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V. Denise Saunders  
Associate General Counsel

December 16, 2016

*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, Respondent

Attention Filing Center:

Enclosed for filing in Docket UM 1805 are Portland General Electric Company's Motion to (1) Strike; (2) Make More Definite and Certain and (3) Request More Time to Respond.

A copy of the motion has been served on all parties listed on the OPUC service list.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink that reads "V. Denise Saunders".

V. Denise Saunders  
Associate General Counsel

VDS:bop

cc: OPUC Service List UM 1805

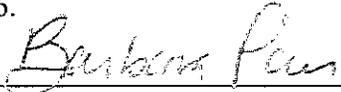
Enclosure

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing Motion to:

**1) STRIKE; (2) MAKE MORE DEFINITE AND CERTAIN AND (3) REQUEST MORE TIME TO RESPOND** on the following named persons on the date indicated below by email and/or U.S. Mail addressed to said persons whose addresses appear on the OPUC service list for Docket UM 1805.

Dated this 16th day of December, 2016.

  
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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.

**PORTLAND GENERAL ELECTRIC  
COMPANY'S (1) MOTION TO  
STRIKE AND (2) MOTION TO MAKE  
MORE DEFINITE AND CERTAIN  
AND (3) MOTION REQUESTING  
MORE TIME TO RESPOND**

Pursuant to OAR 860-001-0420(3), ORCP 21 D and E, and ORCP 15 B, Portland General Electric Company ("PGE") moves the Public Utility Commission of Oregon ("Commission") or the Administrative Law Judge ("ALJ") for an order or ruling:

1. Striking both of Complainants' claims for relief because they contain multiple claims not separately stated; and/or
2. Ordering Complainants to make their claims and allegations more definite and certain by (a) stating each claim separately, (b) stating the relief requested for each claim separately, and (c) pleading with greater definiteness, certainty, and detail all allegations involving Complainants' claim that the Commission should impose a contractual "interpretation" or construction on PGE's previously executed standard contracts as part of the resolution of Complainants' claims; and

3. Declaring that PGE's deadline to file an answer is deferred until 10 days after PGE receives either: (a) notice that its motion to strike and motion to make more definite and certain have been denied; or (b) service of Complainants' amended complaint.

## I. INTRODUCTION

This case centers on a disagreement between PGE and Complainants over Commission policy governing the availability of fixed prices under qualifying facility ("QF") standard contracts. On May 13, 2005, the Commission issued Order No. 05-584 in Docket UM 1129. Among other policy determinations, the Commission decided that standard contracts for QFs would have a maximum term of 20 years, that utilities would be required to pay fixed rates for any QF output obtained during the first 15 years of the 20-year term, and that utilities would pay market-based prices for any QF output obtained during the last five years of the 20-year term.<sup>1</sup>

The Commission's order requires fixed prices during the first 15 years of the contract term.<sup>2</sup> PGE's standard contracts state that their term begins at execution.<sup>3</sup> It follows that PGE must pay fixed prices for QF output delivered in the first 15 years after execution. Complainants take the view that Commission policy requires 15 years of fixed prices measured from the date a QF achieves commercial operation. If this case

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<sup>1</sup> OPUC Order No. 05-584, Docket UM 1129 at 20.

<sup>2</sup> *Id.* ("...we are persuaded that standard contract prices should be fixed only for the first 15 years of a 20-year term.")

<sup>3</sup> *See e.g.*, PGE's current Standard Off-System Variable Power Purchase Agreement effective August 12, 2016, which defines "Term" in Section 1.37 as "the period beginning on the Effective Date and ending on the Termination Date" and which indicates in Section 2.1 that the "Agreement shall become effective upon execution by both Parties ("Effective Date")." The combined effect of these two provisions is that the standard contract's term begins when both parties execute the contract.

reaches a decision on the merits, the Commission will be called upon to determine whether Complainants' view is correct.

But before this case can proceed, PGE is entitled to understand precisely what claims Complainants are making and what remedies they seek. Unfortunately, PGE cannot yet do so because Complainants have improperly pleaded multiple claims not separately stated. Complainants have also made oblique reference to a need for the Commission to impose an "interpretation" on PGE's previously executed contracts, apparently as part of resolving one or more of Complainants' claims.<sup>4</sup> But Complainants have alleged no information that allows PGE to understand the nature of this claim for interpretation of existing contracts.

Put bluntly, PGE cannot tell what Complainants want. Do they want the Commission to amend its prior orders to embrace Complainants' view that fixed rates should be available for 15 years from commercial operation? Do they want future PGE contracts to include a statement that fixed rates will be paid for 15 years from commercial operation? Do they want PGE to draft new form agreements for Commission approval that contain such language? Are they looking to have the Commission reform or otherwise impose wholesale contract "interpretation" on PGE's previously executed standard contracts? If so, they need to clearly say so.

To illustrate the challenge of responding to Complainant's vague pleading, if Complainants are asking for wholesale reformation of existing contracts—how would that work? There are multiple generations of standard contract and multiple variants within each generation, all with slightly different terms. How would a wholesale "interpretation" of existing contracts take into account the specific "meeting of the

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<sup>4</sup> See Complaint at pars. 9, 10 and 11.

minds” between PGE and each existing QF counterparty? Does each counterparty need to be joined in this complaint? Do Complainants believe QFs with existing contracts are being harmed and are entitled to damages? If this is the relief sought by the complaint the action will require each counterparty to join as a party and prove its damages.

The Commission should order Complainants to clearly and separately state their claims and to plainly articulate their theories of relief so that PGE and the Commission can understand what Complainants want.

## **II. DISCUSSION**

The Commission’s regulations provide that the Oregon Rules of Civil Procedure (“ORCP”) apply in contested case proceedings.<sup>5</sup> PGE is moving for an order to strike (ORCP 21 E) or an order to amend the complaint to make more definite and certain (ORCP 21 D) because the claims made in the complaint are so indefinite and uncertain that the precise nature of the charges against PGE are not apparent. It is the purpose of these ORCP 21 motions to empower the defendant to compel the plaintiff to state its case with sufficient clarity and precision to allow the defendant to understand plaintiff’s claims and prepare a defense.

### **A. MOTION TO STRIKE**

Complainants have alleged two claims for relief. They label the first claim: “Violation of the Commission’s Orders and Policies Implementing PURPA and Related State Law.”<sup>6</sup> They label the second claim: “Arbitrary Application of Schedule 201 and

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<sup>5</sup> OAR 860-001-0000(1) (“The Oregon Rules of Civil Procedure ... apply in contested case and declaratory ruling proceedings unless inconsistent with these rules, a Commission order, or an Administrative Law Judge (ALJ) ruling.”)

<sup>6</sup> Complaint at pars. 46-52 on pages 14-15.

the standard PPA.”<sup>7</sup> Complainants do not request relief specific to each claim. Rather, they state one prayer for relief following both claims.<sup>8</sup> Presumably, Complainants intend this prayer to apply to both claims.

The prayer requests three forms of relief. The first two requests appear to be the primary relief sought. Complainants ask the Commission: (a) to declare that PGE’s standard contract requires payment of fixed prices for 15 years from QF operation; and (b) to order PGE to cease any “business practices” to the contrary. The third form of relief appears to be an alternative request, which Complainants seek only if their first two forms of relief are denied. In the third request for relief, Complainants ask the Commission to order PGE to file new standard contracts clearly stating that the 15 years of fixed prices run from commercial operation.

Under the ORCP, a “claim for relief is a series of factual allegations that form the legal basis for a single remedy or form of relief.” Complainants are allowed to join multiple claims for relief in a single contested case. But Complainants “must state each claim for relief separately and identify each theory of recovery within that claim as separate counts.”<sup>9</sup> This requirement is more than a mere formality; Complainants must observe it so that PGE can have a clear understanding of the charges it faces.

Complainants have made two claims for relief. And alleged that each of those claims for relief is the legal basis for three remedies or forms of relief. Put more

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<sup>7</sup> *Id.* at pars. 53-56 on page 15.

<sup>8</sup> *Id.* at pars. 1-4 on page 16.

<sup>9</sup> Oregon Civil Pleading and Practice (2012 rev.) § 19.2-5(a) citing *Navas v. City of Springfield*, 122 Or. App 196, 201, 857 P.2d 867 (1993) (“Defendant is entitled to rely on the theory pleaded by plaintiff to frame the issues to be tried. The rule is that a complaint must separately state each claim and within each claim, it must identify alternative theories of recovery as separate counts. ORCP 16 B.”); see ORCP 16 B (“Each separate claim or defense shall be separately stated. Within each claim alternative theories of recovery shall be identified as separate counts.”).

concretely, Complainants assert a “claim” for “violation of Commission orders and policies implementing PURPA” but then assert that this “claim” entitles it to three forms of remedy. As discussed above, “a claim is a series of factual allegations that form the legal basis *for a single remedy or form of relief.*”<sup>10</sup> Because Complainants’ “First Claim for Relief” is the basis for the three remedies contained in Complainants’ Prayer for Relief, it is clear that the “First Claim for Relief” actually contains at least three claims not separately stated.

Similarly, Complainants’ appear to plead that their “Second Claim for Relief” also forms the basis of the three remedies requested in the prayer for relief. It follows that the “Second Claim for Relief” also contains at least three claims not separately stated

Improperly consolidating multiple claims into one “Claim for Relief” results in an impermissible “blurring of the lines” that makes it impossible for PGE to understand Complainants’ claims with any precision. This improper consolidation of claims also makes it more difficult for PGE to efficiently move against Complainants’ claims under ORCP 21 A or to defend against them on the merits.

The importance of separately stating claims is made apparent in this case by the allegations contained in paragraphs 9, 10 and 11 of the “Jurisdiction” section of the complaint. Those paragraphs indicate that some of Complainants claims (apparently those leading to the relief requested in the first two paragraphs of the prayer for relief) may require the Commission to impose a contract interpretation upon PGE’s previously executed standard contracts. An “interpretation” of contracts to which Complainants are not parties. If this is true, then PGE needs to be able to understand the precise nature of

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<sup>10</sup> Oregon Civil Pleading and Practice (2012 rev.) § 19.2-5(a) (emphasis added).

such a claim so that it can evaluate whether Complainants have standing, whether all necessary parties have been joined, and the applicability of any other ORCP 21 motions or affirmative defenses. PGE cannot do so when Complainants' claims are improperly combined or when aspects of those claims are buried in allegations about jurisdiction.

ORCP 21 E expressly provides that a party may move to strike a pleading containing more than one claim not separately stated;<sup>11</sup> PGE so moves against both Complainants' First Claim for Relief and Complainants' Second Claim for Relief. Because those pleadings contain more than one claim not separately stated, which prevents PGE from developing a clear and precise understanding of the charges against it, the Commission or ALJ should strike both Claims for Relief.

#### **B. MOTION TO MAKE MORE DEFINITE AND CERTAIN**

If the Commission or ALJ denies PGE's request to strike, or grants the request but gives Complainants' leave to amend, then PGE respectfully moves the Commission for an order requiring Complainants to amend their complaint to make their allegations more definite and certain as provided for by ORCP 21 D.<sup>12</sup>

For the reasons discussed above, Complainants should be required to separately plead all claims, and to separately plead the relief requested for each claim.<sup>13</sup>

Complainants should also be required to plead with greater clarity and detail their apparent allegation that one or more of their claims will involve the need for the

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<sup>11</sup> ORCP 21 E provides in relevant part: "Upon motion made by a party before responding to a pleading ... the court may order stricken ... any sham, frivolous, or irrelevant pleading or defense or *any pleading containing more than one claim or defense not separately stated* ..."

<sup>12</sup> ORCP 21 D provides in relevant part: "...the court may require the pleading to be made definite and certain by amendment when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge ... is not apparent."

<sup>13</sup> See Oregon Civil Pleading and Practice (2012 rev.) § 19.2-7 ("When more than one claim for relief is stated, a prayer for each claim should be set forth. See ORCP 18 B.").

Commission to impose a contract interpretation on PGE's previously executed standard contracts. The only apparent allegations on this issue in the current complaint are found in paragraphs 9, 10 and 11. But these oblique references to the Commission imposing an "interpretation" on PGE's executed contracts as part of a decision in this case are far too indefinite and uncertain to provide PGE with any real understanding of Complainants claim or allegations. If Complainants seek to have executed contracts—which represent private rights of contract between PGE and its QF counterparties—interpreted or construed as part of this proceeding, then Complainants need to make their allegations more definite and certain so that PGE can evaluate them and raise any defenses, whether by Rule 21 motion, by affirmative defense, or otherwise.

Complainants should be required to allege which specific claims involve Commission interpretation or reformation of executed contracts. And the Complainants should be required to allege ultimate facts indicating which contracts require interpretation, what language or provisions require interpretation and why. PGE's executed agreements are written documents. As the Oregon Supreme Court stated in *Vaughan v. Spence*, 170 Or 440, 448-449, 133 P.2d 242 (1943):

Code pleading permits a party to make an averment which concerns a document in any one of three ways: (1) [s]um up in the body of the pleading the parts of the document which are material; (2) copy the material parts of the document into the pleading; or (3) attach a copy of the document to the pleading as an exhibit and by averment make it a part of the pleadings.

Complainants have followed none of these alternatives with regard to the contracts that they ask the Commission to "interpret."

In sum, the allegations regarding the need for the Commission to impose a contract interpretation or construction on PGE's executed contracts is so indefinite and

uncertain that there is no way for PGE to understand the precise nature of the charge.

Pursuant to ORCP 21 D, PGE respectfully requests an order or ruling requiring Complainants to re-plead their allegations about interpretation or construction of existing contracts as a specific part of one or more of Complainants' separately plead claims so that PGE may understand the precise nature of Complainants' claims and have a basis upon which to evaluate its defenses.

**C. Request for ruling that PGE will have the right to evaluate any amended complaint and file any appropriate motions against the amended complaint under ORCP 21 or otherwise before being required to file an Answer.**

Finally, PGE respectfully requests that the Commission or ALJ confirm that once Complainants have amended their complaint, PGE will have the opportunity to evaluate those newly clarified claims and to assert ORCP 21 motions before being required to file an answer.

Pursuant to ORCP 15 B,<sup>14</sup> the submission of these ORCP 21 D and E motions to strike and to make more definite and certain extends the deadline for PGE to file a responsive pleading, such that no answer is due until the later of: (a) 10 days after receipt of an order denying these motions; (b) 20 day after receipt of an amended complaint if these motions are granted; or (c) the original deadline of December 27, 2016. The Commission's rules do not have a similar provision but ORCP 15 B should apply in this situation because the Commission has incorporated the ORCP.<sup>15</sup>

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<sup>14</sup> ORCP 15 B(1) provides: "If the court denies a motion, any responsive pleading required shall be filed within 10 days after service of the order, unless the order otherwise directs. ORCP 15 B(2) provides: "If the court grants a motion and an amended pleading is allowed or required, such pleading shall be filed within 10 days after service of the order, unless the order otherwise directs."

<sup>15</sup> Under the Commission's prior rules of practice and procedure, ALJ Kirkpatrick issued at least one ruling that ORCP 15 B controls in these circumstances. *See* Ruling issued December 15, 2004, in OPUC Docket No. UCB 13 (ruling that where defendant filed a motion to dismiss on or before the deadline to file an

PGE respectfully requests that the Commission or ALJ confirm, as part of any decision on these motions, that PGE's answer will not be due until 10 days after PGE receives notice of an order or ruling denying these motions, or until 20 days after PGE receives an amended complaint. In the event the Commission or ALJ determines that ORCP 15 B does not apply, and PGE has not been informed of that fact in time to file an answer by December 27, 2016, PGE denies all allegations of the complaint and reserves all affirmative defenses and will request leave to file an answer with the Commission.

Dated this 16<sup>th</sup> day of December, 2016.

Respectfully submitted,



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answer, ORCP 15 B applied and the deadline to file an answer was deferred until after resolution of the motion).