

PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: October 11, 2016

REGULAR X CONSENT EFFECTIVE DATE n/a

DATE: October 5, 2016

TO: Public Utility Commission

FROM: Brittany Andrus *BA*

THROUGH: Jason Eisdorfer *JE* and John Crider *JC*

SUBJECT: CYPRESS CREEK RENEWABLES, LLC: (Docket No. DR 51)
Petition for Declaratory Ruling.

STAFF RECOMMENDATION:

The Public Utility Commission of Oregon (Commission) should substantively consider Cypress Creek Renewables, LLC's (Cypress Creek) Petition for Declaratory Ruling (Petition).

DISCUSSION:

Issue

Whether the Commission should substantively consider the Cypress Creek Petition for Declaratory Ruling.

Applicable Rules, Statutes and Orders

ORS 756.450 provides, "[o]n petition of any interested person, the Public Utility Commission may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission. A declaratory ruling is binding between the commission and the petitioner on the state of facts alleged, unless it is modified, remanded or set aside by a court."

In 1999, the Commission concluded that "[a] declaratory ruling proceeding is an appropriate mechanism for declaring rights of a party when there are disputes about the meaning of orders the Commission has issued."¹

¹ *In re Portland General Electric Company* (Docket DR 22), Order No. 99-627.

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However, in 1991, the Commission observed that ORS 756.450 does not provide Commission authority to interpret tariffs because they are not statutes or rules. Nonetheless, the Commission concluded that it had jurisdiction to issue an order interpreting special tariffs under other statutes, including ORS 756.040(2), which authorizes the Commission “to do all things necessary and convenient in regulating public utilities[,]”; ORS 756.500, which authorizes any person to file a complaint regarding a matter within the Commission’s jurisdiction; and ORS 756.5015, which authorizes the Commission to investigate, on its own motion, any matter relating to a public utility.²

Under OAR 860-001-0430, the Commission has 60 days from the date a petition for declaratory ruling is filed to decide at a public meeting whether it will substantively consider the request.³ The Petition was filed on August 24, 2016, and the 60-day period ends on October 24, 2016.

Discussion and Analysis

The petition for declaratory ruling filed by Cypress Creek (“Petition”) concerns the Commission’s implementation of the Public Utility Regulatory Policy Act (PURPA). The statements in the Petition reflect that a dispute has arisen between Cypress Creek and PacifiCorp regarding PacifiCorp’s obligation to enter into a non-standard contract with “renewable rates.” Cypress seeks a declaratory ruling confirming that under Order No. 11-505, PacifiCorp is required to offer QFs a non-standard contract with prices based on a renewable avoided cost price stream.

Background and Current Filing

Cypress Creek develops solar QFs. In its petition, Cypress Creek asserts that it has requested three non-standard QF contracts from PacifiCorp for three of its projects currently in development, and has further specifically requested renewable Schedule 38 rates for such contracts.⁴ Cypress Creek asserts that it requested indicative pricing under PacifiCorp’s Schedule for non-standard contracts (Schedule 38) for three of its projects currently in development. Specifically, Cypress Creek “requested PPAs offering renewable indicative pricing, inclusive of the Renewable Energy Certificates (also known as Renewable Energy Credits and Green Tags, collectively, “RECs”) that [Cypress

² *Northwest Natural Gas Company v. Oregon Steel Mills* (UM 367) Order No. 91-376 (1991 WL 511040).

³ OAR 860-001-0430(2).

⁴ Cypress Creek Renewables Petition for Declaratory Ruling 3-4.

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Creek] is willing to sell to PacifiCorp and thus reflective of the full cost that PacifiCorp avoids in purchasing renewable energy from Petitioner's QFs."⁵ Cypress Creek asserts that PacifiCorp responded via email that PacifiCorp is unsure whether it is required to provide indicative pricing for renewable QFs under Schedule 38. PacifiCorp based its uncertainty on three assertions.⁶ The first was that any request for Schedule 38 contracts was at the time, (i.e., prior to Order No. 16-174) based solely on the pricing methodology provided in Order No. 07-360. The second was that PacifiCorp was waiting for approval of a new calculation methodology in Docket UM 1610. The third was PacifiCorp's view that Commission staff testimony in Docket UM 1610 made it seem that PacifiCorp might not be required to offer renewable Schedule 38 rates.⁷

Staff Analysis

The legal question at issue in the Petition appears to be straightforward; whether Order No. 11-505 requires PacifiCorp to enter into non-standard QF contracts based on a renewable avoided cost price stream. Order No. 11-505 requires Portland General Electric Company (PGE) and PacifiCorp to offer standard and non-standard renewable avoided cost prices, finding that "[r]enewable QFs willing to sell their output and cede their RECs to the utility allow the utility to avoid building (or buying) renewable generation to meet their RPS requirements [and these] QFs should be offered an avoided cost stream that reflects the costs that utility will avoid."⁸ Cypress Creek's allegations reflect that PacifiCorp relies on legal authority other than Order No. 11-505 for its position it is not required to enter into a non-standard QF contract based on a renewable avoided cost price stream.

Staff recommends that the Commission substantively address the question raised in the Petition. Staff's discussions with Cypress Creek and PacifiCorp reflect that they have not been able to resolve their differences and that a Commission resolution of the question presented by the Petition appears to be necessary before PacifiCorp and Cypress Creek can continue with their negotiations.

⁵ Cypress Creek Renewables Petition for Declaratory Ruling 7.

⁶ Cypress Creek Renewables Petition for Declaratory Ruling 7.

⁷ Cypress Creek Renewables Petition for Declaratory Ruling 7.

⁸ Docket No. UM 1396 (Phase II), Order No. 11-505 at 9 (Dec. 13, 2011) ("Order No. 11-505")

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Staff has two alternate recommendations for how to address the Petition, however.

The question presented in the Petition is of a type appropriately resolved by declaratory ruling – application of law to specific facts—but ORS 756.450 refers only to declaratory rulings regarding the application of statutes and rules. The Commission has previously determined that a declaratory ruling proceeding is appropriate to address the proper application of an order to a set of facts, finding in Docket No. 22 that “[a] declaratory ruling proceeding is an appropriate mechanism for declaring rights of a party when there are disputes about the meaning of orders the Commission has issued.”⁹ Accordingly, issuing a declaratory ruling on the issue presented in the Petition is consistent with the Commission’s order in DR 22.

However, the Commission could choose to avoid any potential jurisdictional issue under ORS 756.450 and treat the Petition as a complaint filed under ORS 756.500.¹⁰ ORS 756.500 authorizes any person to file a complaint “against any person whose business or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or regulation of which is conferred upon the commission.” The Petition satisfies the statutory requirements of a complaint, which are that the complaint state “all grounds of complaint on which the complainant seeks relief or the violation of any law claimed to have been committed by the defendant, and the prayer of the complaint shall pray for the relief to which the complainant claims the complainant is entitled.” The Petition also satisfies the Commission’s pleading requirements, which are the same as those for a petition.¹¹

Finally, if the Commission were to treat the Petition as a complaint, the Commission would serve the Petition/complaint on PacifiCorp under ORS 756.512 and allow PacifiCorp the opportunity to answer, which should address any concern that PacifiCorp did not have adequate notice of a complaint.¹²

Staff believes whether the Petition is treated as a petition for declaratory ruling or complaint will have little practical effect on how the case is addressed by parties.

⁹ *In re Portland General Electric Company* (Docket No. DR 22), Order No. 99-627.

¹⁰ See e.g., *In the Matter of Idaho Power Company* (Docket No. UE 195), Order No. 08-491 (Commission concluding that utility’s tariff provided information necessary for a deferral application and that it provided sufficient notice regarding utility’s proposed deferral to warrant treating tariff filing as deferral application.)

¹¹ 860-001-0400.

¹² OAR 860-001-0400(4)(a).

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It is Staff's understanding that the facts are not in dispute. Accordingly, the matter could be resolved with legal briefs whether the matter is processed as a complaint or petition for declaratory ruling.

Whether this Petition is treated as a petition for declaratory ruling or complaint does impact the relief that Cypress Creek can obtain. If the Commission were to issue a declaratory ruling as requested, the declaratory ruling would not be binding on PacifiCorp. Instead, the declaratory ruling would be binding between the Commission and the petitioner on the state of the facts alleged, unless it is modified, vacated or set aside by a court.¹³ Accordingly, if PacifiCorp did not act consistently with the declaratory ruling, Cypress Creek would likely to have to file a complaint against PacifiCorp under ORS 756.500, or seek other relief from a court.

In contrast, the Commission's order in a complaint filed against PacifiCorp, to which PacifiCorp has had opportunity to respond and oppose, would be binding on PacifiCorp.

Staff Position

Staff recommends that the Commission substantively consider the legal issue presented in Cypress Creek's Petition for Declaratory Ruling by either substantively considering the Petition or by treating the Petition as a Complaint and reviewing under ORS 756.512.

PROPOSED COMMISSION MOTION:

Substantively consider Cypress Creek's Petition for a Declaratory Ruling.

Alternatively,

Determine that the Petition is to be treated as a complaint filed under ORS 756.500 and that it be served on PacifiCorp under ORS 756.512.

reg_-DR51 PacifiCorp Renewable Schedule 38.docx

¹³ ORS 757.450.