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January 12, 2018

Via Electronic Filing

Public Utility Commission of Oregon
Filing Center
201 High St SE, Suite 100
PO Box 1088
Salem OR 97308-1088

Re: UM 1805 – Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition, Complainants vs. Portland General Electric Company, Defendant

Attention Filing Center:

Enclosed for filing in Docket UM 1805 is Portland General Electric Company's Application for Rehearing or Reconsideration of Order No. 17-465.

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 APPLICATION FOR
REHEARING OR RECONSIDERATION
AND APPLICATION TO AMEND
ORDER NO. 17-465**

Pursuant to ORS 756.561 and OAR 860-001-0720, Portland General Electric Company ("PGE") respectfully applies for rehearing or reconsideration of Order No. 17-465. In the alternative, and pursuant to ORS 756.568 and OAR 860-001-0400, PGE respectfully applies for an order amending Order No. 17-465 to affirm that PGE's standard contract forms in effect on July 2017 or alternatively, all of PGE's prior Commission-approved standard contract forms, limited the availability of fixed prices to the first 15 years following contract execution.

Both Complainants and PGE asked the Commission to rule on the issue of whether PGE's standard contract forms in effect when the complaint was filed limited the availability of fixed prices to the first 15 years following contract execution. The answer to this critical question could determine whether PGE's customers are ultimately responsible for millions of dollars of additional payments to QF counter-parties. Both parties extensively briefed the issue and have expended significant effort and expense seeking a decision from the Commission on this important question.

The question has now become more critical because the NewSun Solar Projects¹ have filed a case against PGE in the United States District Court for the District of Oregon seeking a determination of the 15-year fixed price question.² PGE believes that the Commission is in the best position to answer that question and must do so in order to ensure that Order No. 17-256 as amended by Order No. 17-465 is well reasoned and serves the public interest.

PGE notes that in addition to this application for rehearing or reconsideration, PGE expects to file a complaint and request for dispute resolution with the Commission seeking resolution of its dispute with NewSun Solar.

I. BACKGROUND

In this case, Complainants³ alleged that Order No. 05-584 required PGE to offer standard contracts with fixed prices for 15 years commencing on the QF's commercial operation date ("COD").⁴ Complainants alleged that PGE's current standard contract forms were consistent with this purported requirement but that PGE was improperly contradicting Order No. 05-584 and PGE's forms by taking the position that its contracts limit the availability of fixed prices to the first 15 years following contract execution.⁵ Complainants asked the Commission to order PGE to stop taking that position.⁶ Complainants also asked the Commission to confirm that PGE's standard contract forms provide for 15 years of fixed prices measured from COD.⁷

¹ The NewSun Solar Projects are 10 proposed qualifying facilities with nameplate capacity of 10 megawatts each. The NewSun Solar Projects have executed Schedule 201 contracts with PGE. *See* Docket No. UM 1805, NewSun Solar's Joint Petition to Intervene Out of Time (Sep. 8, 2017) for details regarding the identity of the NewSun Solar Projects and for copies of the 10 Schedule 201 contracts in question.

² *Alfalfa Solar I LLC et al. (NewSun Qualifying Facilities) v. Portland General Electric Company*, US Dist. Ct. Case No. 3:18-cv-00040 (Jan. 8, 2018) (complaint seeking declaratory relief filed in United States District Court for the District of Oregon).

³ Complainants in UM 1805 are Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition.

⁴ *See* Docket No. UM 1805, Complaint at pages 1-3 and 16 (Prayer for Relief ¶ 1) and ¶¶ 17, 47, 56 (Dec. 6, 2016).

⁵ *Id.* at 16 (Prayer for Relief ¶¶ 1 and 2) and ¶¶ 52 and 56.

⁶ *Id.* at 16 (Prayer for Relief ¶ 2).

⁷ *Id.* at 16 (Prayer for Relief ¶ 1).

In its answer PGE admitted that it takes the position that its contracts limit the availability of fixed prices to the first 15 years of the contract following contract execution.⁸ PGE pointed out that it takes this position because Order No. 05-584 authorized that position and because PGE's Commission-approved forms and rate schedule so provided.⁹ PGE moved for summary judgment. PGE asked the Commission to rule that PGE's current contract forms limited fixed prices to the 15 years following contract execution; PGE noted that its forms have done so since they were first adopted following Order No. 05-584.¹⁰ PGE provided detailed analysis of the various generations of its standard contract forms and demonstrated how its current standard contract forms limited fixed prices to 15 years immediately following contract execution.¹¹

In Order No. 17-256, the Commission granted PGE's motion for summary judgment and dismissed the complaint. The Commission stated that PGE's standard contract forms limited fixed prices to 15 years immediately following contract execution and that this was permissible because: (a) the Commission approved the forms; and (b) Order No. 05-584 never established a trigger date for the 15-year fixed price period.¹² In addition to granting PGE's motion for

⁸ Docket No. UM 1805, PGE's Answer at ¶ 39 (Mar. 28, 2017) ("PGE admits that it will not enter into a QF standard contract that provide for fixed prices for a period of more than 15 years measured from the contract effective date because such a provision would be contrary to PGE's Commission-approved Schedule 201 tariff, contrary to PGE's Commission-approved standard contract forms, contrary to the resolution on page 20 of Order No. 05-584, and contrary to any other Commission orders directed at PGE and addressing the period during which PGE is required to offer fixed prices under a QF standard contract.").

⁹ *Id.*

¹⁰ Docket No. UM 1805, PGE's Motion for Summary Judgment at 34-35 ("The Commission should also conclude, as a matter of law, that PGE's currently effective Schedule 201 and currently effective standard contract forms unambiguously limit fixed prices to the first 15 years of the standard contract term and unambiguously provide that a standard contract term begins when the contract is executed by both parties.") and at 1-2 ("PGE's Schedule 201 and standard contract forms have provided for such an approach since July 2005 and the Commission has repeatedly approved PGE's rate schedule and form contracts as consistent with the requirements of its orders.") (Apr. 24, 2017).

¹¹ *Id.* at 18-25.

¹² Docket No. UM 1805, Order No. 17-256 at 3 (Jul. 13, 2017) ("When we concluded that QFs should receive 15 years of fixed prices under standard contracts in Order No. 05-584, we did not specify the date on which that 15-year term begins. ... 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.").

summary judgment, the Commission took the opportunity to clarify that on a going-forward basis its policy would be to require all utilities to offer fixed prices for 15 years measured from COD.¹³

Because PGE's existing contract forms were not consistent with this newly clarified policy, the Commission ordered PGE to revise its contracts to provide for fixed prices for 15 years measured from COD.¹⁴ This made perfect sense. If PGE's existing forms limited fixed prices to 15 years immediately following execution and the Commission's newly clarified policy required fixed prices for 15 years following COD, then PGE needed to file a revised set of forms. PGE has done so and those new contract forms are now effective.¹⁵

Complainants and NewSun Solar then applied for reconsideration of Order No. 17-256. Complainants and NewSun Solar both appeared to acknowledge that the Commission had ruled that PGE's currently effective contract forms limited fixed prices to 15 years measured from contract execution.¹⁶ But they both asked the Commission to clarify or reconsider Order No. 17-256 and to hold that the Commission has not made any determination as to whether PGE's executed contracts or older, superseded standard contract forms limit fixed prices to 15 years

¹³ *Id.* at 4 (“We take this opportunity, however, to clarify our policy in Order No. 05-584 to explicitly require standard contracts, on a going-forward basis, to provide for 15 years of fixed prices that commence when the QF transmits power to the utility.”).

¹⁴ *Id.* (“... 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.”).

¹⁵ Docket No. UM 1805, Order No. 17-373 (Sep. 28, 2017) (order adopting Staff's recommendation to approve PGE's compliance filing modifying Schedule 201 and associated standard contract forms to provide for fixed prices for 15 years measured from scheduled COD).

¹⁶ Docket No. UM 1805, Complainants' Petition for Clarification and Application for Rehearing or Reconsideration at 5 (Sep. 11, 2017) (Complainants note that they “were not seeking the Commission to interpret prior versions of PGE's standard contracts, but only the currently effective contracts”); Docket No. UM 1805, NewSun Solar Projects' Joint Motion for Clarification and Application for Rehearing or Reconsideration at 2-3 (Sep. 8, 2017) (noting that the proceeding “appeared to be focused ... on whether PGE was in violation of any Commission orders or policies as applied to its *current practices* and its *currently effective* standard contract form” and asking the Commission to confirm that its finding that PGE's contract forms limit fixed prices to 15 years following contract execution does not extend to executed contracts or previously effective standard contract forms).

measured from contract execution.¹⁷ PGE opposed these requests and argued that in Order No. 17-256 the Commission had concluded that all prior versions of PGE's contract forms limited fixed prices to 15 years measured from contract execution.¹⁸

In response to these arguments, the Commission issued Order No. 17-465. The Commission denied Complainants' request for reconsideration, but treated the request as an application to amend Order No. 17-256.¹⁹ The Commission then informed the parties that in reaching its decision in Order No. 17-256, it relied on the fact that it had repeatedly reviewed and approved PGE's standard contract forms submitted following its decision in Order No. 05-584 that QFs should receive 15 years of fixed price.²⁰ For that reason the Commission stated that it could not find that PGE's standard contract forms were in violation of Commission orders.²¹ In doing so, however, the Commission answered a question that was not asked and stated that it neither examined nor addressed the specific terms and conditions of any past QF contract form or executed contract.²² The unfortunate result of that statement means that Order No. 17-256, as amended by Order No. 17-465, required PGE to modify its July 2017 contract forms needed to be modified, *i.e.* the orders did not conclude that PGE's contract forms without actually finding that the July 2017 contract forms limited the availability of fixed prices to 15 years following contract execution.

Based on the extensive briefing already before it and contained in the parties' cross motions for summary judgment, the Commission can and should affirm that PGE's standard contract forms in effect in July 2017 limited the availability of fixed prices to the first 15 years

¹⁷ *Id.*

¹⁸ Docket No. UM 1805, PGE's Response in Opposition to Complainants' Petition for Clarification and Application for Rehearing or Reconsideration (Oct. 24, 2017).

¹⁹ Docket No. UM 1805, Order No. 17-465 (Nov. 13, 2017).

²⁰ *Id.* at 4.

²¹ *Id.*

²² Docket No. UM 1805, Order No. 17-465 at 4 (Nov. 13, 2017).

following contract execution. Alternatively, the Commission can grant rehearing or reconsideration and require additional briefing or even hold a hearing to resolve this important issue. Deciding the proper interpretation of PGE's then-effective forms in this docket will allow the Commission to place Order No. 17-256 on a sound footing, resolve the questions placed before the Commission by the complaint and by PGE's motion for summary judgment, and limit the need for piecemeal litigation in the courts and before the Commission by providing PGE and its counter-parties with better certainty regarding what PGE's forms contracts required with regard to the fixed price period.

II. APPLICATION FOR REHEARING OR RECONSIDERATION

Pursuant to ORS 756.561 and OAR 860-001-0720, PGE respectfully applies for rehearing or reconsideration of the Commission's decision in Order No. 17-465. That order was served November 13, 2017, and this application is therefore timely submitted before the expiration of the 60-day period within which a party must apply for rehearing or reconsideration.

PGE notes the following in compliance with the requirements of OAR 860-001-0720:

A. Grounds for reconsideration or rehearing – OAR 860-001-0720(1).

Order No. 17-465 made it clear for the first time that the Commission did not interpret PGE's then-effective standard contract forms (the July 2017 forms) as part of rendering its decision in Order No. 17-256. The earlier order required PGE to modify its July 2017 forms to make them comply with the Commission's newly clarified policy to offer fixed prices for 15 years measured from COD. However, the order to revise PGE's July 2017 forms is arbitrary and lacking in substantial reason unless the Commission has determined that PGE's July 2017 forms limited the availability of fixed prices to the first 15 years immediately following contract

execution and therefore needed to be revised to comply with the Commission's new policy²³ requiring fixed prices or 15 years following COD. As a result, it is necessary for the Commission to grant reconsideration or rehearing and render a decision as to whether PGE's July 2017 standard contract forms limited the availability of fixed prices to the first 15 years immediately following contract execution.

In addition, the complaint alleged that PGE was improperly taking the position that fixed prices are limited to 15 years from contract execution when its then-effective contract forms and Order No. 05-584 required fixed prices for 15 years measured from COD. PGE defended against this claim by arguing that its then-effective contract forms limited the availability of fixed prices to the first 15 years following contract execution and that this was approved by the Commission and permitted by Order No. 05-584. It was arbitrary for the Commission to resolve the case without addressing this question. As a result, the Commission should grant rehearing or reconsideration and affirm that the reason it directed PGE to refile its July 2017 contract form was because that form limited fixed prices to the first 15 years immediately following contract execution.

An additional ground for granting reconsideration or rehearing is that NewSun has now filed suit in federal district court for interpretation of the 15-year fixed price period question and, as a result, there is an immediate need for Commission interpretation and ruling on the question. This material change in circumstances is further grounds for granting rehearing or reconsideration.

²³ PGE believes the Commission's requirement to offer fixed prices for 15 years measured from COD is a *new* policy not a *clarification* of an existing policy because the Commission acknowledged in Order No. 17-256 at page 3 that Order No. 05-584 did not specify the date on which the 15-year fixed price period begins.

B. Specification of the portion of the challenged order that is erroneous or incomplete – OAR 860-001-0720(2)(a).

The portion of the challenged order that is erroneous or incomplete is the Commission’s requirement in Order No. 17-256 that PGE revise its standard contract forms coupled with the Commission’s statement in Order No. 17-465 that it has not determined whether PGE’s then-effective standard contract forms limited the availability of fixed prices to the first 15 years following contract execution.

C. Specification of the portion of the record, laws, rules, or policy relied on to support the application – OAR 860-001-0720(2)(b).

Decisions by the Commission, like decisions by any Oregon administrative agency, must “be rational, principled, and fair, rather than *ad hoc* and arbitrary.”²⁴ And a “final order must be supported by substantial reason, which requires that the order articulate ‘the reasoning that leads the agency from the *facts* that it has found to the *conclusions* that it draws from those facts.’”²⁵ In this case, the Commission has granted summary judgment and dismissed the complaint without determining that PGE’s contract form limited fixed prices to the first 15 years following contract execution as asserted in the motion for summary judgment. And the Commission has ordered PGE to file revised contract forms when it has not determined that the previous forms limited fixed prices for 15 years from contract execution and therefore violated the Commission’s new policy. Because the Commission has not made this determination, its decisions in Order No. 17-256 as amended by Order No. 17-465 are arbitrary and not supported by substantial reason.

²⁴ *Gordon v. Board of Parole and Post Prison Supervision*, 343 Or. 618, 469 (2007).

²⁵ *Dubray v. SAIF Corp.*, 246 Or. App. 270, 274 (2011), citing *TTC-The Trading Co., Inc. v. DCBS*, 235 Or. App. 606, 612 (2010) (quoting *Drew v. PSRB*, 322 Or. 491 (1996) (emphasis in *Drew*)).

D. Specification of the change in the order the applicant seeks – OAR 860-001-0720(2)(c).

The Commission should change Order No. 17-465 to state that the Commission will reconsider PGE's motion for summary judgment and/or declare that PGE's standard contract forms in effect in July 2017 limited the availability of fixed prices to the first 15 years immediately following contract execution.

E. Specification of how the requested change will alter the outcome – OAR 860-001-0720(2)(d).

The requested change will allow the Commission to support its order to revise PGE's standard contract forms with a rational basis: i.e., a determination that PGE's then-effective forms limited fixed prices to 15 years following execution and that this conflicted with the Commission's newly clarified policy of fixed prices for 15 years from COD. The requested change will also provide PGE and PGE's counterparties with needed clarity as to the effect of PGE's prior standard contract forms in the context of the Commission's regulatory scheme.

F. Specification of grounds for reconsideration – OAR 860-001-0720(2)(e).

The specific grounds for reconsideration are new evidence, error of law or fact that is essential to the decision, and good cause for further examination of an issue essential to the decision.

First, the need for interpretation of PGE's then-effective standard contract forms was not apparent until the Commission clarified in Order No. 17-465 that it did not render such an interpretation as part of Order No. 17-256. The new information that the Commission did not interpret PGE's then-effective standard contract forms as part of the decision in Order No. 17-256 represents both new evidence and good cause to grant rehearing or reconsideration.

Second, it is an error of both fact and law for the Commission to modify Order No. 17-256: (a) to state that the Commission has not addressed whether PGE’s standard contract forms limit fixed prices to 15 years following contract execution; and (b) to simultaneously require PGE to revise those contract forms because they limit fixed prices to 15 years following contract execution and are therefore inconsistent with the Commission’s modified policy requiring fixed prices for 15 years measured from COD.

Third, there has been a fundamental change in the underlying circumstances and that change represents good cause for further examination of an issue essential to the decision. Specifically, NewSun has filed suit in the United States District Court for the District of Oregon and NewSun is seeking an interpretation of whether the 15-year fixed price period begins to run at contract execution or at COD. PGE specifically requested in its motion for summary judgment that the Commission rule as to whether PGE’s currently-effective standard contract forms limited the availability of fixed prices to the first 15 years following contract execution.²⁶ Complainants also sought a ruling on this question.²⁷ PGE requested a ruling on this question so that PGE and its QF counter-parties would have an authoritative ruling from the Commission on this question that would inform any disputes between them and prevent or simplify the problem or piecemeal litigation.

Determining the meaning of PGE’s standard contract forms is not strictly or solely an exercise in contract interpretation or in the application of contract law. Rather, PGE’s standard

²⁶ Docket No. UM 1805, PGE’s Motion for Summary Judgment at 34-35 (“The Commission should ... conclude, as a matter of law, that PGE’s currently effective Schedule 201 and currently effective standard contract forms unambiguously limit fixed prices to the first 15 years of the standard contract term and unambiguously provide that a standard contract term begins when the contract is executed by both parties.”)

²⁷ Docket No. UM 1805, Complaint at 16 (Prayer for Relief ¶ 2) (Dec. 7, 2016) (“... Complainants respectfully request that the Commission issue an order: ... [d]eclaring that PGE’s standard contract [i.e., PGE’s then-effective standard contract forms], 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.”).

contract forms are regulatory compliance documents that have been created and maintained by PGE in response to the requirements of the Commission's regulatory orders. The Commission is the most qualified decisional authority to interpret the meaning and effect of PGE's standard contract forms in light of the history and context of the Commission's orders relating to QF standard contracts and PURPA and to determine whether any particular set of standard contract forms does or does not limit the availability of fixed prices to the first 15 years following contract execution.²⁸

That question has now become a live controversy with the filing of NewSun's case in federal court. In addition, as indicated above, PGE expects to file a complaint with the Commission seeking interpretation of the NewSun Solar contracts. The Commission can and should greatly simplify the resolution of the NewSun Solar cases before the federal court or in a Commission proceeding by granting rehearing or reconsideration in UM 1805 and rendering the decision that PGE's standard contract forms in effect in July 2017 limited the availability of fixed prices to the first 15 years following contract execution. In addition, PGE believes that the Commission has sufficient information to rule that all of PGE's prior Commission-approved standard contract forms likewise limited the availability of fixed prices to the first 15 years following contract execution.

III. APPLICATION TO AMEND ORDER NO. 17-465

In the alternative to the above request for rehearing or reconsideration, PGE respectfully applies for an order amending Order No. 17-465. For the reasons discussed above, the

²⁸ See e.g. *Indep. Energy Producers Ass'n, Inc. v. California Pub. Utilities Comm'n*, 36 F3d 848, 856 (9th Cir 1994) (in dicta the court recognized that PURPA and FERC delegate to the states "the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilities operating under the regulations promulgated by [FERC]."). The State of Oregon has in turn delegated primary authority for implementing PURPA to the Commission. See e.g. ORS 758.535(2)(a).

Commission can and should render an interpretation of PGE's standard contract forms in effect in July 2017 and conclude that those forms limited the availability of fixed price to the first 15 years following contract execution.

PGE has already briefed the issue extensively in its motion for summary judgment and PGE urges the Commission to render a decision on the issue based on the parties' briefing on motions for summary judgment. Alternatively, PGE requests that the Commission amend Order No. 17-465 to provide that the Commission will provide an opportunity for additional briefing, or a hearing if deemed necessary, and then render a decision on whether PGE's previously-effective standard contract forms limited the availability of fixed prices to the first 15 years following contract execution. In addition, PGE also believes that the Commission has sufficient information to rule that all of PGE's prior Commission-approved standard contract forms likewise limited the availability of fixed prices to the first 15 years following contract execution.

In support of these requests PGE incorporates by reference the argument it has presented in support of its application for rehearing or reconsideration. In addition, PGE notes that the question of how PGE's previously effective standard contract forms address this issue has become a live issue with the filing of the NewSun case in federal district court, the issue has the potential to arise repeatedly in piecemeal litigation regarding specific executed contracts, and the resolution of this issue is likely to have an impact on PGE's customers measured in the tens or hundreds of millions of dollars.

IV. CONCLUSION

For the reasons detailed above, PGE respectfully requests that the Commission either grant rehearing or reconsideration of Order No. 17-465 or issue an order amending Order No. 17-465 to clarify that PGE's standard contract forms in effect when the complaint was filed in

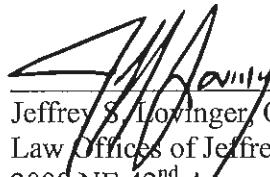
this proceeding, or alternatively, all of PGE's prior Commission-approved standard contract forms limited the availability of fixed prices to the first 15 years following contract execution. PGE requests that this determination be made either based on the existing briefing in UM 1805 or after additional briefing or hearing as provided on rehearing, reconsideration, or in an amended order.

DATED this 12th day of January, 2018.

Respectfully submitted,



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