

February 15, 2019

**Via Electronic Filing**

Public Utility Commission of Oregon  
Attn: Filing Center  
PO Box 1088  
Salem, OR 97308-1088

**Re: UM 1931 - Portland General Electric Company v. Alfalfa Solar I LLC, et al.**

Attention Filing Center:

Enclosed for filing in the above-named docket is the Declaration of Anit Jindal in Support of Complainant's Response to Defendants' and Intervenors' Motions for Summary Judgment.

Thank you for your assistance.

Very truly yours,



Dallas DeLuca

ALFA-PUC\836597

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1931**

PORTLAND GENERAL ELECTRIC	)	
COMPANY,	)	<b>DECLARATION OF ANIT JINDAL IN</b>
	)	<b>SUPPORT OF COMPLAINANT’S</b>
Complainant,)	)	<b>RESPONSE TO DEFENDANTS’ AND</b>
	)	<b>INTERVENORS’ MOTIONS FOR</b>
v.	)	<b>SUMMARY JUDGMENT</b>
	)	
ALFALFA SOLAR I LLC, et al.	)	
	)	
Defendant.)	)	

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I, Anit Jindal, declare:

1. I am complainant’s attorney, and I make this declaration in support of Complainant’s Response to Defendants’ and Intervenors’ Motions for Summary Judgment. The following statements are true and correct and, if called upon, I could competently testify to the facts averred herein.


2. Attached as **Exhibit 1** is a true and accurate copy of an excerpt of the Respondent’s Answering Briefing, filed in the appeal of Public Utility Commission of Oregon, Docket No. UM 1805, *Northwest and Intermountain Power Producers Coalition, et al. v. Portland General Electric Company*, Court of Appeals of the State of Oregon, Case No. CA A167707 (Feb. 14, 2019).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 15th day of February, 2019.

MARKOWITZ HERBOLD PC

By:



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Anit K. Jindal, OSB #171086

ALFA-PUC\836574

IN THE COURT OF APPEALS OF THE STATE OF OREGON

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NORTHWEST AND  
INTERMOUNTAIN POWER  
PRODUCERS COALITION,  
COMMUNITY RENEWABLE  
ENERGY ASSOCIATION,  
RENEWABLE ENERGY  
COALITION, and THE PUBLIC  
UTILITY COMMISSION OF  
OREGON,

Respondents,

v.

PORTLAND GENERAL ELECTRIC  
COMPANY,

Petitioner.

Public Utility Commission of Oregon  
No. UM1805

CA A167707

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RESPONDENT'S ANSWERING BRIEF

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Petition for Judicial Review of the Final Order  
Of the Public Utility Commission of Oregon

*Continued...*  
2/19

(ER 4). In its second order on reconsideration (Order No. 18-079), the PUC described Order No. 17-256 as “affirm[ing] our policy that the 15-year fixed price period begins with commercial operation.” (ER 11).

PGE disagrees with the PUC’s characterization of its orders on review as clarifying or affirming the policy it established in Order No. 05-584. (App Br 24). PGE asserts that the PUC’s orders are not based on substantial reason because PUC misinterpreted its prior policy, for three reasons. But, as argued below, each of PGE’s arguments fails.

**a. Order No. 05-584 established the term of QF contracts to be 20 years, with the first 15 years at a fixed price.**

PGE first argues that the orders under review in this case are not supported by substantial reason because they were based on a misinterpretation of the policy established in the PUC’s 2005 order. (App Br 24). But PUC did not misinterpret its policy.

As described above, in Order No. 05-584, the PUC balanced the competing goals of accurately pricing QF power and ensuring that QFs would be able to obtain financing by establishing a 20-year contract term, with the price for the first 15 years fixed. Order No. 05-584 at 20. PGE’s standard contract form that it submitted pursuant to Order No. 05-584, and PGE’s contracts with QFs that the PUC approved thereafter, may have allowed for the 15-year fixed price period began on the date of contract execution. (ER 3). In

the orders under review in this case, the PUC did not order any changes to those existing contracts, but it ordered that PGE's future QF contracts unambiguously provide for the 15-year fixed price period to begin when the QF begins generating power.

That prospective change to PGE's contracts represented at most a clarification, and not a misinterpretation, of PUC policy. Order No. 05-584 established that QF contracts have a 20-year term, with the first 15 years at a fixed price. (Order No. 05-584 at 20). However, that order did not specify when that the 15-year fixed price period had to begin, which resulted in PGE taking a different approach than the other two electric utilities operating in Oregon. Both Idaho Power's and PacifiCorp's QF contract forms, unlike PGE's, unequivocally provided that the 15-year fixed price term began when the QF began to generate power, and that the fixed price to be paid is the price that existed at the time of contract execution. *See* Order No. 16-175 at 2-3 (describing contracts).

The PUC's implementation of the statewide policy it established in Order No. 05-584 encompassed both contracts that provided for the 15-year fixed price period to begin when the QF began to deliver power, and contracts that may have provided for that period to begin at contract execution. When the PUC ordered PGE to change its contracts on a going-forward basis to provide that the 15-year fixed price period begin in the same manner as in Idaho

Power's and PacifiCorp's contracts, it articulated that, prospectively, the PUC's policy would encompass only contracts that provided for the 15-year fixed price period to begin when the QF begins to deliver power to the utility.

Even if that marked a change for PGE, it was not a misinterpretation of PUC's policy established in Order No. 05-584. At most, it was a change in policy applicable to PGE.<sup>9</sup> The PUC's decision also was a grant of partial relief to complainants, although the PUC's order did not say that.<sup>10</sup> Either way, as argued above, the PUC articulated its reasoning for prospectively requiring that the 15-year fixed price period in PGE's QF contracts begins when the QF first delivers power to PGE.

**b. Order No. 05-584 provided for QFs to receive 15 years of fixed prices.**

PGE next argues that Order No. 05-584 allows the 15-year period to run from contract execution and that the PUC got its "reasoning exactly backwards" in this case because it described the 15-year period as providing a benefit to QFs rather than to utilities' customers. (App Br 27, 29). As already noted, after it issued Order No. 05-584, the PUC approved Idaho Power's and PacifiCorps'

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<sup>9</sup> As argued in Section D, below, it was not a policy change but, even if it was, PUC properly made that change in Order No. 17-256.

<sup>10</sup> As described above, complainants alternatively requested that the PUC "order[ ] PGE to file revised standard contracts clearly stating that the 15 years of fixed prices run from the commercial operation date." (Rec 16).

contracts, which provided that the 15-year period began when the QFs began to deliver power. The PUC's approval of PGE's contracts, which may have allowed for the 15-year period to begin on the date of contract execution, thus does not mean that the PUC determined in Order No. 05-584 that the fixed price could not apply to years 16 through 18 of the calendar term of QF contracts.

This court cannot substitute its judgment for the agency's. *See Castro v. Board of Parole*, 232 Or App 75, 83, 220 P3d 772 (2009) (substantial evidence review does not authorize court to substitute its judgment for that of agency); *Shearer's Foods v. Hoffnagle*, 284 Or App 859, 864, 395 P3d 622 (2017), *rev den*, 361 Or 886 (2017) (substantial evidence review includes review for substantial reason). As argued above, the PUC explained in Order No. 17-256 that it ordered PGE to prospectively change when the 15-year fixed price period in its contracts begins to provide the benefit to QFs described in Order No. 05-584—access to financing based on 15 years of fixed prices for power sold to the utility. The PUC thus satisfied the requirement that it provide a connection between the facts found and the result reached. *Jenkins*, 356 Or at 200. PGE may disagree with the PUC's reasoning, but that is not a basis for reversal.

**c. The PUC's pre-existing policy allowed for the 15-year fixed price period to begin when a QF delivered power to PGE.**

PGE's third argument in support of its contention that the PUC's orders are not supported by substantial evidence is that PGE's contracts that the PUC



approved since 2005 provided for market prices after the first 15 contract years and, thus, “there was no pre-existing Commission policy requiring that the 15-year period begin at scheduled commercial operation.” (App Br 32-33). PGE is correct that Order No. 05-584 did not *require* the 15-year period to begin when the QF began delivering power, but neither did the PUC prohibit it. Rather, the PUC permitted PGE to do what it did, just as it permitted Idaho Power and PacifiCorp to take the other approach.

PGE takes issue with the PUC’s characterization in its second order on reconsideration (Order No. 18-079) that Order No. 17-256 “affirmed” the policy that it adopted in 2005.<sup>11</sup> But PGE does not explain how that characterization, even if incorrect, demonstrates that the PUC’s order in this case is not supported by substantial reason. Regardless whether Order No. 17-256 clarified, affirmed, or changed policy, PUC’s order that PGE prospectively change when the 15-year fixed price period in its QF contracts begins was, as argued above, supported by substantial reason. Moreover, as argued below, if that order was a change in policy, the PUC properly ordered that change in this case.

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<sup>11</sup> In Order No. 17-256, the PUC characterized its decision in this case as “clarifying” the policy it adopted in 2005. (ER 4). In Order No. 18-079, it said that Order No 17-256 “affirmed our policy that the 15-year period begins with commercial operation.” (ER 11).

**CONCLUSION**

This court should dismiss this case as moot, or it should affirm the PUC's orders.

Respectfully submitted,

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Attorney General  
BENJAMIN GUTMAN  
Solicitor General

/s/ Keith L. Kutler

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