

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1859

| | | |
|---------------------------|---|-----------------------------------|
| FALLS CREEK HYDRO LIMITED |) | |
| PARTNERSHIP, |) | |
| |) | |
| Complainants, |) | FALLS CREEK HYDRO’S |
| |) | RESPONSE TO PORTLAND |
| v. |) | GENERAL ELECTRIC COMPANY’S |
| |) | MOTION FOR REQUEST FOR |
| PORTLAND GENERAL ELECTRIC |) | EMERGENCY STAY AND |
| COMPANY, |) | CONFERENCE |
| |) | |
| Defendant. |) | |
| _____ |) | |

I. INTRODUCTION

Falls Creek Hydro Limited Partnership (“Falls Creek Hydro” or “Complainant”) respectfully request that Oregon Public Utility Commission (the “Commission” or “OPUC”) Administrative Law Judge (“ALJ”) Allan Arlow deny Portland General Electric’s (“PGE’s”) motion for request for emergency stay and set a schedule that requires PGE to file its answer no later than Tuesday, September 5, 2017. Falls Creek Hydro also objects to consolidated treatment with other complaints filed against PGE because it only owns one unique project with a single complaint against PGE. PGE’s exaggerated claims about its workload are irrelevant, and PGE has already had sufficient time to prepare an answer to Falls Creek Hydro.¹ Providing additional time to PGE

¹ Falls Creek complaint should also not come as a surprise to PGE given the numerous creative and illegal efforts PGE has made to prevent Falls Creek from obtaining a contract.

would cause substantial harm to Falls Creek Hydro, which must establish a power purchase agreement (“PPA”) expeditiously to remain operational, is not warranted under these circumstances.

II. BACKGROUND

Falls Creek Hydro is a qualifying facility (“QF”) with an existing nameplate 4.1 MW hydropower project that has been operating since 1984 and it should have been very easy for PGE to process Falls Creek Hydro’s PPA. Aside from the unique local benefits Falls Creek Hydro provides to western Oregon in Linn County, Falls Creek Hydro offers a valuable capacity resource that is similar to those the Commission has directed PGE to consider renewing as part of its 2016 integrated resource plan process. Falls Creek Hydro delivers significant environmental benefits as well; constructing a new facility (regardless of its technology) that produces a commensurate amount of carbon-free energy could ratepayers more than retaining an existing and proven facility.

Falls Creek Hydro was due an executable PPA by July 20, 2017, according to its own calculations—and by August 25, 2017, according to PGE’s. Falls Creek Hydro began negotiating with PGE on June 6 with the understanding that PGE’s rates would change again in October or November. As discussed more thoroughly below, timing is of the essence for Falls Creek Hydro. As such, Falls Creek Hydro was concerned that PGE harbored secretive plans to thwart Falls Creek from completing the PPA process, and even specifically asked PGE if it planned to make an early avoided cost rate filing. PGE refused to answer, and committed regulatory fraud by knowingly and falsely informing

Falls Creek that it would provide an executable PPA on August 25, 2017.²

During its negotiations with Falls Creek, PGE has made numerous illegitimate objections to keep Falls Creek from establishing a PPA or legally enforceable obligation. For example, although Falls Creek initially provided PGE with the information that PGE requested and asked for a draft PPA, but PGE did not accurately note the date the information was provided.³ Once PGE noted the correct date the initial information was received, PGE requested additional minor and inconsequential information, and Falls Creek Hydro then provided the additional information on June 13, 2017. PGE then delayed and refused to provide a draft PPA because PGE asked for a new point of delivery, which not required for the execution of a final PPA and should not have held up PGE providing at least providing a draft PPA.

After receiving its draft PPA, Falls Creek Hydro requested an executable PPA rather than a final draft PPA and pointed out two non-substantive errors in PGE's PPA (namely, correcting the county name and the capacity). Rather than responding with an executable PPA as required by Commission precedent and PGE's Schedule 201, PGE provided a new draft PPA claiming that Falls Creek Hydro had requested changes to its initial draft. To be clear, the "changes" requested by Falls Creek Hydro were to fix the county name ("Linn" rather than "Lane") and the nameplate capacity ("4.1 MW" rather than "4.9 MW"). Falls Creek Hydro provided correct information in the both of the original submissions provided by Falls Creek Hydro. Thus, Falls Creek Hydro was not

² Attachment A (email from PGE promising to send executable contract on August 25, 2017).

³ PGE did not change the date received even after being provided verification from FedEx.

actually requesting PGE make any changes, but merely asking PGE to correct its own typographical errors (or intentionally inserted mistakes to delay the process). Regardless, the “changes” were minor and should not have required PGE to issue a new draft PPA.

Overall, PGE has used creative means to drag out its negotiations with Falls Creek Hydro, including using its Schedule 201 timelines to preclude Falls Creek Hydro from finalizing its PPA, providing knowingly false and inaccurate information, and not being forthcoming with Falls Creek Hydro about its recent OPUC filings, all of which was designed to preclude Falls Creek from finalizing its PPA. If PGE had spent half of the time it has used to attempt to prevent Falls Creek Hydro from executing a PPA on preparing an answer, then PGE could easily have filed its answer today. PGE’s failure to negotiate in good faith with Falls Creek Hydro is the reason that Falls Creek Hydro now objects to a stay of its complaint proceeding, and are justifications to expeditiously process Falls Creek Hydro’s complaint.

III. ARGUMENT

A. Falls Creek Hydro Owns Only One Existing and Operating Hydroelectric Project and Objects to Consolidated Treatment

OAR 806-01-0600 provides for the consolidation of proceedings at the discretion of the Commission or ALJ. Falls Creek objects to any such consolidation and requests that PGE be required to proceed with its complaint according to the Commission’s established process, and without delay. The fact that Falls Creek Hydro’s attorney has filed complaints from other QFs with different owners against PGE should be irrelevant to Falls Creek Hydro’s unique facts and circumstances.

Falls Creek Hydro owns one project and has made only one complaint, and

therefore sees no reason to allow PGE any additional time after months of delays originated by PGE during its negotiation process. As PGE’s own motion points out, “each complaint involves a unique set of facts . . . is relatively complex,” and “involves a series of dozens of communications between PGE and the Complainant.”⁴ Yet, PGE chose to lump all of its complaints together rather than address the fact that some of its complaints, like Falls Creek Hydro’s, will in fact be prejudiced by delay.

PGE’s Motion suggests that because many of the complaints against PGE were filed by the same counsel, and the same PGE employees are needed to review the facts, that they should all be subject to the same types of delays.⁵ This just does not make any sense given the costs such delay inflicts upon Falls Creek Hydro, which is a single small operating project with unique circumstances. The fact that Falls Creek Hydro’s attorney has filed complaints against PGE from other QFs with different owners should be irrelevant to the unique facts and circumstances surrounding Falls Creek Hydro. PGE and Falls Creek Hydro’s counsel are also involved in a number of other unrelated complaints,⁶ PGE-specific regulatory proceedings,⁷ and other generic proceedings

⁴ PGE’s Motion at 2.

⁵ Id.

⁶ Blue Marmot V, LLC v. PGE, Docket No. UM 1829 (April 28, 2017); Blue Marmot VI, LLC v. PGE, Docket No. UM 1830 (April 28, 2017); Blue Marmot VII v. PGE, Docket No. UM 1831 (April 28, 2017); Blue Marmot VIII, LLC v. PGE, Docket No. UM 1832 (April 28, 2017); Blue Marmot IX v. PGE, Docket No. UM 1833 (April 28, 2017) (Counsel representing Blue Marmot V, VI, VII, VIII and IX QFs against PGE for failure to execute PPAs).

⁷ Re PGE Application to Update Schedule 201 Qualifying Facility Information, Docket No. UM 1728 (Counsel representing Renewable Energy Coalition (“REC”) in PGE’s avoided cost rate update); Re PGE 2016 Integrated Resource Plan, Docket No. LC 66 (Counsel representing Northwest and Intermountain Power Producers Coalition (“NIPPC”) and REC in PGE’s integrated resource plan); Re Northwest and Intermountain Power Producers Coalition, Community

regarding PURPA and independent power producers that PGE is an active party to,⁸ none of which should be consolidated with these complaints. Complainants therefore request that PGE be required to proceed with its complaints according to the Commission's established process, and without delay.

B. PGE's Claims About Workload Are Irrelevant

PGE argues that it will take PGE a whopping 186 business days to review all of its newly-filed complaints while simultaneously acknowledging that number does not account for any efficiencies of scale and is therefore overblown.⁹ PGE suggests it "may be possible PGE staff to assemble the facts regarding one complaint while PGE's attorneys are drafting an answer to another complaint (for which PGE's staff has already

Renewable Energy Association and Renewable Energy Coalition v. PGE, Docket No. UM 1805 (Counsel representing NIPPC, Community Renewable Energy Association ("CREA") and REC in complaint against PGE regarding its PURPA PPA); Re Application to Lower the Standard Price and Standard Contract Eligibility Cap for Solar Qualifying Facilities, Docket No. UM 1854 (Counsel representing NIPPC and REC in PGE's request to reduce standard contract eligibility); Re Staff Investigation Into Qualifying Facility Contracting and Pricing, Docket No. UM 1610 (Counsel representing REC in generic PURPA investigation); Re PGE Application for Transportation Electrification Programs, Docket No. UM 1811 (Counsel representing Electric Vehicle Charging Association); and Re PGE Advice No. 17-05 (ADV 523), Schedule 134 Gresham Privilege Tax Payment Adjustment, UE 324 (Counsel representing City of Gresham).

⁸ Re OPUC Staff Investigation of Competitive Bidding Guidelines Related to Senate Bill 1547, Docket No. UM 1776 (generic investigation to competitive bidding guidelines for utility resource acquisitions)(counsel representing NIPPC, REC and CREA); Re Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources, Docket No. AR 600 (competitive bidding rulemaking)(Counsel representing NIPPC, REC and CREA), and Re Recommendation for Portfolio Options pursuant to ORS 757.603(2) and OAR 860-038-0220, Docket No. UM 1020 (use of voluntary renewable funds for generators and QFs)(Counsel representing REC).

⁹ PGE's Motion at 3.

assembled the facts)” and, thus, “it *may* be possible for PGE to develop answers to all 31 complaints in less than the 186 business days”¹⁰

Falls Creek Hydro has more confidence in PGE’s abilities to work hard and efficiently, and these assertions are preposterous. PGE has a full internal staff and team of lawyers, and has recently retained at least two outside law firms as well.¹¹ PGE also has an unlimited legal budget, courtesy of its ratepayers, and has litigated a wide variety of complex issues before the Commission, at FERC, and in our court systems. Thus, PGE has demonstrated enough legal prowess and expertise to figure out how to manage its own internal workflow in a way that actually does account for economies of scale and ensures that PGE meets its deadlines.

Moreover, PGE should not be permitted to use a self-inflicted problem to its advantage. PGE’s PURPA staff, which PGE claims would be forced to “work on nothing but” reviewing complaints and developing answers,¹² was certainly able to make several discretionary filings recently (including requests for retroactive relief that would subject developers to dire consequences as well as its own complaint against the Covanta Marion QF¹³) to undermine its ongoing PURPA negotiations. If PGE spent its time processing PPAs and preparing its answers rather than trying to put Falls Creek Hydro out of

¹⁰ Id. at 3-4 (emphasis added).

¹¹ These firms include McDowell Rackner and Gibson (which has six lawyers) and Law Office of Jeff Lovinger.

¹² PGE’s Motion at 3.

¹³ Re PGE Application to Lower the Standard Price and Standard Contract Eligibility Cap for Solar QFs, Docket No. UM 1854, PGE’s Motion for Interim Relief at 1 (June 30, 2017); Re PGE Updates to Schedule 201 QF (10MW or Less) Avoided Cost, Docket No. UM 1728, PGE’s Motion for Temporary Relief From Schedule 201 Prices at 1 (Aug. 18, 2017); PGE v. Covanta Marion, Inc., Docket No. UM 1887, Complaint (Aug. 11, 2017).

business, then it should have easily been able to file a single answer within 20 days.

Thus, PGE's claims that its staff is too busy to deal with the results of those filings are disingenuous and self-serving.

Falls Creek Hydro notes that its legal counsel does not appear to have the same difficulties completing its work as PGE. At bottom, if a two-attorney firm can process all these complaints in a timely manner along with their regular workload (including responding to PGE's myriad of regulatory filings), then PGE should be able to do so with vastly superior resources.

C. PGE Failed to Accurately Reflect Falls Creek Hydro's Position Regarding a Stay

PGE's Motion notes that it requested additional time to answer its complaints and that in 17 cases, PGE and the QF complainant were not able to reach agreement regarding an extension of time to file an answer. PGE did not, however, provide a single detail regarding those failures. For example, Falls Creek agreed to provide PGE a 45-day extension, if PGE provided its executable PPA (which was due on August 25, 2017) or a one-week extension, if PGE did not. PGE refused. PGE's Motion failed to include any information about its discussions with Falls Creek Hydro, and therefore failed to adequately inform the ALJ of Falls Creek Hydro's efforts and willingness to work with PGE. Thus, ALJ Grant suspended PGE's due date for responding to Falls Creek Hydro based on inaccurate information, and PGE should be directed to provide its answer on September 5, 2017.

D. Delaying the Schedule Prejudices Falls Creek Hydro

In the short term, Falls Creek will sustain immediate harm from any delays in its

complaint schedule. For example, Falls Creek still needs to finalize its transmission arrangements and suspending the procedural schedule for Falls Creek's complaint could cause Falls Creek to incur additional transmission costs. Worse yet, the transmission that Falls Creek needs could disappear during any additional time allotted to PGE, which would prohibit Falls Creek from finalizing its PPA.

In addition to negotiating a new power contract, Falls Creek may also need to negotiate a new interconnection agreement as well. Falls Creek needs to move forward with interconnection studies, which it cannot fund unless it has the security of a PPA in place. Delays in establishing its PPA with PGE are therefore causing delays in ensuring that its interconnection with PacifiCorp is up to date.

More than other small business in Oregon, Falls Creek needs to be able to predict its revenues to make business decisions needed to remain in operation. For example, Falls Creek Hydro needs to make decisions regarding maintenance and operations of the hydro facility which can be deferred, but could significantly increase costs in the future. If Falls Creek Hydro is unable to enter into a PPA at reasonable rates, then it will shut down and these investments should not be made. If Falls Creek Hydro is able to enter into a PPA at reasonable rates, then it will operate and these investments should be made now to avoid potentially significant costs in the future. Falls Creek relies on a line of credit, which is based on projected revenue. If Falls Creek Hydro is not able to predict its revenue with a new PPA, it could lose that line of credit and require Falls Creek Hydro to shut down its operations.

Longer term, Falls Creek Hydro will need to shut down without prompt resolution of its complaint. Falls Creek Hydro's original 35-year contract with PacifiCorp is

ending, and although the Falls Creek project was built to last 100 years, PacifiCorp's current avoided cost rates are too low for the Falls Creek Hydro project to remain in operation. Falls Creek Hydro submitted testimony in UM 1794, urging the Commission to act to correct PacifiCorp's resource sufficiency date.¹⁴ Because the Commission decided to allow PacifiCorp to update its resource sufficiency as part of its 2017 integrated resource plan, negotiating a contract with PGE (and incurring additional wheeling charges) remains Falls Creek Hydro's only option for keeping its project operational.

Finally, Falls Creek Hydro is aware that complaints before the Commission can be difficult and time consuming. PGE often raises arguments and motions and refuses to provide information, with the result that the adjudicatory process is slowed down. It is an inauspicious start to this complaint that PGE has sought to delay the process even before it starts. Therefore, Falls Creek Hydro urges the ALJ to require PGE to promptly file an answer and move this case toward a timely resolution.

IV. CONCLUSION

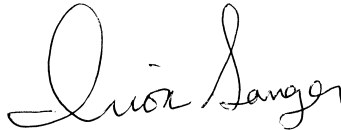
For the reasons outlined above, PGE has failed to establish any justification for delaying the prosecution of the Falls Creek Hydro complaint. PGE did not adequately represent Falls Creek Hydro's offer to allow PGE a one-week delay, and PGE should not be permitted to use that omission to its advantage to secure additional delays. PGE's attempts to lump all its recently-filed complaints together ignores the unique harm

¹⁴ See Re PacifiCorp Investigation into Schedule 37 Avoided Cost Purchases, Docket No. UM 1794, Response Testimony of Gary Marcus on behalf of CREA and the Coalition (May 30, 2017).

inflicted upon each complainant. Because any delay will subject Falls Creek Hydro to substantial harm, PGE should be required to proceed under the Commission's normal process.

Dated this 28th day of August 2017.

Respectfully submitted,

A handwritten signature in cursive script that reads "Irion Sanger".

Irion Sanger
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Portland, OR 97215
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Fax: 503-334-2235
irion@sanger-law.com

Of Attorneys for Falls Creek

Attachment A

PGE Communications



Portland General Electric Company
121 SW Salmon Street • Portland, Oregon 97204

8/3/17

Via Electronic Mail

RE: Transmittal of Final Draft Standard PPA
Falls Creek Hydro project, a proposed 4.1 megawatt Hydro QF

Mr. Marcus,

Thank you for your interest in entering into a Standard Power Purchase Agreement (Standard PPA) with Portland General Electric (PGE). We received your written request for a final draft Standard PPA on 7/13/17. PGE has determined that you have provided sufficient information to allow PGE to prepare a final draft Standard PPA.

Enclosed please find a final draft Standard PPA for your Falls Creek Hydro project, 4.1 megawatt hydro generating facility that was self-certified as a qualifying facility (QF) pursuant to 18 CFR 292.207. PGE understands that Falls Creek H.P., a limited partnership company formed under the laws of the State of Oregon is the owner of the Falls Creek Hydro project and will be the Seller under the Standard PPA. If any of this information or any of the factual details contained in the enclosed final draft Standard PPA are incorrect or change, please inform PGE immediately.

The enclosed final draft Standard PPA is a discussion draft; it is not a binding offer and PGE reserves the right to revise any of its variable terms, including exhibits. No binding Standard PPA will exist between PGE and Falls Creek H.P. unless and until PGE has provided Falls Creek H.P. with an executable Standard PPA and both Falls Creek H.P. and PGE have executed the document.

At this stage in the process you have several options: you can decide not to pursue a contract any further; you can propose in writing substantive changes to your project proposal or to the variable terms of the final draft Standard PPA; or you can send PGE a written request to prepare an executable Standard PPA without proposing any substantive changes to your project or the final draft contract.

If you propose substantive changes to your project or the variable terms of the final draft Standard PPA, PGE will treat your proposal as a new request for a draft Standard PPA. Within 15 business days of receiving your written proposal, PGE will send you either a new draft Standard PPA or PGE will request additional or clarifying information if PGE reasonably determines that it requires more information before it can prepare a new draft Standard PPA in response to your proposal to change contract terms or project details.

If you request an executable Standard PPA without proposing substantive changes to your project proposal or the variable terms of the final draft Standard PPA, then within 15

business days of receiving your written request, PGE will send you either an executable Standard PPA or request additional or clarifying information if PGE reasonably determines that additional information is necessary to prepare an executable Standard PPA.

Once you receive an executable Standard PPA, you can execute it without alteration and establish a legally enforceable obligation. Pursuant to PGE's Schedule 201 at Sheet No. 201-3 and OPUC Order No. 16-174 at 3, the power purchase prices you are entitled to receive under your Standard PPA will be based on PGE's Standard Avoided Costs or Renewable Avoided Costs in effect at the time that you execute an executable Standard PPA provided to you by PGE.

This letter summarizes certain aspects of the Standard PPA process; it does not address every detail of the process.

Sincerely,

Ryin Khandoker | Structuring and Origination

Portland General Electric | 121 SW Salmon Street, 3WTC0306, Portland, Oregon 97204

☎: 503-464-8448 | ✉: ryin.khandoker@pgn.com

enclosure: Final Draft Standard PPA for Falls Creek H.P.'s Falls Creek Project

Subj: **Re: Falls Creek Hydro, Request for contract under Schedule 201**
Date: 8/25/2017 4:13:51 P.M. Pacific Daylight Time
From: Ryin.Khandoker@pgn.com
To: GaryMarcus1@aol.com
CC: Brett.Greene@pgn.com, Angeline.Chong@pgn.com, John.Morton@pgn.com

Mr. Marcus,

PGE is committed to entering into a power purchase agreement (PPA) with Falls Creek Hydro regarding its existing 4.1-megawatt hydroelectric qualifying facility (QF) located in Linn County, Oregon, subject to the requirements of the Public Utility Regulatory Policies Act and the relevant rules and orders of the Public Utility Commission of Oregon (Commission). However, as you know, there are two pending proceedings before the Commission which will determine the applicable rates and process to use in the final executable PPA between PGE and Falls Creek Hydro.

First, on August 7, 2017, Falls Creek Hydro filed a complaint against PGE with the Commission alleging that PGE has violated the Schedule 201 contracting process and that Falls Creek Hydro has established a legally enforceable obligation on or before August 7, 2017. The complaint has been docketed as UM 1859.

Second, on August 8, 2017, the Commission partially acknowledged PGE's 2016 integrated resource plan ("IRP") and on August 18, 2017, PGE filed updated avoided cost prices and a motion to suspend its obligation to offer or enter into Schedule 201 contracts with QFs larger than 100 kW. Alternatively, PGE's motion asks the Commission to declare that PGE's new avoided cost prices are effective August 8, 2017. The updated prices and motion are docketed in UM 1728. PGE has filed its motion in UM 1728 to protect its customers from avoided cost prices that PGE believes are substantially in excess of PGE's actual average avoided costs.

In order to ensure that PGE is offering Falls Creek Hydro the correct contract at the correct prices, PGE cannot complete the Schedule 201 process until the complaint in UM 1859 and/or the motion in UM 1728 are resolved. PGE understands that Falls Creek Hydro has an existing power purchase agreement with PacifiCorp. PGE expects that both the complaint in UM 1859 and PGE's motion in UM 1728 will be resolved in time to allow PGE and Falls Creek Hydro to complete a PPA in advance of the expiration of Falls Creek Hydro's current PPA with PacifiCorp.

Regards,

Ryin Khandoker | Structuring and Origination

Portland General Electric | 121 SW Salmon Street, 3WTC0306, Portland, Oregon 97204

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Friday, August 25, 2017 AOL: GaryMarcus1