedure.<sup>5</sup> PGE has no objection to moving forward with a complaint proceeding but strongly believes that procedural and substantive due

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<sup>2</sup> ORCP 16 B provides in relevant part: “Each separate claim or defense shall be separately stated. Within each claim alternative theories of recovery shall be identified as separate counts.” The Commission has adopted this rule by reference in contested case and declaratory ruling proceedings. *See* OAR 860-001-0000(1).

<sup>3</sup> Docket UM 1805, Commission Staff’s Comments on Declaratory Ruling Option at 4 (Dec. 30, 2016).

<sup>4</sup> *Id.* at 8.

<sup>5</sup> Docket UM 1805, Complainants’ Comments on Declaratory Ruling Option at 1-2 (Dec. 29, 2016).

process entitle PGE to understand Complainant’s claims and be afforded an opportunity to object to, move against, or otherwise oppose claims that PGE believes are without merit, are non-justiciable, or are otherwise flawed.

**B. The Issues Raised By the Complaint.**

In their December 29, 2016 comments regarding the appropriateness of a declaratory ruling, Complainants assert that their complaint raises “two simple and straightforward questions” which they described as: 1) whether Commission policy entitles a QF to 15 years of fixed prices from the time the facility delivers its net output; and 2) whether PGE’s standard contract entitles QFs to 15 years of fixed prices from the time of deliveries.<sup>6</sup>

While it is helpful to obtain a succinct statement of the questions the Complainants want the Commission to answer, these “simple and straightforward questions” do not appear in the complaint. The complaint—not Complainants’ comments—is the operative pleading establishing the claims against PGE.<sup>7</sup> Complainants should be required to amend the complaint to clearly state their “simple and straightforward questions.” As importantly, the Complainants should amend their complaint to allege what specific provisions of statute, rule or Commission order PGE is alleged to have violated.

As best PGE can determine, it appears Complainants seek two declarations from the Commission:

- (1) A declaration that the Commission’s existing “policy” requires PGE to offer fixed prices for 15 years measured from the date a QF achieves commercial operation; and

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<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Navas v. City of Springfield*, 857 P.2d 867, 870 122 Or. App. 196, 200 (1993)(“Generally, a trial court has no authority to render a decision on an issue not framed by the pleadings.”); *Sholl v. Anderson*, 50 P.3d 1248, 1252, 182 Or. App. 659 (2002)(citing *Navas* with approval).

- (2) A declaration that PGE's currently available standard form contracts and currently effective Schedule 201 Tariff are compatible with such a "policy" and do not require any revisions to adapt them to such a "policy".

But it appears that Complainants may also be seeking to have the following additional claims addressed:

- (3) Whether PGE's *superseded* standard contract forms and *superseded* Schedule 201 Tariffs are compatible with Complainants' alleged requirement that PGE offer fixed prices for 15 years from the date a QF achieves commercial operation. To the extent Complainants intend to make this claim, PGE believes it is non-justiciable as moot and should be subject to a motion to dismiss or other dispositive motion.
- (4) Whether PGE's *previously executed* standard contracts are compatible with Complainants' alleged requirement that PGE offer fixed prices for 15 years from the date a QF achieves commercial operation.<sup>8</sup> If Complainants intend to make such a claim, PGE believes it is non-justiciable because Complainants lack standing to seek adjudication of the private rights of contract represented by the executed contracts and because Complaints have failed to join indispensable parties (the QF counterparties to the executed contracts).
- (5) Whether the Commission should revise its existing orders authorizing PGE to offer fixed prices for 15 years measured from the date a standard contract is executed. If Complainants seek such a change, they need to do so as part of a different proceeding, such as a rulemaking, because the period has passed for seeking clarification, rehearing or reconsideration of Order 05-584 or of the Commission's orders approving PGE's form contracts and Schedule 201 tariffs.

Again, it is not clear from the complaint whether Complainants seek any of the relief described in items (3) through (5) above. PGE is inappropriately left to guess about the scope of Complainants claims. If Complainants seek to advance any version of the relief described in items (3) through (5), PGE is entitled to clear notice of the fact so that PGE can move against such claims on the grounds that they are non-justiciable or on any other appropriate grounds.

The Commission should grant PGE's pending motions and order Complainants to amend their complaint: (a) to clearly and separately state each claim asserted against PGE; (b) to clearly

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<sup>8</sup> The vague allegations about "interpretation" of executed contracts contained in paragraph 10 of the complaint suggest Complainants may seek the determination described in item (4) above, notwithstanding Complainants' comment that they "are not seeking to revisit any individual QF contracts executed between PGE and any individual QF." Docket No. 1805, Complainants' Comments at 4 (Dec. 29, 2016).

state the specific requirement of statute, rule, or Commission order that PGE is alleged to have violated with regard to each claim; (c) to separately state the relief sought for each claim; (d) to clarify the scope and nature of Complainants' request that the Commission "interpret" executed standard contracts; (e) to specify which executed contracts and what executed contract language should be "interpreted"; (f) to clearly state Complainants "two simple and straightforward questions" articulated in Complainants' December 29, 2016 comments; and (g) to clearly state whether Complainants seek any additional relief, including without limitation any of the determinations described as items (3) through (5) above.

**C. There is No Basis To Waive Regular Procedure and Adopt an Expedited Process.**

In their December 27, 2016 comments, Complainants repeatedly suggest that PGE seeks to delay or frustrate this proceeding. There is no basis upon which to reach such a conclusion. PGE does not seek delay and PGE is not seeking to make this case complex.

It is Complainants' vague and imprecise complaint that makes this case complex. PGE hopes that when the complaint is amended to provide a clear statement of each claim and a clear statement of what specific requirements of statute, rule or order PGE is alleged to have violated, this case will become clear and may be subject to a dispositive motion to dismiss and/or motion for summary judgment.

Complainants' hyperbolic claims of delay are not well made given that this case is only weeks old. Complainants chose to bring a complaint proceeding. The Commission has noted that "[c]ontested case proceedings are subject to the most procedural requirements of any decision-making process used by the Commission."<sup>9</sup> The Commission's regulations provide a regular process and regular time frames for motions to test and perfect a complaint and for the

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<sup>9</sup> *In the Matter of Public Utility Commission of Oregon, Internal Operating Guidelines*, Docket No. UM 1709, Order No. 14-358 at 7 (Oct. 17, 2014).

filing of an answer and affirmative defenses.<sup>10</sup> There is no basis upon which to consider the justified use of due process a delaying tactic.

In their December 29, 2016 comments, Complainants urge the Commission and ALJ Arlow to depart from regular process and adopt an expedited process. Complainants appear to seek a process that does not include an amended complaint or an answer and that asks the Commission to instead proceed solely on the basis of a stipulated issue list and immediate motions for summary judgment without the possibility of discovery.<sup>11</sup>

Complainants have provided no showing of good cause why the regular process must be abandoned in favor of a rushed and ill-defined process. PGE has been in compliance with the Commission's orders regarding fixed prices since 2005. The Complainants have had 11 years to bring their claims; they should not now be allowed to rush a decision to the detriment of the PGE's due process rights.

The Commission or ALJ can waive timelines or procedures for limited purposes in specific proceedings, provided a waiver is requested in writing and good cause is shown to support waiver.<sup>12</sup> Complainants have made no attempt to show good cause to depart from the Commission's regular process and timeframes.

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<sup>10</sup> See e.g., OAR 860-001-0420(3) ("A motion against an initiating or responsive pleading ... must be filed within 10 days after the pleading is filed."); OAR 860-001-0400(4)(a) ("An answer to a complaint ... must be filed within 20 days after the pleading is filed."); ORCP 15 B(1) ("If the court denies a motion, any responsive pleading required shall be filed within 10 days after service of the order, unless the order otherwise directs.").

<sup>11</sup> Docket UM 1805, Complainants' Comments on Declaratory Ruling Option at 1 (requesting an expedited resolution via legal pleadings and recommending adoption of the process in UM 1799) and 8-9 (recommending adoption of schedule similar to that in UM 1799 including a date by which the parties file a joint issue list and stipulated facts and file motions for summary judgment and requesting resolution of all procedural motions on an expedited basis).

<sup>12</sup> OAR 860-001-000(2) ("For limited purposes in specific proceedings, the Commission or ALJ may modify or waive any of the rules in this division for good cause shown. A request for exemption must be made in writing, unless otherwise allowed by the Commission or ALJ.")

**D. Process Proposed by PGE.**

PGE has no objection to making this proceeding as efficient as possible. PGE has no interest in prolonging this proceeding or making it more complex than necessary. But PGE does have a procedural and substantive due process interest in availing itself of the regular processes provided by the Commission's contested case procedures so that PGE can understand Complainants' claims and retain an opportunity to object to, move against, or otherwise oppose claims that PGE believes are without merit, are non-justiciable, or are otherwise flawed.

In the interest of efficient resolution of the issues presented by PGE's pending motions, and in an effort to achieve a rapid opportunity for the resolution of any preliminary legal questions presented by the complaint, PGE proposes the following approach:

1. Complainants voluntarily amend their complaint: (i) to state each of their claims separately, (ii) to identify the specific provisions of statute, rule or Commission order they allege PGE has violated with respect to each claim; (iii) to separately state the relief requested by each claim, (iv) to reflect the "two simple and straightforward questions" that Complainants have articulated in their comments, (v) to identify any additional claims they seek, (vi) to clarify the scope and nature of the request for interpretation of previously executed contracts; and (vii) to specify which contracts and what language should be interpreted.
2. Once an amended complaint is filed and served, PGE will have 10 days to file any motions against the complaint and 20 days to file an answer.
3. Once PGE has answered, ALJ Arlow will convene a prehearing conference and, to the extent then deemed appropriate, adopt an approach similar to that in UM 1799 where the parties are directed to attempt to develop a joint list of agreed or disputed facts and defined legal issues and the time line for discovery (if any) and summary judgment motions is established.

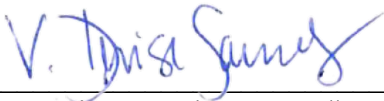
This approach provides for regular process to develop clear claims through an amended complaint and for PGE to file an answer and affirmative defense. It facilitates rapid resolution of this case through motions to dismiss filed against an amended complaint, if appropriate. And it facilitates the efficient presentation and decision of motions for summary judgment as desired by



Complainants. Based on some of the allegations in the current complaint, PGE anticipates that the parties may have significant disagreement about both factual allegations and the relevant legal issues. In UM 1799, the time for motions against the complaint had elapsed and defendant was allowed to file an answer *before* the Commission scheduled a motion for summary judgment and directed the parties to prepare a Joint List of Stipulated Facts and Defined Legal Issues. The same opportunity for preliminary motions and an answer should apply in this case.

Dated this 5<sup>th</sup> day of January 2017.

Respectfully submitted,



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