BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1805

NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, COMMUNITY RENEWABLE ENERGY ASSOCIATION and RENEWABLE ENERGY COALITION, Complainants, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	**COMPLAINANTS' PETITION FOR CLARIFICATION AND APPLICATION FOR REHEARING OR RECONSIDERATION OF ORDER NO. 17-256**

I. INTRODUCTION AND SUMMARY

Pursuant to ORS 756.568, ORS 756.561 and OAR 860-001-0720, Northwest and Intermountain Power Producers Coalition ("NIPPC"), the Community Renewable Energy Association ("CREA"), and Renewable Energy Coalition ("REC) (collectively "Complainants") hereby petition for clarification and rehearing or reconsideration of the Public Utility Commission of Oregon's ("Commission" or "OPUC") Order No. 17-256 (hereafter the "Order"). The Complainants specifically request that the Commission clarify that the Order did not interpret PGE's previously effective standard contract forms or any fully executed standard contracts because the Complainants did not, and specifically requested that the Commission not, address those issues.

Clarification is necessary because the Order is vague and ambiguous as to whether it intends to provide a binding interpretation of the numerous different versions of Portland Electric Company's ("PGE") standard contract form made available to qualifying facilities ("QF") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Both the Complainants and PGE specifically asked the Commission not to attempt to provide a binding interpretation of either: 1) prior standard contract forms; or 2) fully executed standard contract forms. However, Order No. 17-256 confusingly states: "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."[1] Even more confusing and concerning is that: "*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."[2] The Order identifies no particular standard contract form that it intends to interpret with the emphasized language, leaving significant ambiguity regarding whether the Commission issued a ruling interpreting prior standard contracts that no one asked the Commission to address.

Complainants understand that PGE may already be taking the position with individual QFs that the Order affirmatively held that each of its past standard contract forms limited the availability of fixed prices to the first 15 years measured from the contract execution, but Complainants dispute that could have been the intent of the Order, or could be a lawfully correct conclusion the Order could have reached. In any specific dispute between a QF and PGE regarding an executed contract, the default position should not be that the current standard

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1 Order No. 17-256 at 3 (emph. added).

2 Id.

contract form governs those prior contracts, which could have materially different terms and conditions. A more reasonable default would be that, just as everywhere else in the country, with PacifiCorp and Idaho Power Company, and consistent with Commission policy, the fifteen-year fixed price period starts at power deliveries.

In any event, the open-ended nature of the language in the Order will create hardship on QFs and allow PGE to exploit its monopoly position to liberally interpret ambiguities in the Order in PGE's favor. It therefore must be clarified to by a new Commission order declaring:

- The Order did not interpret PGE's previously effective standard contract forms or any fully executed standard contracts.[3]

Alternatively, if the Commission intended to interpret prior versions of past standard contracts or previously executed contracts, then it needs to provide proper notice to affected parties. PGE itself argued that the Commission could not interpret prior executed contracts, because those parties were indispensable.[4] 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.

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[3] In accordance with OAR 860-001-0720(a), the portions of the challenged order that are incomplete and therefore misleading are:

- Page 3, ¶6: "Because we approved PGE's standard contract filings that limited the availability affixed prices to the first fifteen years measured from contract execution, PGE cannot be found to have been in violation of our orders."
- Page 4, ¶3: "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."

[4] Complainants Response at 8.

Additionally, the Complainants agree with the merits of the application for rehearing or reconsideration filed by the NewSun Solar Projects, and incorporate those arguments by reference with regard to the 2015 Standard Renewable Contract Form (approved by Order No. 15-289).

II. BACKGROUND

The complaint in this proceeding requested that the Commission should issue an order providing the following relief:

> 1. Ordering PGE to cease and desist from any business practices inconsistent with Commission policy and orders that require long-term contracts with fixed rates, by openly disputing that it must offer 15 years of fixed prices from the QF's operation date, as PacifiCorp and Idaho Power contracts already do in an unambiguous fashion; and
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> 2. 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;
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> 3. Alternatively, if the relief requested in paragraphs 2 and 3 of this Prayer for Relief is denied, ordering PGE to file revised standard contracts clearly stating that the 15 years of fixed prices run from the commercial operation date; and
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> 4. Granting any other such relief, including equitable relief, as the Commission deems necessary.[5]

After numerous procedural disputes, the Complainants and PGE jointly framed the sole issue in the proceeding as a question of the violation of any statute, rule, or Commission order.[6] The Complainants pleadings explain that they were not seeking Commission resolution or

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[5] Complaint at Prayer for Relief.

[6] PGE Motion for Summary Judgment at 1; Complainants Motion for Summary Judgment at 1-2.

interpretation of any executed contracts or past contract forms.

For example, in response to PGE's Motion to Strike, Motion to Make More Definite and Certain, and Motion Requesting More Time to Respond, Complainants explained that: "PGE's Comments posit that PGE's previously executed standard contracts make this claim non-justiciable due to a failure to join indispensable parties. They do not, because the *Complainants do not seek Commission interpretation of any previously executed contracts, but only the generic contract terms approved by the Commission*."[7] The Complainants again stated they "not ask the Commission to interpret any of PGE's previously executed contracts."[8] For a third time in the same document, the Complainants stated that do not "ask the Commission to interpret any of PGE's previously executed contracts and Complainants do not wish to unnecessarily broaden the scope of this proceeding by litigating specific contracts."[9]

In addition, the Complainants also clearly stated that they were not seeking the Commission to interpret prior versions of PGE's standard contracts, but only the currently effective contracts. Specifically, Complainants stated that: "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."[10]

Rather than interpret prior contract forms or previously executed contract, the exact question presented was: "Has PGE violated any statute, rule or Commission order regarding

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7 Complainants Response at 8.

8 Id. at 16.

9 Id.

10 Complainants Reply to PGE Response to Complaints' Motion for Summary Judgment at 12.

when the 15-year fixed price period begins under QF standard contracts?"[11] Neither party requested that the Commission provide a legally binding declaration as to the meaning of any of PGE's previously effective standard contract forms or any executed contract.

The Commission issued Order No. 17-256 on July 13, 2017. The Order generally concludes that Order No. 05-584 did not expressly specify the date on which the 15-year term of fixed prices must begin in Oregon utilities' standard contracts. The Order then applies this holding to PGE's actions in offering unidentified versions of its standard contract forms, as follows:

> 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.[12]

Thus, PGE did not violate any Commission orders to the extent that it limited the contract term to 15 years after contract execution in any previously offered standard contract forms.

However, the Order agreed with Complainants that the 15-year term of fixed prices *should* logically start at the time the QF begins delivering power, as is the undisputed industry practice. Specifically, the Order explains: "Standard contracts, whether prepared by PGE, Idaho Power or PacifiCorp, all contain QF performance benchmark event dates that must be achieved before the QF can offer power to the utility."[13] The Order then states:

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11 Joint Issues Statement, at Attach. A at 2 (filed March 10, 2017).

12 Order at 3. Remarkably, while the Commission resolved a question that took hundreds of pages of briefing, there is *no* analysis as to why the Commission believes that the PGE contract should be read to start the fixed price term at the time of contract execution. Regardless of whether the Complainants agree or disagree with the Commission's order, parties litigating issues before the Commission at least deserve the benefit of the Commission articulating why it made the decision that it did.

13 Id. at 4.

> The 15-year period of fixed prices is, of necessity, tied to these benchmarks. Prices paid to a QF are only meaningful when a QF is operational and delivering power to the utility. Therefore, we believe that, to provide a QF the full benefit of the fixed price requirement, the 15-year term must commence on the date of power delivery.[14]

The Order therefore provided clarification to the "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."[15] It then directs PGE to file revised standard contracts with language consistent with the "requirement that the 15-year term of fixed prices commences when the QF transmits power to the utility."[16]

Thus, although the Order "dismissed" the complaint, the Order in fact agreed with the complaint's basic premise – that the 15 years should run from the time the QF begins delivering energy. The Order also expressly *ordered* the relief requested in paragraph three of the prayer for relief by directing PGE file revised standard contracts that unambiguously provide that the 15-year term of fixed prices begins at the time the QF begins delivering energy. Yet the Order suggested that some unidentified standard contracts offered by PGE "limited the availability of fixed prices to the first fifteen years measured from contract execution" and declined to order reformation of these unidentified standard contracts or presumably the fully executed versions of the same.[17]

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14 Id.
15 Id.
16 Id.
17 Id. at 3-4.

III. PETITION FOR CLARIFICATION

A. Standard of Law

Clarification of a Commission order is appropriate where the scope and effect of the order is unclear.[18]

B. The Order Must be Clarified

The Order is ambiguous as to its scope and meaning. It states that some unidentified standard contract forms "limited the availability of fixed prices to the first fifteen years measured from contract execution" and further suggests that it provides an interpretation of some unidentified standard contracts by refusing order reformation of any contracts.[19] There are many different versions of both PGE's previously effective standard contract forms and the Schedule 201 that contain different contractual terminology addressed the overall term of the contract through its natural termination date and the term of fixed pricing.[20] But the Order discussed none of the applicable contractual language and identifies no specific contract it had in mind when it suggested that some version of that contract form limited the 15-year period of fixed prices in the manner that PGE argued in this proceeding. Therefore, it is impossible to determine what portions of PGE's currently approved standard contract formed the basis of the Commission's holding.

Complainants are concerned that PGE will liberally interpret the Order in its favor as a

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18 See In re Public Utility Commission of Oregon: Investigation into Qualifying Facility Contract Pricing, OPUC Docket No. UM 1610, Order No. 16-337, at 6 (Sept. 6, 2017).

19 Order at 3-4.

20 Joint Issues Statement, at Attach. B at ¶¶ 19-31, 98-111, 115-121, 131-139 (discussing the different language contained in the "2005 Standard Contract," the "2014 Standard Renewable Contracts," the "2014 Standard Contracts," the "2015 Form Contracts" and the "2016 Form Contracts").

blanket declaration, with binding legal effect, that each and every standard contract form ever executed with PGE before issuance of the Order "limited the availability of fixed prices to the first fifteen years measured from contract execution."[21] Complainants seriously doubt that was the Commission's intent and submit that such a conclusion would be wrong as a matter of law. But clarification is now needed to remove the ambiguity created by the Order.

In considering this request, the Commission should recall from the briefing that individual contracts can contain language and exhibits that alter the meaning that could be ascertained from reviewing the blank, incomplete form. It is a basic rule of contract interpretation that the parties' inserted language controls over the language in the boilerplate form.[22] For example, PGE executed a standard contract form with OneEnergy Oregon Solar, LLC on February 19, 2014, which contains unambiguous language requiring PGE to pay the fixed avoided cost prices for 15 years after the commercial operation date, not the date of execution.[23] This is but one example, and there are likely others that were not discussed in the briefing in this matter. Thus, even if the Order could somehow conclude in a catch-all statement that all of the boilerplate contract forms supported PGE's argument in the abstract, an individually executed agreement may not, and the Order could not possibly interpret each and every executed standard contract without addressing the terms of each.

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21 Order at 3.

22 ORS 42.270; Emmert v. O'Brien, 72 Or. App. 752, 755, 697 P.2d 222 (1985); see also OAR 860-029-0005(2) ("Nothing in these rules limits the authority of a public utility or a qualifying facility to agree to a rate, terms, or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be provided by these rules, provided such rate, terms, or conditions do not burden the public utility's customers." *Id.*)

23 Joint Issues Statement, at Attach. B at ¶¶ 88-91.

Moreover, certain versions of PGE's contract form have language that is difficult read as anything but mandating that the QF be paid for 15 years of fixed prices from the time of power deliveries. For example, there is the language in the previously available renewable standard contract ties the period of fixed prices to the period of PGE's ownership of "RPS Attributes" and provides that period ends 15 years after the commercial operation date, not 15 years after contract execution. This language was contained 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 issuance of Order No. 16-377 on October 11, 2016. The Order, however, does not discuss these unique terms of that previously effective standard contract form.

Furthermore, as a matter of basic administrative law, if the Order wishes to lawfully interpret each of PGE's previously effective standard contract forms, or any executed contracts, it must adequately explain the reasoning to reach that conclusion as to each different contract it interprets. Oregon courts require a rational explanation that leads from the facts of the case to the ultimate conclusion of an agency's order.[24] This requirement is known as the substantial reason rule and it exists to ensure the order is understandable to the parties and the reviewing court, as opposed to an arbitrary declaration of the agency's conclusion. Under the substantial reason rule, the Commission must correct and clarify the Order's failure to discuss, or even recite, the critical terms of the contracts it interprets (if any). Specifically, the Order must cite the critical provisions of each contract it interprets and which language the Commission finds to control the matter in dispute. Alternatively, a new order must clarify that the Order did not

[24] See Drew v. Psychiatric Sec. Review Bd., 322 Or. 491, 499-501, 909 P.2d 1211 (1996); Nw. Nat. Gas Co. v. Pub. Util. Comm'n, 195 Or. App. 547, 559, 99 P.3d 292 (2004).

interpret *any* specific contract and merely intended to rule that PGE did not violate Order No. 05-584 or any Commission policies *even if* (without deciding the point) PGE's current or past standard contract forms limited the term of fixed prices to 15 years from the date of contract execution.

Additionally, as noted above, the Order expressly *ordered* the relief requested in paragraph three of the complaint's prayer for relief by directing PGE file revised standard contract that unambiguously provides that the 15-year term of fixed prices begins at the time the QF begins delivering energy. It is not clear how an Order can "dismiss" a complaint yet grant part of the affirmative relief requested therein. The Commission should also clarify therefore that the complaint was granted in part against PGE.

Finally, to the extent the Commission's order constitutes "utility type" regulation over qualifying facilities it is pre-empted by PURPA.[25] 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.[26]

In short, the Order must be clarified to ensure that it is not misinterpreted to purport to address the meaning of the various contract forms or executed standard contracts.

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[25] See Oregon Trail Electric Consumers Cooperative, Inc. v. Co-Gen Co., 7 P.3d 594, 605; 168 Or. App. 466, (Ct. App. Or 1998)("PURPA precludes a regulator's exercise of post-contractual, utility-type price modification authority").

[26] Wah Chang v. PacifiCorp, OPUC Docket No. UM 1002, Order No. 09-343 slip op. at 12 (September 2, 2009) ("The circuit court may be correct in saying that this Commission has no specialized knowledge of common law contract issues such as mutual mistake, frustration of purpose, extreme hardship, or unjust enrichment. But in so saying, the circuit court assumes that Wah Chang and PacifiCorp can, as a matter of law, set rates on their own in a contract. They cannot. Only this Commission can set rates.").

IV. APPLICATION FOR REHEARING OR RECONSIDERATION

Complainants agree with the arguments made in the NewSun Solar Projects' application for rehearing or reconsideration ("NewSun Application") as to the version PGE's standard contract form for renewable QFs that was approved by Order No. 15-289 (hereafter referred to as the "2015 Standard Renewable Contract Form").[27] In the interest of limiting the filings that must be reviewed by the Commission, 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. As demonstrated therein, the terms of the 2015 Standard Renewable Contract Form provide 15 years of fixed prices from the commercial operation date by tying the period of payment at fixed renewable prices to the period during which PGE owns the "RPS Attributes" produced by the QF. The NewSun Application refutes PGE's argument as to that contract form.

The ambiguities in the Order impose a particularly unjust result on QFs that have executed that version of PGE's formerly effective contract form because PGE will now use the ambiguities in the Order to override the plain intent and meaning of their executed contracts. Numerous renewable QFs planned to be constructed throughout Oregon signed that version of the standard contract form in good faith reliance on the plain meaning of its terms and have now invested capital in developing renewable energy projects in reliance what appeared to be a well settled contractual matter. If not promptly corrected, the ambiguities in the Order are likely to frustrate financing and development of numerous QFs that signed this standard contract in good faith reliance on the right to 15 years of fixed prices after the operation date. That outcome will thwart the policies behind the Commission's adoption of renewable avoided costs and the state's

[27] See Joint Issues Statement, at Attach. B at ¶¶ 101-121.

objectives to promote small renewable energy facilities under 20 MW in size.

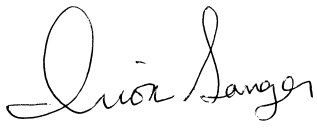
The Commission should grant rehearing or reconsideration and issue a new order ruling that PGE's 2015 Standard Renewable Contract Form requires payment by PGE to the QF at fixed renewable prices for 15 years after the QF's commercial operation date rather than merely 15 years after the time of contract execution, unless express language is inserted by the QF that demonstrates a contrary intent.

V. CONCLUSION

For the reasons explained above, Complainants respectfully request that the Commission grant clarification and rehearing or reconsideration of Order No. 17-256.

Dated this 11th day of September 2017.

Respectfully submitted,



Irion Sanger
Sidney Villanueva
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: 503-747-7533
Fax: 503-334-2235
irion@sanger-law.com

Of Attorneys for Northwest and Intermountain Power Producers Coalition

Of Attorneys for Community Renewable Energy Association

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