

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 OBJECTION TO JOINT
PETITION TO INTERVENE OUT OF
TIME**

Pursuant to OAR 860-001-0300(5), Portland General Electric Company (“PGE”) objects to the joint petition to intervene out of time (“Petition”) filed on September 8, 2017, by Dayton Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, Wasco Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Alfalfa Solar I LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, and Riley Solar I LLC (collectively, “Petitioners”).

I. INTRODUCTION

PGE respectfully requests that the Public Utility Commission of Oregon (“Commission”) deny the Petition for the following reasons. First, the Commission lacks the statutory authority to grant the Petition because the proceeding has moved beyond the final taking of evidence and the Commission has issued an order disposing of the case. Second, even if the Commission had the statutory authority to grant the Petition, it should refuse to do so because Petitioners would unreasonably expand the issues in this

proceeding. Third, the equities do not favor granting the petition: the Petitioners participated in the initial prehearing conference in this matter and were encouraged by the Commission to intervene but decided not to do so; even if the Petition is granted, it is now too late for the Petitioners to file a timely application for rehearing or reconsideration; and the Complainants have filed an application for rehearing and reconsideration which will address most of the issues Petitioners seek to address through their time-barred petition to intervene and their time-barred application for rehearing or reconsideration.

II. BACKGROUND

A. The Complaint Proceeding.

This proceeding arises out of a complaint filed against PGE on December 6, 2016, by Northwest Intermountain Power Producers Coalition, the Community Renewable Energy Association, and Renewable Energy Coalition (collectively “Complainants”).¹ The complaint alleged that Order No. 05-584 established a Commission policy requiring electric utilities to pay qualifying facilities (“QFs”) fixed prices for 15 years measured from the date a QF achieves commercial operation.² The complaint alleged that PGE’s current and prior standard contract forms and Schedule 201 rate schedules provided for fixed prices for 15 years from commercial operation.³ The complaint alleged that in 2016

¹ Docket No. UM 1805, Complaint (Dec. 6, 2016).

² *See, e.g., Id.* at 1 (“The Commission’s policy is that 15 years of fixed pricing commences when the QF achieves operation.”), at ¶ 47 (“The Commission’s policy set forth in its extant orders is to require Oregon’s public utilities to offer fixed prices for 15 full years after operation begins – not only for 15 years after execution of the standard contract, which almost always occurs months to years in advance of operation.”), and at ¶ 56 (“PGE’s refusal to follow Commission policy that all QFs can obtain 15 years of fixed prices commencing on the Commercial Operation Date is arbitrary, and unjustly harms those QFs who PGE asserts are entitled to 15 years of fixed prices from the Effective Date.”).

³ *See, e.g., 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.”); at ¶ 22 (“PGE’s Commission-approved standard contracts and Schedule 201 available since 2005 have

PGE began to improperly dispute that its contract forms provide for fixed prices for 15-years from commercial operation and instead began taking the position that its forms provided for 15 years of fixed prices measured from contract execution.⁴

The complaint asked the Commission to issue an order declaring that PGE's standard contract requires fixed prices for 15 years measured from commercial operation, unless the QF inserts express language that demonstrates a contrary intent.⁵ Complainants sought such a ruling with regard to all versions of PGE's standard contract forms used by PGE after Order No. 05-584.⁶ The complaint also asks the Commission to order PGE to stop openly disputing that it must offer 15 years of fixed prices from the commercial operation date.⁷ In the alternative, if the Commission denied the above relief, the complaint asks the Commission to order PGE to file revised standard contracts clearly stating that the 15 years of fixed prices run from the commercial operation date.⁸

PGE responded by denying that Commission policy as established by Order No. 05-584 requires PGE to offer fixed prices for 15 years measured from commercial operation.⁹ PGE also denied that its current or prior standard contract forms and Schedule 201 rate schedules provided for 15 years of fixed prices measured from commercial operation.¹⁰ PGE instead argued that all of PGE's standard contract forms and Schedule 201 rate schedules filed since Order No. 05-585 have provided for fixed prices for 15

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.").

⁴ See, e.g., Docket No. UM 1805, Complaint at ¶ 28 (Dec. 6, 2016) ("At no time prior to 2016 did PGE publicly state that it would only pay QFs 15 years of fixed prices commencing on the effective date of the PPA.").

⁵ *Id.* at 16 (see paragraph 2 of the Prayer for Relief).

⁶ See, e.g., *Id.* at ¶¶ 9-10, 22-26, 3-32.

⁷ *Id.* (see paragraph 1 of the Prayer for Relief).

⁸ *Id.* (see paragraph 3 of the Prayer for Relief).

⁹ Docket No. UM 1805, PGE's Answer at ¶ 56 (Mar. 28, 2017) ("... PGE denies that it is Commission policy that all QFs can obtain 15 years of fixed prices commencing on the Commercial Operation Date.").

¹⁰ See, e.g., *Id.* at ¶¶ 22, 49 and 50.

years measured from contract execution and that the Commission has approved those form contracts and rate schedules.¹¹

On December 20, 2016, the Commission issued notice of a December 22, 2016 prehearing conference to be held for the purpose of identifying parties and establishing a procedural schedule.¹² The Commission strongly encouraged any person wanting to participate as a party to the proceeding to file a petition to intervene before the prehearing conference.¹³ Renewable Northwest filed a petition to intervene the next day—December 21, 2016.¹⁴ The proceeding was assigned to Administrative Law Judge (“ALJ”) Allan J. Arlow, who presided over the initial prehearing conference on December 22, 2016, and granted Renewable Northwest’s petition to intervene.¹⁵ The Petitioners—NewSun Energy—participated in the initial prehearing conference.¹⁶ However, Petitioners elected not to intervene in the proceeding.

PGE and Complainants ultimately filed a list of stipulated facts and issues and filed two lists of facts and issues upon which the parties were unable to agree.¹⁷ PGE then filed an answer denying most of the allegations in the complaint.¹⁸ Following the answer,

¹¹ See, e.g., Docket No. UM 1805, PGE’s Answer at ¶ 39 (Mar. 28, 2017). See also, Docket No. UM 1805, PGE’s Motion for Summary Judgment at 1-2 (Apr. 24, 2017) (“PGE’s Schedule 201 and standard contract forms have provided for [fixed prices for 15 years measured from contract execution] since July 2005 and the Commission has repeatedly approved PGE’s rate schedule and form contracts as consistent with the requirements of its orders.”); Docket No. UM 1805, PGE’s Reply in Support of PGE’s Motion for Summary Judgment at 19 (May 15, 2017) (noting that PGE’s standard contract forms, from 2005 through the present, have consistently and unambiguously provided for a contract term that begins at contract execution and extends for a maximum of 20 years with the consequence that fixed prices for the first 15 years of that term means fixed prices for the first 15 years measured from contract execution).

¹² See Docket No. UM 1805, Notice of Expedited Prehearing Conference at 1 (Dec. 20, 2016).

¹³ *Id.*

¹⁴ Docket No. UM 1805, Renewable Northwest’s Petition to Intervene (Dec. 21, 2016).

¹⁵ Docket No. UM 1805, Prehearing Conference Memorandum at 1 (Dec. 22, 2016).

¹⁶ *Id.*

¹⁷ Docket No. UM 1805, PGE’s and Complainants’ Joint Statement (Mar. 10, 2017).

¹⁸ Docket No. UM 1805, PGE’s Answer (Mar. 28, 2017).

PGE and Complainants each filed a motion for summary judgment¹⁹ and both PGE and Complainants filed additional evidence.²⁰ The motions for summary judgment were fully and extensively briefed.²¹

B. Order No. 17-256.

On July 13, 2017, the Commission issued Order No. 17-256 granting PGE's motion for summary judgment and dismissing the complaint.²² The Commission summarized its holding in Order No. 17-256 as follows:

In this order, we grant the motion for summary judgment of Portland General Electric Company (PGE) and dismiss the complaint filed by Northwest Intermountain Power Producers Coalition (NIPPC), the Community Renewable Energy Association (CREA), and Renewable Energy Coalition (Coalition) (complainants). We find that PGE has lawfully offered standard contracts to operators of qualifying facilities (QFs) that have 15-year periods of fixed prices that begin on the date of execution, rather than on the date that the QF begins to transmit power.

We further conclude, however, that PGE must, on a going forward basis, offer standard contracts in which the 15-year period of fixed prices begins on the date that a QF begins to transmit power to the utility.²³

More specifically, the Commission concluded that Order No. 05-584, which required utilities to offer 15 years of fixed prices, did not specify the date on which the

¹⁹ Docket No. UM 1805, PGE's Motion for Summary Judgment (Apr. 24, 2017); Docket No. UM 1805, Complainants' Motion for Summary Judgment (Apr. 24, 2017).

²⁰ Docket No. UM 1805, Declaration of Shawn Davis in Support of PGE's Motion for Summary Judgment (Apr. 24, 2017) (PGE submits additional evidence through declaration and exhibits accompanying PGE's motion for summary judgment); Docket No. UM 1805, Complainants' Response to PGE's Motion for Summary Judgment (May 8, 2017) (Complainants submit additional evidence as exhibits to Complainants' response in opposition to PGE's Motion for Summary Judgment).

²¹ There were more than 140 pages of briefing in this case. *See* Docket No. UM 1805, PGE's Motion for Summary Judgment (Apr. 24, 2017); Docket No. UM 1805, Complainants' Motion for Summary Judgment (Apr. 24, 2017); Docket No. UM 1805, PGE's Response in Opposition to Complainants' Motion for Summary Judgment (May 8, 2017); Complainants' Response in Opposition to PGE's Motion for Summary Judgment (May 8, 2017); Docket No. UM 1805, PGE's Reply to Complainants' Response in Opposition to PGE's Motion for Summary Judgment (May 15, 2017); Complainants' Reply to PGE's Response in Opposition to Complainants' Motion for Summary Judgment (May 15, 2017); and Docket No. UM 1805, Renewable Northwest's Response to PGE's Motion for Summary Judgment (May 15, 2017).

²² Docket No. UM 1805, Order No. 17-256 (Jul. 13, 2017).

²³ *Id.* at 1.

15-year term begins.²⁴ The Commission noted: “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.”²⁵ The Commission concluded:

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. Accordingly, PGE's motion to dismiss the complaint should be granted.²⁶

However, the Commission did not stop at granting PGE's motion for summary judgment and dismissing the Complaint. Instead, the Commission took the opportunity to “clarify” its 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.”²⁷ The Commission concluded Order No. 17-256 by stating:

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 revised. However, PGE should promptly file revisions to Schedule 201 which shall include a revised standard contract PPA with language consistent with our requirement that the 15-year term of fixed prices commences when the QF transmits power to the utility.²⁸

C. The Petition to Intervene Out of Time and Applications for Rehearing or Reconsideration.

Pursuant to ORS 756.561, a *party* may request rehearing or reconsideration of Order No. 17-256, but a request for rehearing or reconsideration must be filed within 60 days of the service date of the order (in this case, a request for rehearing or

²⁴ *Id.* at 3.

²⁵ Docket No. UM 1805, Order No. 17-256 at 3 (Jul. 143, 2017).

²⁶ *Id.*

²⁷ *Id.* at 4.

²⁸ *Id.*

reconsideration must be filed by a *party* on or before September 11, 2017).²⁹ On Friday, September 8, 2017, one business day before the running of the deadline to file a request for rehearing or reconsideration, the Petitioners filed a petition to intervene out of time and a request for rehearing or reconsideration.³⁰ On Monday, September 11, 2017—the deadline for filing a request—Complainants filed a request for rehearing or reconsideration of Order No. 17-256.³¹

Petitioners had actual notice of the complaint, the proceeding, and the parties’ positions. Indeed, Petitioners admit they participated in the initial prehearing conference. Petitioners could have easily intervened at the early stages of the proceeding or at anytime before the final taking of evidence and the issuance of a dispositive order. But the Petitioners elected not to do so. Rather, they relied upon Complainants to obtain a favorable order.

If Complainants had obtained the order requested in the complaint, Petitioners would have gladly taken advantage of that order to establish that PGE owed Petitioners 15 years of fixed prices from the commercial operation date. However, having “laid in the weeds” during the entire proceeding, Petitioners now ask to intervene long after the final taking of evidence, and after the issuance of a dispositive order dismissing the complaint, in order to argue for a different result than that obtained by Complainants. Petitioners argue that the version of PGE’s standard contract forms that was used to generate their executed contracts includes language regarding ownership of “RPS

²⁹ ORS 756.561; *see also* Docket No. UM 1805, Order No. 17-256 at 5 (Jul. 13, 2017).

³⁰ Docket No. UM 1805, Petitioners’ Joint Petition to Intervene Out of Time (Sep. 8, 2017); Docket No. UM 1805, Petitioners’ Joint Motion for Clarification and Application for Rehearing or Reconsideration (Sep. 8, 2017).

³¹ Docket No. UM 1805, Complainants’ Petition for Clarification and Application for Rehearing or Reconsideration (Sep. 11, 2017).

Attributes” that the Commission did not consider when ruling on the complaint.³² But this is simply not correct. The complaint specifically called out this language regarding “RPS Attributes” as one of the reasons the Commission should agree with Complainants that PGE’s form contracts require fixed prices for 15 years from commercial operation.³³ The parties have already briefed this question and the Commission rejected Complainants’ arguments. Petitioners are simply seeking a “second bite at the apple.” Petitioners’ untimely request to intervene should be denied for the following reasons.

III. OBJECTION

Pursuant to OAR 860-001-0300(5), PGE objects to the Petition on the following grounds and respectfully requests that the Commission deny the Petition.

A. The Commission Lacks the Authority to Grant the Requested Intervention.

The Commission lacks the statutory authority to grant the Petition. Pursuant to ORS 756.525, the Commission can grant permission for any person to participate in any proceeding *before the final taking of evidence in the proceeding*.³⁴ In this proceeding, the parties submitted stipulated facts and issues as well as disputed facts and issues on March 22, 2017, and both parties submitted additional evidence as part of the briefing of their motions for summary judgment in April and May of 2017.³⁵ On July 13, 2017, the Commission issued Order No. 17-256 granting PGE’s motion for summary judgment and

³² Docket No. UM 1805, Petitioners’ Joint Motion for Clarification and Application for Rehearing and Reconsideration at 14 (Sep. 8, 2017).

³³ Docket No. UM 1805, Complaint at ¶¶ 31-32.

³⁴ ORS 756.525(1) (“The Public Utility Commission may permit any person to become a party who might, on the institution of the proceeding, have been such a party, if application therefore is made before the final taking of evidence in the proceeding.”); ORS 756.525(2) (“At any time before the final taking of evidence in a proceeding, any person may apply to the commission for permission to appear and participate in the proceeding. The commission . . . shall grant the application, subject to appropriate conditions, if the commission determines that such appearance and participation will not unreasonably broaden the issues or burden the record, and otherwise may deny the application.”).

³⁵ See footnotes 17 and 20 *supra*.

dismissing the complaint.³⁶ Clearly, the final taking of evidence in this proceeding occurred before the Commission issued its order on July 13, 2017. But Petitioners waited until 58 days *after* the order disposing of the case before filing a petition to intervene. Pursuant to ORS 756.525, the Commission lacks the authority to grant a petition to intervene that is filed after the final taking of evidence and after the issuance of the order disposing of the proceeding. As a result, the Petition must be denied.

Denial of the Petition on these grounds is consistent with prior Commission precedent. In Order No. 08-016 issued in Docket No. DR 38, the Commission denied a petition to intervene out of time under circumstances similar to those in the current proceeding.³⁷ Specifically, Docket No. DR 38 involved a petition for declaratory ruling filed jointly by PacifiCorp and the owner of a mobile home park (“HCA Management”).³⁸ On March 20, 2007, PacifiCorp and HCA Management petitioned the Commission for a declaratory ruling on whether HCA Management must bill each of its submetered tenants for electricity at PacifiCorp’s residential Schedule 4 rate.³⁹ The homeowners association for the mobile home park was invited to intervene in the proceeding but decided not to do so.⁴⁰

The parties to Docket No. DR 38 developed and filed a joint issue list.⁴¹ The Citizen’s Utility Board intervened in the proceeding.⁴² The parties then filed opening briefs, joint stipulated facts, and reply briefs.⁴³ On October 22, 2007, the Commission

³⁶ See footnote 22 *supra*.

³⁷ Docket No. DR 38, Order No. 08-016 at 2-3 (Jan. 18, 2007).

³⁸ Docket No. DR 38, Joint Petition for Declaratory Ruling (Mar. 20, 2007).

³⁹ *Id.*

⁴⁰ Docket No. DR 38, Order No. 08-016 at 2 (Jun. 18, 2007).

⁴¹ Docket No. DR 38, Joint Issue List (May 17, 2007).

⁴² Docket No. DR 38, CUB’s Notice of Intervention (May 21, 2007).

⁴³ Docket No. DR 38, Staff’s Opening Brief (July 2, 2007); Docket No. DR 38, PacifiCorp’s Opening Brief (July 2, 2007); Docket No. DR 38, Owner’s Opening Brief (July 2, 2007); Docket No. DR 38, Joint

issued Order No. 07-455 declaring that HCA Management must bill each of its submetered tenants for electricity at PGE's Schedule 4 rate.⁴⁴ The homeowners association was not happy with this outcome and 21 days after the Commission issued Order No. 07-455, the homeowners association filed a petition to intervene out of time and an application for rehearing or reconsideration.⁴⁵

In Order No. 08-016, the Commission denied the petition to intervene out of time and the application for rehearing or reconsideration (the Commission also clarified Order No. 07-455 on its own motion).⁴⁶ The Commission held that it had no authority to allow the homeowners association to intervene at such a late stage of the proceeding.⁴⁷ The Commission noted:

ORS 756.525(1) authorizes the Commission to permit any person to become a party to the proceeding "if application therefore is made before the final taking of evidence in the proceeding." There is no provision authorizing the Commission to permit a person to become a party after the final taking of evidence, let alone after a final decision has been rendered. ... Movants' petition to intervene must be denied.⁴⁸

For the same reasons the Commission denied the petition to intervene out of time in Docket No. DR 38, the Commission must deny Petitioners' joint petition to intervene out of time in Docket No. UM 1805. In both cases the persons seeking to intervene out of time had actual knowledge and notice of the proceeding and were encouraged to intervene at the early stages of the proceeding. In both cases the parties to the proceedings filed stipulated facts and legal issues and other evidence. In both cases the

Stipulation of Facts (July 2, 2007); Docket No. DR 38, Staff's Reply Brief (July 16, 2007); Docket No. DR 38, PacifiCorp's Reply Brief (July 16, 2007); Docket No. DR 38, Owner's Reply Brief (July 16, 2007).

⁴⁴ Docket No. DR 38, Order No. 07-455 (Oct. 22, 2007).

⁴⁵ Docket No. DR 38, Homeowners Association's Petition to Intervene (Dec. 12, 2017); Docket No. DR 38, Homeowners Association's Application for Rehearing or Reconsideration (Dec. 12, 2017).

⁴⁶ Docket No. DR 38, Order No. 08-016 at 2-4 (Jan. 18, 2008).

⁴⁷ *Id.* at 2.

⁴⁸ *Id.* at 2-3.

parties provided extensive briefing of the issues. In both cases the Commission issued dispositive orders based on the stipulated facts and submitted evidence. In both cases, interested persons claimed that they were adversely impacted by the order and that the order was in error and required clarification. And in both cases the persons claiming to have been adversely impacted by the order petitioned to intervene out of time after the final taking of evidence in the proceeding and after the issuance of an order resolving the proceeding.

In Docket No. DR 38 the Commission concluded that it lacked the statutory authority to grant a late intervention under such facts. The Commission should follow its precedent and reach the same conclusion in Docket No. UM 1805. The Commission should deny the Petition to intervene out of time because the Commission lacks the authority to grant an intervention after the taking of final evidence and the issuance of a dispositive order.

B. The Commission Should Deny the Requested Intervention under the Standards of OAR 860-001-0300.

Pursuant to OAR 860-001-0300(6), the Commission must grant a *timely* petition to intervene if the Commission finds:

... the petitioner has sufficient interest in the proceedings and the petitioner's appearance and participation will not unreasonably broaden the issues, burden the record, or delay the proceedings⁴⁹

As discussed above, the Commission must deny the petition to intervene filed September 8, 2017, because it is untimely and was filed after the final taking of evidence in the proceeding. However, even if the Commission were to determine that the Petition is timely, the Commission should still deny the Petition on the grounds that Petitioners'

⁴⁹ OAR 860-001-0300(6).

appearance and participation will unreasonably broaden the issues and delay the proceedings.

From the Petition and the application for rehearing or reconsideration filed on the same day, it is clear that Petitioners intend to pursue two lines of argument. First, they intend to argue that the Commission has not considered the standard or boilerplate language of the standard contract forms approved by Order No. 15-289, which are the forms that Petitioners assert were used to create Petitioners' contracts.⁵⁰ From this premise, Petitioners seek to argue that the Commission erred in holding that all of PGE's prior standard contract forms provide for 15 years of fixed prices measured from contract execution.⁵¹

In the briefing surrounding the competing motions for summary judgment, both PGE and Complainants addressed the interpretation of the standard contracts in detail. In its statement of facts filed with the Commission on March 10, 2017, PGE provided the Commission with a detailed description of how the different generations of standard contract forms changed over the years and how each generation addressed the 15-year period for fixed prices.⁵² PGE noted that the vintage of standard contract forms approved by Order No. 15-289 (which served as the basis for Petitioners' executed contracts) had the same language with regard to the 15-year fixed price period as the vintage of standard contract forms approved by Order No. 14-435.⁵³ And the complaint clearly alleged that the standard contract forms approved by Order No. 14-435 provide for fixed prices for 15

⁵⁰ Docket No. UM 1805, Petitioners' Joint Petition to Intervene Out of Time at ¶ 8

⁵¹ *Id.* at ¶¶ 8-9.

⁵² Docket No. UM 1805, PGE's and Complainants' Joint Statement at Attachment B (Mar. 10, 2017).

⁵³ *Id.* at Attachment B, ¶¶ 115-121 (PGE explained that the standard contract forms approved by Order No. 15-289 had the same language regarding the 20 year maximum term and the 15-year fixed price period as the standard contract forms approved by Order No. 14-435).

years from commercial operation.⁵⁴ PGE denied that allegation and the parties briefed the question thoroughly.

To the extent that Petitioners seek to argue that the Commission should not conclude that the Order No. 15-289 contract forms provide for fixed prices for 15 years from contract execution, the Petitioners simply seek to re-litigate an issue that has already been briefed by the parties and resolved by the Commission. At the very least, this would unreasonably burden the record and delay the proceeding. It is also manifestly unfair to allow Petitioners to brief and argue the issues already addressed by the parties after the time for such briefing has long passed.

Petitioners' second line of argument would unreasonably broaden the issues in this proceeding. Petitioners suggest that even if the standard language of the contract forms provides for fixed prices for 15 years from contract execution, it is possible that the parties to a specific executed contract have inserted language in the exhibits or in the blank spaces of the form contract that provides for fixed prices for 15 years measured from commercial operation.⁵⁵ PGE agrees that this is *possible*, although PGE is only aware of it happening in one case, the case of the February 19, 2014 contract between PGE and OneEnergy. That contract was discussed in detail by the parties and PGE acknowledged that it contained unique language committing PGE to offer fixed prices for 15 years from commercial operation.⁵⁶

⁵⁴ Docket No. UM 1805, Complaint at ¶ 31 (Dec. 6, 2017).

⁵⁵ Docket No. UM 1805, Petitioners' Joint Petition to Intervene Out of Time at ¶ 11 (Sep. 8, 2017) (“[Fully executed power purchase agreements] often include inserted language in blank spaces or exhibits that can provide clarity and alter the meaning that could be adduced from the boilerplate form alone on important points.”).

⁵⁶ Docket No. UM 1805, PGE's Reply in Support of PGE's Motion for Summary Judgment at 14-15 (May 15, 2017).

It is clear that the complaint sought a ruling on whether PGE's current and prior standard contract forms provided for fixed prices for 15 years from contract execution or from commercial operation.⁵⁷ It is also clear, however, that Complainants did not seek a ruling on whether any specific executed contract provided for fixed prices for 15 years from contract execution or commercial operation.⁵⁸ To the extent that Petitioners now seek a ruling that their 10 specific contracts contain unique language or exhibits that provide for fixed prices for 15 years measured from commercial operation, Petitioners seek to unreasonably broaden the issues involved in this proceeding and the Petition should be denied on those grounds. If any of Petitioners' contracts actually contain unique language that provides for fixed prices for 15 years from commercial operation rather than contract execution, the Petitioners remain free to so argue in any future proceeding regarding their specific contracts.

In addition, Petitioners spend 11 pages of their request for rehearing or reconsideration arguing why the form contract used as the basis of Petitioners' executed contracts should be interpreted as requiring fixed prices for 15 years from commercial operation.⁵⁹ The proper interpretation of PGE's contract forms is one of the core issues that Complainants and PGE briefed over the course of six months and 140 pages of briefing. Petitioners now seek to re-litigate those issues. For example, Petitioners seek to re-argue that customary industry convention and understanding requires the Commission

⁵⁷ See Docket No. UM 1805, Complainants' Response to PGE's Motion to Strike or Make More Definite and Certain at 17-18 (Jan. 24, 2017) (Complainants explain that the complaint seeks an interpretation of the standard language of previously effective standard contract forms on which executed contracts are based but does not seek interpretation of any specific executed contract which might contain language different from the standard language of previously effective standard contract forms).

⁵⁸ *Id.*

⁵⁹ Docket No. UM 1805, Petitioners Joint Motion for Clarification and Application for Rehearing or Reconsideration at 17-35 (Sep. 8, 2017).

to interpret PGE's standard contract in the way that Petitioners prefer.⁶⁰ Complainants already made this argument in their response in opposition to PGE's motion for summary judgment and the Commission rejected it.⁶¹ It is completely inappropriate to allow Petitioners to brief and argue these issues months after the scheduled time for response to PGE's motion for summary judgment. The Commission should deny the Petition on the grounds that the relief requested by Petitioners would unreasonably broaden the issues in the proceeding, burden the record, and delay the proceedings.

C. The Equities Favor Denial of the Petition.

There are a number of other reasons to deny the Petition.

1. It is Too Late for Petitioners to File a Timely and Effective Request for Rehearing or Reconsideration.

The Petitioners' seek to intervene so that they can request rehearing or reconsideration of Order No. 17-256. But it is already too late for Petitioners to file a timely and effective request for rehearing or reconsideration. Pursuant to ORS 756.561(1):

After an order has been made by the Public Utility Commission in any proceeding, any *party* thereto may apply for rehearing or reconsideration thereof within 60 days from the date of service of such order. The Commission may grant such a rehearing or reconsideration if sufficient reason therefor is made to appear.⁶²

Pursuant to the statute, a request for rehearing must be filed by a party and must be filed within 60 days of service of the order on which rehearing or reconsideration is sought. In the immediate case, Petitioners are not yet parties to the proceeding. They will not

⁶⁰ Docket No. UM 1805, Petitioners' Joint Petition to Intervene Out of Time at ¶ 7 (Sep. 8, 2017); Docket No. UM 1805, Petitioners' Joint Motion for Clarification and Application for Rehearing or Reconsideration at 17-18 and 29-32 (Sep. 8, 2017).

⁶¹ Docket No. UM 1805, Complainants' Response in Opposition to PGE's Motion for Summary Judgment at 4-8 (May 8, 2017) (Complainants argue that PGE's standard contract forms must be interpreted in light of trade usage and custom in the electrical industry).

⁶² ORS 756.561(1) (emphasis added).

become parties unless and until the Commission grants their petition to intervene out of time. That petition has not yet been granted or denied. As a result, the earliest Petitioners can become parties is September 19, 2017 (assuming the Commission issues an order granting the Petition the day after PGE filed this objection). However, if the Petitioners become parties on September 19, 2017 (or on some later date) it will be too late for Petitioners to file a timely request for rehearing or reconsideration of Order No. 17-256. And the request for rehearing or reconsideration filed by Petitioners on September 8, 2017, is ineffective because Petitioners were not parties when they filed the request.

This is a dilemma of the Petitioners' own making. The Petitioners were encouraged by the Commission to intervene in this proceeding during its early stages. Once Order No. 17-256 was issued, there was still ample time for Petitioners to petition to intervene in time to become a party and then file a timely request for rehearing or reconsideration before the September 11, 2017 deadline. Petitioners simply elected not to do so and waited until September 8, 2017 to petition for intervention, by which time it was too late to both obtain party status and then file a timely request for rehearing or reconsideration. Because the Petitioners cannot file a timely and effective application for rehearing or reconsideration, there is no equitable reason to grant them an out of time intervention (even if the Commission had the authority to do so).

2. Complainants have Requested Rehearing or Reconsideration on Substantially the Same Grounds as Petitioners.

The Commission should deny the Petition because the Commission lacks the authority to grant it at this late date, because the Petitioners would unreasonably broaden the issues in this proceeding, and because it is not possible for the Petitioners to file a timely and effective request for rehearing or reconsideration. Denying the Petition for

these reasons will not work an equitable hardship because Complainants have requested rehearing or reconsideration of Order No. 17-256 and are advancing most or all of the same arguments Petitioners seek to advance.⁶³

3. The Commission can Deny the Petition and Clarify Order No. 17-256

Petitioners urge the Commission to ignore the significant reasons why it cannot or should not grant intervention out of time and encourage the Commission to grant late intervention in order to avoid an immediate appeal for judicial review.⁶⁴ However, if the Commission concludes that Order No. 17-256 is vulnerable to reversal on judicial review, the Commission can clarify Order No. 17-256 on its own motion and does not need to improperly grant party status to Petitioners in order to do so.⁶⁵

If the Commission decides to clarify Order No. 17-256, PGE recommends that it clarify: (1) that it has considered each of the prior versions of PGE's standard contracts and Schedule 201 rate schedules approved by the Commission between Order No. 05-584 and Order No. 17-256 and has concluded that the standard language of those form contracts and rate schedules provides for 15 years of fixed prices measured from contract execution; and (2) that this conclusion does not preclude specific QFs with executed contracts from demonstrating that unique or non-standard language inserted in the blanks of the form contract or in the exhibits demonstrates that in the particular contract in question the parties clearly and unambiguously agreed that PGE will pay fixed prices for 15 years measured from commercial operation.

⁶³ See Docket No. UM 1805, Complainants' Petition for Clarification and Application for Rehearing or Reconsideration (Sep. 11, 2017).

⁶⁴ Docket No. UM 1805, Petitioners' Joint Petition to Intervene Out of Time at ¶ 13 (Sep. 8, 2017).

⁶⁵ See *e.g.*, Docket No. DR 38, Order No. 08-016 at 5 (Jan. 18, 2008) (after denying a petition to intervene out of time and an associated request for rehearing or reconsideration, the Commission on its own motion issued a clarification of the order on which rehearing or reconsideration was requested).

The Commission should not grant Petitioners party status at this late date merely to address any perceived ambiguities in Order No. 17-256. The Commission can determine whether there are any ambiguities and clarify them on its own motion or in response to Complainants' September 11, 2017 filings.

4. The Commission Should not Grant Intervention Because of the Threat of an Application to Rescind, Suspend or Amend Order No. 17-256.

Petitioners urge the Commission to grant their request for an out of time intervention “in the interest of administrative efficiency.”⁶⁶ The Petitioners argue that under ORS 756.568, they could apply to rescind, suspend or amend Order No. 17-256 and that allowing them to become parties to UM 1805 at this late date would be more administratively efficient than requiring them to make application to amend the order under ORS 756.568.⁶⁷ The Commission should deny this request. As discussed above, under the unambiguous language of ORS 756.525, the Commission lacks the authority to grant the requested late intervention. Granting a late intervention would also contradict the precedent established by Order No. 08-016. If Petitioners apply to rescind, suspend or amend Order No. 17-256, the Commission can address such a request on its merits. However, the Commission should refuse to consider modification of Order No. 17-256 under ORS 756.568 before Complainants' request for rehearing or reconsideration is resolved.

⁶⁶ Docket No. UM 1805, Petitioners' Joint Petition to Intervene Out of Time at ¶ 14 (Sep. 8, 2017).

⁶⁷ *Id.*

IV. CONCLUSION

On September 8, 2017, the Petitioners—10 QF projects with existing PPAs—asked the Commission to grant them party status in this proceeding well after the final taking of evidence in the proceeding and well after the Commission issued its order resolving the proceeding and dismissing the complaint. As the Commission has previously held in Order No. 08-016, the Commission lacks the statutory authority to grant party status to a person who requests to intervene after the final taking of evidence. For the same reasons the Commission denied the petition to intervene out of time in Order No. 08-016, the Commission should deny the Petition in this case.

Even if the Commission had the authority to grant late intervention, it should refuse to do so because Petitioners' involvement at this late date would unreasonably broaden the issues and delay the proceedings in violation of OAR 860-001-0300(6) and ORS 756.525(2). Through their petition to intervene out of time and request for rehearing or reconsideration, Petitioners seek to re-litigate the very issues previously considered and decided by the Commission. Petitioners also seek to expand the scope of this proceeding to include review and interpretation of 10 specific, executed contracts. It is completely inappropriate to allow Petitioners to intervene after a decision has been rendered so that they can respond to PGE's motion for summary judgment months after responses were due. It is also unreasonable to broaden the issues in this proceeding to include interpretation of Petitioners' specific, executed contracts.

To the extent that Petitioners seek to argue that the standard language of PGE's contracts provides for fixed prices for 15 years from commercial operation, that issue has already been argued and decided: the Commission concluded that PGE's standard

contracts provide for fixed prices for 15 years measured from contract execution. To the extent Petitioners seek to argue that their specific, executed contracts include unique language in the exhibits or in the blank spaces of the standard contract form, and that such unique language results in fixed prices for 15 years from commercial operation, the Petitioners should raise such new claims in a new proceeding.

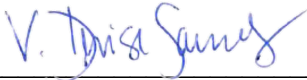
Moreover, there is no equitable reason to grant Petitioners' request for late intervention. The Petitioners were well aware of the proceeding and the arguments being advanced by all parties but elected not to intervene in this proceeding at an earlier and appropriate date. Even if Petitioners are granted party status sometime after September 18, 2017, they will not be able to file a timely and effective request for rehearing or reconsideration because the deadline to do so passed on September 11, 2017, and the petitioners were not parties on that date. Only a party can request rehearing or reconsideration.

Complainants have filed a request for rehearing and reconsideration that raises most, and perhaps all, of the arguments that Petitioners seek to make if they are granted party status. And, to the extent that the Commission believes Order No. 17-256 needs any

clarification, the Commission can clarify the order on its own motion and does not need to grant Petitioners party status to clarify to Order No. 17-256.

Dated this 18th day of September 2017.

Respectfully submitted,



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