BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1987

In the Matter of Portland General Electric Company, Request to Update Schedule 201 and Standard Power Purchase Agreements.	REPLY IN SUPPORT OF MOTION TO STAY OF NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, RENEWABLE ENERGY COALITION, AND COMMUNITY RENEWABLE ENERGY ASSOCIATION

INTRODUCTION AND SUMMARY

The Northwest and Intermountain Power Producers Coalition ("NIPPC"), the Renewable Energy Coalition (the "Coalition"), and the Community Renewable Energy Association ("CREA") (collectively the "QF Parties") respectfully submit this reply in support of the QF Parties' motion that the Public Utility Commission of Oregon ("OPUC" or "Commission") stay this proceeding until after completion of the generic proceedings to develop standard contract provisions for qualifying facilities ("QF") in AR 631.

As we previously argued, the Commission should stay this proceeding to avoid duplicative proceedings and to conserve the resources of the parties and the Commission itself. Portland General Electric Company ("PGE") argues that the Commission should undertake this duplicative process simultaneously to AR 631, but PGE's arguments are unpersuasive.

While PGE and the QF Parties certainly disagree on a number of issues in this matter, there are two keys points of agreement that warrant granting the stay. *First*, PGE and the QF Parties agree that there will inevitably be overlap of issues between this case and AR 631. Thus,

if this matter proceeds before AR 631 is concluded there will be duplicative process to re-write the power purchase agreement ("PPA") templates and Schedule 201 resulting from this proceeding in order to incorporate the results of AR 631. *Second*, PGE agrees that "Staff seeks to resolve AR 631 on a fast-track[.]" *PGE's Response* at 7. While PGE disputes whether quick resolution is possible in AR 631, it is apparent that quick resolution will not occur in this docket either. Indeed, it is entirely possible that AR 631 could be resolved before a final order would be issued in this proceeding.

Even more problematic, denial of the stay is likely to prejudice the outcome of certain issues in AR 631 and undermine the rights of the parties to that proceeding, including the other two utilities. This undesirable result would occur if any issue of interest in AR 631 is addressed in this proceeding – either directly or indirectly – because the resolution of the issue in this proceeding would establish a precedent that would later influence the outcome of the same issue in AR 631.

Thus, a stay is necessary to avoid duplicative litigation and inefficient process. Without a stay, the parties will litigate the proper resolution and form of PGE's newly proposed PPAs only to immediately thereafter engage in a whole new process to re-write the very same documents to incorporate the directives of AR 631. Given the workload of the Commission and the stakeholders in ongoing PURPA proceedings, this type of duplicative process makes no sense and should not be promoted.

Finally, if the Administrative Law Judge ("ALJ") denies the motion for stay, PGE's proposed procedural schedule is inadequate. It would be appropriate to reconvene a procedural conference if the motion is denied. However, because PGE has skipped straight to proposing

dates for events in the proceeding, the QF Parties have provided a competing procedural schedule for consideration, if the stay motion is denied.

REPLY ARGUMENT

PGE continues to unreasonably urge the Commission to engage in a protracted adjudication of a whole new set of standard PPAs and Schedule 201 at the same time that the Commission is engaged in a major PURPA investigation to develop standard PPA terms and conditions applicable to all three utilities. The Commission should deny PGE's request and should stay this proceeding during pendency of the Staff-driven rulemaking process in AR 631.

1. This Proceeding Should be Stayed to Avoid Duplicative Procedures

PGE opens its arguments with a lengthy discussion of the standards used for evaluating a stay motion in Oregon tax court and in the federal courts,[1] but PGE fails to even discuss the directly applicable precedent from this Commission under indistinguishable circumstances. *See PGE's Response* at 6 & nn. 6-8. As we explained previously, the Commission stayed a dispute between another utility and a QF pending the outcome of a generic PURPA proceeding, Docket No. UM 1610, due to the overlapping issues in the proceedings. *See Three Mile Canyon Windfarm, LLC v. PacifiCorp*, Docket No. UM 1546, Order No. 12-475 (Dec. 10, 2012) (staying dispute regarding third-party transmission costs because the same issue was being addressed in the generic proceeding). PGE does not attempt to distinguish the *Three Mile Canyon* precedent.

[1] To the extent that the tax court precedent has any relevance, it generally requires a balancing of the equities between the parties. The QF Parties have addressed the equities of the parties in their stay motion and do so again here in the following section of this reply to PGE's response.

Nor could it do so. The Commission's decision to "avoid unnecessary duplicative litigation" in *Three Mile Canyon* applies equally here and compels a stay of this proceeding. *Id.* at 3.

PGE's opposition to a stay hinges largely on PGE's assertion that Staff is planning to address "a finite list of contracting issues" as opposed to drafting "an entire standard PPA for use by all three utilities" in AR 631. *PGE's Response* at 2; *see also id.* at 5. While the QF Parties agree that Staff has apparently changed its position on this point since the time we filed the stay motion,[2] it is a distinction without a meaningful difference for several reasons.

First of all, PGE appears to agree there will necessarily be an overlap of issues between AR 631 and the issues to be addressed in this proceeding if the stay motion is denied, and PGE further agrees that the same issues should not be addressed in two different proceedings. *See PGE's Response* at 7. This a critical and dispositive point.

PGE attempts to propose a solution for the problem of overlap between the two cases, asserting: "To the extent a disputed issue in docket UM 1987 is to be addressed concurrently in docket AR 631, PGE would agree to defer consideration of that issue to AR 631." *Id.* PGE posits that a procedure could be crafted where part of UM 1987 moves forward while the issues being addressed in AR 631 would somehow "be removed from UM 1987 pending decision in AR 631." *Id*. at 8. Although not stated in PGE's response, it would appear that PGE's proposed process would require PGE to re-draft and re-file yet another set of proposed PPA templates and Schedule 201 that somehow do not address the issues that will be included for resolution in AR

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[2] As the stay motion pointed out, Staff had previously stated in reports and recommendations opening AR 631 that it intended to draft a uniform contract for all three utilities. *See NIPPC, REC and CREA's Motion for Stay* at 9-10.

631. Yet, as PGE acknowledges, the issues list in AR 631 is not yet complete. Thus, there is no way to even set PGE's proposed process in motion yet because PGE acknowledges there should be no overlap.

Second, it is not possible to simply "remove" from this proceeding all issues that will be addressed in AR 631, and PGE is incorrect to assume it would be possible. The parties to this proceeding have fundamental disagreement as to the treatment of several different contractual issues – involving the substantive treatment of issues and how to properly draft contract language that captures the substantive treatment. It is not possible to draft a PPA that declines to address the issues that will be addressed in AR 631 because such a PPA would be incomplete. As everyone agrees, the terms of a PPA are interrelated. Thus, leaving an issue unaddressed in the PPA and then later attempting to graft that provision onto the PPA templates resulting from this process is not a reasonable process.

To illustrate, we will discuss some of the issues we already know are likely to be addressed in AR 631. One of the issues already under discussion in the AR 631 process is the rights and procedures under the PPA allowing the QF to upgrade its facility after execution of the PPA, either by changing equipment or adding battery storage or other technological changes to the facility. PGE has proposed to address that issue in a manner that the QF Parties oppose in its Revised Filing in this proceeding, which is included in Section 6.3 of PGE's newly proposed PPA template. The parties to AR 631 are also likely to address whether and how a QF may revise its scheduled commercial operation date after execution of the contract, due to changed circumstances or excused performance. That is another issue in dispute in PGE's Revised Filing, which is included in PGE's Revised Filing in the PPA template at Section 2.6 in a manner to

which the QF Parties object. Indeed, based on current discussions, several, and perhaps even most, of the issues identified by the QF Parties in dispute reflected in the attachment to their stay motion in this proceeding are likely to be included and resolved in AR 631.

The additional issues likely to be included in AR 631 are numerous and include: milestones that must be achieved by a QF between PPA execution and commercial operation; flexibility to change specifications for the facility in the PPA's exhibits (e.g., the estimated monthly output) after execution; maximum and minimum delivery obligations; damages calculations for non-performance; the utility's obligation to pay for power delivered after the utility issues a termination notice; performance assurance the QF must post; start-up testing requirements; compensation for energy and renewable energy certificates delivered prior to commercial operation; requirements for achieving commercial operation; damages owed if default occurs before commercial operation; the definition of the point of delivery; lender cure and consent provisions; unique provisions for the smallest QFs; election of mechanical availability guarantee for run-of-river hydropower QFs; the definition of RPS Attributes; a QF's right to suspend performance prior to commercial operation; appropriate cure periods; and the measurement of a facility's nameplate capacity. Additionally, the QF Parties intend to continue proposing that the contract templates offered by the utilities should be more uniform and consistent, even if Staff will not propose a single template for all three utilities. There will likely be further issues that one or more of the utilities will also recommend for inclusion in AR 631. All of these issues would somehow have to be excised from PGE's proposed PPA templates contained in its Revised Filing in order for PGE's proposed process to move forward. Removing

issues from the PPA significantly undermines the integrity of any PPA template that could result in this proceeding and also undermines efforts to standardize the utilities' PPAs.

Similarly, many issues with respect to the contracting process will be included for resolution in AR 631. These include the level of project development (e.g., interconnection status, etc.) required to obtain an executable PPA, the extent of information QFs must supply to obtain a draft PPA, intervals between different steps in the contracting process, and improving the clarity of the contracting process, among other topics. It is not possible to approve a Schedule 201 for PGE in this proceeding without addressing those issues. As is readily apparent, the practical effect of denying the stay motion is that the parties and the Commission will be addressing the same issues twice and working to incorporate the same issues into Commission-approved contract templates and Schedule 201 twice.

Even more problematic, denial of the stay is likely to prejudice the outcome of certain issues in AR 631 and undermine the rights of the parties to that proceeding, including the other two utilities. This undesirable result would occur if any issue of interest in AR 631 is addressed in this proceeding – whether it is addressed in this proceeding explicitly through litigation and direct Commission resolution of the issue or whether it is addressed implicitly through approval of PGE's treatment of the issue in the finally approved contract templates in this case. The outcome of this proceeding would establish a precedent that would later influence the outcome of the same issue in AR 631. This could happen even if an issue is not explicitly addressed in an order by the Commission because a proponent of the treatment of the issue in PGE's final contract template in this proceeding could assert that such treatment is "reasonable" and the default outcome by virtue of the fact that it was not objectionable to any party to this proceeding.

Therefore, if the Commission moves forward with this proceeding so close in time to the AR 631 proceeding, it will be prejudicing the rights of the parties to that proceeding to present their views on the issues in this proceeding, which include the reasonable contents of a standard PURPA contract.

Allowing this case to move forward also creates the risk that this procedure will unduly influence the procedural schedule in AR 631 and may ultimately cause delay and inefficiency in that docket. The current schedule of AR 631 is moving forward on its own accord, based solely on Staff's determination of how best that matter should proceed. However, if the stay is denied, it is very likely that PGE or other parties may attempt to influence the schedule in AR 631 – for instance, by advocating for expediting finalization of the issues list or by advocating to delay the proceeding to allow this proceeding to move more quickly. In contrast, putting this proceeding in a stay will allow AR 631 to develop on its own merits without the risk of parties attempting to unduly influence that process.

Moreover, the process PGE proposes is the very same problematic process that Staff cited as the basis for opening its proceeding in AR 631, which is to holistically address the terms and conditions of PPA terms. Staff explained, "terms of a contract *are interdependent* and previous changes to certain terms of a contract after a complaint proceeding or general investigation *can have unintended consequences* for the application or implementation of other terms. A *holistic examination* of PURPA standard contracts, with emphasis on obtaining internal consistency that balances the interests of the utility and QFs would benefit the Oregon wholesale market and ratepayers." *Staff Memorandum Re Regular Public Meeting on July 30, 2019*, Regular Agenda Item 2: UM 2000, at 4 (July 22, 2019) (emph. added). It makes sense to allow Staff's "holistic

examination" to run its course *before* engaging in adjudication of the terms and conditions of PGE's standard PPA. In contrast, PGE's proposal creates the risk of the "unintended consequences" of grafting the outcome of AR 631 onto the PPA templates approved in this case.

Furthermore, and importantly for the instant stay motion, PGE agrees the AR 631 process is on the fast track. PGE agrees that "Staff has indicated a desire to resolve docket AR 631 in the near term[,]" even though PGE is dissatisfied that the "issue list is not yet developed, and the docket has no clear timetable." *PGE's Response* at 5. PGE agrees that "Staff seeks to resolve AR 631 on a fast-track." *Id.* at 7. Although PGE argues Staff's goal is not "realistic," *id.*, PGE provides no basis to assume AR 631 will be resolved any less quickly than this proceeding. PGE asserts that "[t]o the extent disputed issues remain [in UM 1987], they are discrete, and there is no reason they cannot be resolved expeditiously." *PGE's Response* at 8.

To the contrary, we already identified two dozen issues on a preliminary pass through of PGE's PPAs proposed in its Revised Filing. Many of these issues are not "discrete." Perhaps the biggest issue is the overall objection by the QF Parties to the level of complexity of PGE's newly proposed PPAs, which were drafted by PGE and necessarily now include extensive additional provisions that include inherent bias in PGE's favor. As Evergreen Biopower notes, "PGE's authorship introduces bias--whether intended or not--into the drafting process." *Evergreen Biopower's Response in Support of Stay* at 2. Thus, as the QF Parties explained to PGE at the procedural hearing, if the case were to proceed, the QF Parties might propose their own counter-proposal of a PPA template for PGE based primarily on the format of PGE's existing contract template. In short, the issues to be addressed should this case move forward are not narrow or discrete.

PGE's response also includes a lengthy quotation of PGE's own comments (filed concurrently with the other two utilities) regarding PGE's own prior understanding that the AR 631 process would move more slowly than it is now apparently moving. *See PGE's Response* at 5 n. 4. PGE's own prior position has no relevance. The salient fact is that AR 631 will be resolved in the near term, not years from now – meaning that litigation of PGE's Revised Filing now will result in duplicative and unnecessary process that burdens the QF Parties and the Commission.

Moreover, PGE fails to refute that resolution of contract terms and issues in the open rulemaking in AR 631 comports with Oregon law, which requires that the "terms and conditions for the purchase of energy or energy and capacity from a qualifying facility shall . . . [b]e established *by rule by the commission* if the purchase is by a public utility . . . ." ORS 758.535(2)(a) (emph. added). Staff's ongoing process to develop the terms and conditions of standard PPAs applicable to all three utilities and all QFs *by rule*, *i.e*. in a collaborative rulemaking, is consistent with the statute. It is not a wise use of resources to spend time debating how best to draft PGE's standard PPA while the proper process for addressing changes to standard contracts is ongoing in the rulemaking.

2. The Equities Weigh in Favor of a Stay

When properly framed, the equities do not weigh in favor of allowing PGE to force an expedited and duplicative adjudication on the QF Parties and the Commission.

PGE argues that expeditious updates are needed because its currently effective standard contract and Schedule 201 were approved in 2005 and PGE has experienced an influx of QF projects since that time. However, that circumstance is not unique to PGE. Both Idaho Power

and PacifiCorp's standard contracts have remained the same since 2005 (aside from periodic minor updates for policy changes since that time). While PGE has seen a recent influx of QF contracts in the time since 2015, both Idaho Power and PacifiCorp have each had their own waves of QF development before that time, yet neither of those utilities have sought a wholesale re-write of their standard contracts as a result.

Further, despite PGE's suggestion, the recent litigation between PGE and QFs has largely been litigation related to PGE's refusal to execute PPAs, *not* confusion related to ambiguities in PGE's standard PPA after it was executed. These cases are the result of PGE's conduct in negotiating the standard PPA, not due to ambiguities that exist in the contract. There is also no basis to assume that PGE's newly drafted PPA would result in less contractual disputes with PGE. Instead, PGE appears to have walked away from a stakeholder process to now attempt to put its thumb on the scale in a new round of PPA templates.

PGE asserts, "The QF Parties have now had nearly a year to review PGE's proposed PPAs." *PGE's Response* at 2; *see also id.* at 9. But that is incorrect. The parties negotiated extensively in the workshops regarding a single PPA template – the variable, renewable off-system PPA – among the eight that were originally filed. There are seven remaining PPA templates that were not discussed by the parties. Many issues that could arise uniquely with the other templates were never even discussed, such as the performance guarantees for the non-variable QFs. There were also issues identified by the QF Parties with inconsistencies across the eight forms, which were never discussed in the workshops. And PGE's Revised Filing made extensive revisions that have never been discussed with any party. PGE simply walked away from the stakeholder process and unilaterally revised its originally filed PPA template and

Schedule 201 in the manner it thought might result in less opposition. The fact that PGE believes the PPAs in its Revised Filing are acceptable does not establish that this proceeding could be resolved expeditiously. To the contrary, the list of two dozen preliminary issues attached to the stay motion demonstrates quite the opposite.

PGE also argues that it "provided detailed explanatory documents with its filing that describe, provision-by-provision, each change made to the current PPAs and Schedule 201 and why each change was proposed[,]" which justifies expeditious review. *PGE's Response* at 2-3; *see also id.* at 9-10. In support of this assertion, PGE relies on the document titled "Power Purchase Agreement Explanatory Matrix" appended to PGE's Initial Filing and then revised and appended to PGE's Revised Filing. The latest version of this matrix appended to the Revised Filing contains tables that are 91 pages long in what appears to be approximately a 10-point font. The matrix contains the provision of the proposed PPA templates in one column and the provision of PGE's currently effective PPA, if any, to which PGE asserts the provision corresponds and revises. In a third column, the tables contain a brief statement as to PGE's position on the change. However, given the fact that PPA provisions are highly interrelated to numerous provisions within the agreement, one cannot assess the effect of the various topics contained in a PPA by comparing one provision to another, as the matrix attempts to do. Additionally, PGE's assertions regarding its position are in many cases exceedingly short, uninformative, and inaccurate. On the whole, the matrix document is a very helpful starting point to understand PGE's position on its proposal, but it can hardly be relied upon as an objective evaluation of PGE's proposal. As we noted in our stay motion, PGE's Initial Application was less than forthcoming about the extent of the changes PGE had proposed, and

parties cannot now trust that PGE's filings identify all issues of which the parties and the Commission should be aware in these whole new documents.

PGE's response also discounts the matters that remain in dispute with respect to its Revised Filing and mistakenly suggests this proceeding could be expeditiously resolved. PGE asserts that the "collaborative process has been largely successful." *PGE's Response* at 1-2. But no other party agrees with that assertion. PGE walked away from the collaborative process and filed a proposal that meets PGE's needs but fails to meet the other parties' needs.

In sum, the equities do not weigh in PGE's favor in this case. The fact that PGE's newly proposed PPAs have not been approved yet is the result of the fact that PGE overreached with its Initial Filing, and then walked away from a stakeholder process just to put forth a revised version of its earlier filing. Given those facts, there is no basis to allow PGE to force other parties into the duplicative and inefficient process it proposes, and a stay is warranted.

3. Response to PGE's Request for Adoption of Schedule: PGE's Proposed Schedule Is Inadequate

On November 21, 2019, PGE filed a request for adoption of a schedule in this docket, even though, as the QF Parties understood the status of the case, ALJ Arlow had stated that the establishment of a schedule would occur only if, and after, the motion to stay were denied. In any event, to ensure there is no misunderstanding, we will highlight our disagreements with PGE's proposed schedule below.

The QF Parties disagree with PGE's assertion that this case should be processed on three rounds of testimony on an expedited basis. Due to the QF Parties' significant disagreement with PGE's newly proposed PPA templates, the QF Parties may make a counter proposal that is based

off of the existing standard contract template, as opposed to a complete re-write of PGE's existing PPA template. Such a filing would be made after PGE files its testimony explaining the problems with the existing PPA and explaining the basis for the newly proposed provisions included with its Revised Filing.

Additionally, although PGE argues the parties have negotiated the provisions of PGE's newly proposed PPA templates and Schedule 201 over the workshop process, PGE's Revised Filing includes new issues and new disputes that the parties have not discussed. The QF parties would like a formal opportunity to present their arguments and evidence in the form of a round of testimony, prior to Staff making its recommendations in this case. Therefore, the schedule should include a date for the QF Parties to respond to PGE's Revised Filing before Staff evaluates both positions and files its testimony.

The QF Parties also propose that parties other than PGE be afforded a responsive round of testimony, which is reasonable given that the QF Parties intend to propose their own counter-proposal PPA and will need a round of testimony to respond to PGE's response to that counter proposal.

Additionally, PGE proposes that the parties begin incurring expenses adjudicating the merits of the PGE's application before the question of whether the matter should be stayed is finally resolved by the Commission. Should the ALJ deny a motion for stay, the QF Parties are likely to request certification for the Commission's consideration. Notably, the other QF party active in this proceeding, Evergreen Biopower, agrees with the QF Parties and "urges the Commission to not require the parties to undertake substantive briefing on PGE's Revised Request until after the Commission has ruled on the Joint QF's Motion and the Parties have

exhausted all avenues of appeal." *Evergreen Biopower's Response in Support of Stay* at 3. Given the expense that would be incurred in the duplicative litigation PGE proposes and the fact that existing Commission precedent from the *Three Mile Canyon* case supports a stay, it would be appropriate for the Commissioners to review any decision to deny a stay. PGE appears to accuse the QF Parties of unreasonableness for proposing to build in time for Commission review of this important procedural question. But it is reasonable to expect that parties might ask the Commission to review major procedural determinations that have a significant impact on the parties. Indeed, the ALJ's stay ruling in *Three Mile Canyon* was certified by the ALJ and reviewed by the Commissioners.

Thus, the following proposed schedule allows for Commission consideration of denial of the stay motion, if the motion is denied, and also provides additional rounds of testimony required by the case. While we have not confirmed all dates work for other parties, the QF Parties recommend the following schedule:

Opening Testimony by PGE[3]	February 3, 2020
Opening Testimony by Intervenors	May 1, 202
Response Testimony by Staff	June 1, 2020
Response Testimony by PGE	July 1, 2020
All Parties Reply Testimony	August 1, 2020
Hearing	September 1, 2020

[3] At the prehearing conference, PGE indicated it was willing to file its opening testimony before resolution of any certification of a ruling denying the stay motion. If PGE prefers to move this date for its opening testimony back one month, the QF Parties would not object.

CONCLUSION

For the reasons explained above, the Commission should place a stay on this proceeding until the completion of AR 631.

Dated: December 6, 2019.

Respectfully submitted,

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