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V. Denise Saunders
Associate General Counsel

October 16, 2017

Via Electronic Filing

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

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

Attention Filing Center:

Enclosed is Portland General Electric Company's Motion for Leave to File Sur-Reply and Sur-Reply to Petitioners' Reply in Support of Joint Petition to Intervene Out of Time in Docket UM 1805.

Thank you 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:hp

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 MOTION FOR LEAVE
TO FILE SUR-REPLY AND SUR-
REPLY TO PETITIONERS’ REPLY
IN SUPPORT OF JOINT PETITION
TO INTERVENE OUT OF TIME**

Pursuant to OAR 860-001-0420, Portland General Electric Company (“PGE”) respectfully moves the Public Utility Commission of Oregon (“Commission”) for leave to file a sur-reply to address new arguments raised in Petitioners’ October 2, 2017 Reply. PGE also submits its sur-reply to the October 2, 2017 reply in support of joint petition to intervene out of time filed 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. MOTION FOR LEAVE TO FILE SUR-REPLY

The Commission’s rules specifically provide for the filing of a petition to intervene, for the filing of objections to a petition, and for the filing of a reply to such objections.¹ The Commission’s rules do not specifically provide for the filing of a sur-reply. However, the Commission has allowed additional briefing not specifically authorized in its rules when such

¹ OAR 860-001-0300 (2) and (5).

briefing is helpful or otherwise appropriate.² Here, Petitioners' October 2, 2017 reply in support of their petition to intervene out of time raises several new arguments to which PGE has not had an opportunity to object or respond. PGE believes its sur-reply will aid the Commission in better understanding PGE's position and therefore respectfully requests leave to file this sur-reply.

II. SUR-REPLY

Petitioners' October 2, 2017 reply contains several new issues to which PGE responds in this sur-reply.

A. Order No. 17-256 Did Not Make Petitioners Parties to Docket No. UM 1805.

In their September 8, 2017 petition to intervene out of time, Petitioners argued that, to the extent Order No. 17-256 interprets their *fully executed contracts*, it makes Petitioners a party to Docket No. UM 1805.³ PGE countered this argument by noting that Order No. 17-256 does not purport to interpret Petitioners' executed contracts or any other executed contracts.⁴ In fact, PGE asked the Commission to deny the petition to intervene in part because Petitioners are asking for an interpretation of their executed contracts and that would unreasonably broaden the scope of the proceeding.⁵

² See e.g., Docket No. UM 1234, Order No. 07-227 at 4 (Jun. 8, 2007) (Commission held that it would consider a reply that was not authorized by the rules and which was objected to by the other party to the proceeding because the reply "better explains" the filing party's position than did that party's original filing); Docket No. UE 267, Order No. 15-195 at 1 (Jun. 16, 2015) (Commission grants leave to file a reply where no objection is made to the reply); Docket No. UM 1566, Order No. 14-425 (Dec. 8, 2014) (Commission grants leave to file a reply not otherwise authorized by rules and not objected to by other parties).

³ Docket No. UM 1805, Petitioner's Joint Petition to Intervene Out of Time at 6 (Sep. 8, 2017) ("... [O]rder [No. 17-256] itself appears to possibly make the NewSun Solar Projects a 'party thereto', i.e., a party to the order, and even possibly 'party against whom the order has been made,' to the extent that its ambiguous language purports to interpret the NewSun Solar Projects' binding and fully executed contracts.") (emphasis added).

⁴ Docket No. UM 1805, PGE's Objection to Joint Petition to Intervene Out of Time at 13-14 (Sep. 18, 2017) (Arguing that Complainants made it clear they did not seek an interpretation of executed contracts and that Petitioners seek to unreasonably broaden the issues in the proceeding by seeking interpretation of their ten executed contracts; PGE points out that any interpretation of specific, fully executed contracts should occur in a new proceeding).

⁵ Docket No. UM 1805, PGE's Objection to Joint Petition to Intervene Out of Time at 19 (Sep. 18, 2017) ("Even if the Commission had the authority to grant late intervention, it should refuse to do so ... [i]t is ... unreasonable to broaden the issues in this proceeding to include interpretation of Petitioners' specific, executed contracts.").

In their October 2, 2017 reply in support of the petition to intervene, Petitioners change tact. They now argue that to the extent Order No. 17-256 interprets the standard contract form underlying Petitioners' executed contracts, the order could adversely impact Petitioners.⁶ It should be noted that Petitioners assert that they made this argument in their original petition to intervene out of time, but this is inaccurate, the argument in the petition was limited to interpretation of executed contracts.⁷

In their reply, Petitioners argue that as persons who might be adversely impacted by the holding in Order No. 17-256, Petitioners are parties to the order but not parties to the proceeding.⁸ And Petitioners argue that under ORS 756.561(1), it is only necessary to be a party to an order to apply for rehearing, it is not necessary to be a party to the proceeding.⁹ In effect, Petitioners have invented a whole new class of participant in Commission proceedings—the person who is not a party to a proceeding but who is a party to the order coming out of a proceeding.

There is no support for this tortured reading of ORS 756.561 in ORS Chapter 756, or ORS Chapter 183. And Petitioners have pointed to no support for this reading in Commission precedent. ORS Chapter 756 establishes administrative procedures specific to the Commission. ORS Chapter 183 establishes administrative procedure applicable to all agencies and is frequently cross referenced by ORS Chapter 756. ORS 183.310(6) defines an “order” as “any agency action expressed orally or in writing *directed to a named person or named persons* other than employees, officers or members of an agency.” By definition, an order is an order by virtue

⁶ Docket No. UM 1805, Petitioners' Reply in Support of Joint Petition to Intervene Out of Time at 7-8 (Oct. 2, 2017) (“... Order [No. 17-256] itself has effectively made the NewSun Solar Projects parties to this proceeding, to the extent it is issued against the NewSun Solar Projects by interpreting their contracts *or the previously effective contract form upon which their contracts are based.*”) (emphasis added).

⁷ See footnote 3 *supra*.

⁸ Docket No. UM 1805, Petitioners' Reply in Support of Joint Petition to Intervene Out of Time at 7-8 (Oct. 2, 2017).

⁹ *Id.*

of being addressed to named persons. Petitioners are not named persons in Order No. 17-256. It therefore makes no sense to speak of Petitioners as “parties to the order.” Rather, it makes much more sense to give ORS 756.561(1) its natural reading: after an order is issued by the Commission in any proceeding, any party thereto (i.e., any party to the proceeding) may apply for rehearing or reconsideration.

The Commission’s own rules also provide that a non-party cannot file pleadings, and an application for rehearing or reconsideration is a pleading.¹⁰ In Order No. 08-016, the Commission concluded that it must deny a petition to intervene out of time and the associated application for rehearing and reconsideration when the petitioners, who were not parties to the proceeding, sought to intervene after the final taking of evidence and after the issuance of a final order, even though the petitioners believed they were adversely affected by the order.¹¹

For all of the reasons discussed above, the Commission should deny Petitioners’ tortured reading of ORS 756.561(1) and hold that a person who is not a party to a proceeding does not have the authority to file an application for rehearing or reconsideration or any other pleading in a Commission proceeding. There is no recognized status of being a “party to an order” but not a “party to the underlying proceeding.”

B. The Commission Has the Evidence It Needs to Support Order No. 17-256.

In their October 2, 2017 reply, Petitioners argue that the Commission did not complete the “taking of evidence” with regard to the standard contract form that underlies Petitioners’ executed contracts (the “2015 Renewable Contract Form”—filed by PGE on May 27, 2015 and

¹⁰ OAR 860-001-0300(7) (“An interested person is not a party to the proceeding, and is not entitled to file pleadings ...”); OAR 860-001-0390(1) (“Pleadings are used to address formal requests to initiate a proceeding or for Commission authorization ... initiating pleadings include applications, petitions, and complaints.”).

¹¹ Docket No. DR 38, Order No. 08-016 at 2 (Jan. 18, 2008) (“The Commission has no authority to allow Movants to intervene at this time. ORS 756.525(1) authorizes the Commission to permit any person to become party to a 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.”).

approved by the Commission in Order No. 15-289).¹² First, it is unclear how this is relevant to the question of whether Petitioners should be allowed to intervene out of time. Petitioners appear to suggest that the taking of final evidence did not occur until they filed a copy of the 2015 Renewable Contract Form as part of their September 8, 2017 motion for clarification and application for rehearing or reconsideration.¹³ This cannot be correct however. Petitioners were not parties when they filed their application, and submissions by non-parties are not evidence.¹⁴ Moreover, the prohibition on intervening after the final taking of evidence would be meaningless if a person could create a new final taking of evidence merely by submitting additional evidence with a petition to intervene.

To the extent Petitioners are arguing that Order 17-256 should be clarified to find that no interpretation of the 2015 Renewable Contract Form was made because there was no copy of the form in evidence, that is an argument for clarification or reconsideration, not an argument in support of late intervention. In any event, the argument is without merit. Complainants put the meaning of the 2015 Renewable Contract Form into question when they made allegations about that era of renewable contract form in paragraphs 31 and 32 of the Complaint. Complainants then argued in their motion for summary judgment that the “RPS Attributes” language contained in the 2015 Renewable Contract Form supports the conclusion that PGE offered fixed prices for 15 years measured from commercial operation.¹⁵ PGE responded to this argument at length in its

¹² Docket No. UM 1805, Petitioners’ Reply in Support of Joint Petition to Intervene Out of Time at 13 (Oct. 2, 2017).

¹³ *Id.*

¹⁴ OAR 860-001-0300(7) (a non-party “interested person” is not entitled to file evidence into the record); *see also* Docket No. UM 1610, ALJ Ruling at 1 (Aug. 15, 2016) (ALJ rules that by filing comments in a proceeding without first obtaining intervenor party status the City of Portland was effectively acting as an Interested Person and noting that submissions by Interested Persons “have no evidentiary value.”).

¹⁵ Docket No. UM 1805, Complainants’ Motion for Summary Judgment at 26-30 (Apr. 24, 2017) (Complainants argue that the “RPS Attributes” language of Section 4.5 of PGE’s renewable standard contract form in effect in 2015 provided for 15 years of fixed prices measured from contract execution).

response in opposition to Complainants' motion for summary judgment.¹⁶ PGE provided the Commission with a section-by-section description of how the language of the 2015 Renewable Contract Form works to limit the availability of fixed prices to the first 15 years measured from contract execution.¹⁷ This explanation included citations to the relevant sections of the 2015 Renewable Contract Form filed by PGE and ultimately approved by the Commission.¹⁸

Between the complaint, Complainants' motion for summary judgment, and PGE's response in opposition to Complainants' motion for summary judgment, the Commission had more than enough information and evidence to reach its conclusion that PGE's Commission-approved standard contract filings—its standard contract forms—limited the availability of fixed prices to the first 15 years measured from contract execution.¹⁹ The language of the relevant standard contract forms was thoroughly described and discussed by the parties. Much of that language was quoted verbatim in the complaint and the parties' summary judgment briefs. PGE filed copies of its July 12, 2016 Schedule 201 ("2016 Schedule 201") and standard contract form ("2016 Standard contract") with the Commission as Attachments 3 and 4 to PGE's motion for summary judgment.²⁰ And PGE filed stipulated facts with the Commission indicating that the key provisions stating that the maximum 20 year term begins at contract execution and limiting the availability of fixed prices to the first 15 years of that term were the same in the 2016 Schedule 201, in the 2016 Standard Contract, and in the 2015 Renewable Contract Form.²¹ This

¹⁶ Docket No. UM 1805, PGE's Response in Opposition to Complainants' Motion for Summary Judgment at 12-14 (May 8, 2017).

¹⁷ *Id.* at 13.

¹⁸ *Id.* (PGE filed the form in question on May 27, 2015, in Docket No. UM 1610 as PGE's Application in Compliance with OPUC Order No. 15-130, *Standard Renewable Off-System Variable Power Purchase Agreement*).

¹⁹ Docket No. UM 1805, Order No. 17-256 at 3 (Jul. 13, 2017).

²⁰ Docket No. UM 1805, PGE's Motion for Summary Judgment at Attachment 3 and Attachment 4 (Apr. 24, 2017).

²¹ Docket No. UM 1805, PGE's and Complainants' Joint statement of Facts and Issues at Attachment B, ¶¶ 117-120, 135-139 (Mar. 10, 2017).

provided the Commission with more than enough evidence and information to support its conclusions.

However, if the Commission ultimately concludes that it needs to do so, it can take official notice of PGE's 2015 Renewable Contract Forms filed by PGE in Docket No. UM 1610 on May 27, 2015 and approved by the Commission through Order No. 15-289. Indeed, Complainants have already moved the Commission to take official notice of that material.²² The Commission has the authority to take official notice of PGE's May 27, 2015 compliance filing in UM 1610 on its own motion if the Commission ultimately concludes that such official notice is necessary to support Order No. 17-256.²³

C. PGE Has Not Requested Clarification of Order No 17-256 or Conceded that Clarification is Necessary.

PGE has not argued that Order No. 17-256 needs to be clarified. Rather, in its objection to Petitioners' joint petition to intervene out of time, PGE suggested that "if the Commission concludes that Order No. 17-256 is vulnerable to reversal on judicial review, that 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."²⁴ PGE then suggested points of clarification that the Commission could make if it deems clarification desirable.²⁵ To be clear, PGE has not argued that clarification is necessary and believes that the Commission can deny both of the pending requests for clarification and reconsideration and affirm Order No. 17-256 without modification or clarification.

²² Docket No. UM 1805, Complainants Motion to for Official Notice at 3 (May 30, 2017).

²³ OAR 860-001-0460(1).

²⁴ Docket No. UM 1805, PGE's Objection to Joint Petition to Intervene Out of Time at 17 (Sep. 18, 2017).

²⁵ *Id.*

D. Granting Late Intervention to Petitioners is Prohibited by ORS 756.525(1).

Petitioners argue that ORS 756.525(1) merely states the Commission “may” permit a person to become a party if application is made before the final taking of evidence and that the use of the word “may” is not a statutory bar to allowing intervention after the final taking of evidence.²⁶ But this ignores that the statute states the Commission “may” grant party status only “if” the petition to intervene is filed before the final taking of evidence. The Commission clearly found as much in Order No. 08-016 when it held:

The Commission has no authority to allow Movants to intervene at this time. ORS 756.525(1) authorizes the Commission to permit any person to become a party to the proceeding “if application therefor 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.²⁷

There is no reason to conclude that the requirement to seek intervention before the final taking of evidence is not mandatory.

There are a number of other arguments and characterizations in Petitioners’ reply with which PGE disagrees, but such disagreement should be clear from PGE’s September 18, 2017 objection to the joint petition to intervene out of time and from PGE’s summary judgment briefing. As a result, PGE has not attempted to reiterate such points of disagreement in this sur-reply.

²⁶ Docket No. UM 1805, Petitioners’ Reply in Support of Joint Petition to Intervene Out of Time at 12 (Oct. 2, 2017).

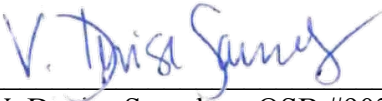
²⁷ Docket No. DR 38, Order No. 08-016 at 2 (Jan 18, 2008).

III CONCLUSION

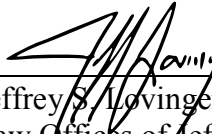
For all of the responses discussed above, PGE respectfully requests leave to file this sur-reply, and PGE respectfully requests that the Commission deny Petitioners' joint petition to intervene out of time.

Dated this 16th day of October 2017.

Respectfully submitted,



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