

ORDER NO. 19-269
ENTERED Aug 15 2019

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1994

KLAMATH HILLS GEOTHERMAL,
LLC,

Complainant,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

Pursuant to ORS 756.500.

ORDER

DISPOSITION: MOTION TO DISMISS GRANTED WITHOUT PREJUDICE;
ALTERNATIVE MOTION TO STRIKE DISMISSED AS MOOT;
OFFICIAL NOTICE TAKEN

I. SUMMARY

In this order, we grant the motion of Portland General Electric Company (PGE) to dismiss the complaint filed by Klamath Hills Geothermal, LLC, (KHG) without prejudice, dismiss as moot PGE's request for alternative relief, and close the docket.

II. REGULATORY BACKGROUND

The Public Utility Regulatory Policies Act of 1978 (PURPA) and corresponding Federal Energy Regulatory Commission (FERC) regulations create a market for the electricity generated by small power producers and cogenerators.¹ Under this law and its implementing regulations, utilities must purchase electricity from qualifying facilities (QFs) at the utility's avoided cost.

¹ Federal Register, Vol. 45, No. 38, (February 25, 1980) p. 12221.

In implementing PURPA in Oregon, this Commission requires electric utilities to enter into standard Commission-approved contracts with QFs with nameplate capacities of 10 megawatts (MW) or less, except as otherwise determined by Commission order. We have adopted rules and approved tariffs that describe how a QF may obtain a standard contract.²

The standard contracts may be, at the project developer's choosing, up to 20 years in length with payments at fixed prices for the project's output during the first 15 years after operation commences. Those fixed prices are based on the avoided costs that are in effect on the date that a legally enforceable obligation (LEO) arises. Utilities must use an approved methodology to calculate those prices, which are also reviewed and approved by the Commission.

The process to be used by a QF for entering into a standard contract with PGE is set forth in PGE's Commission-approved Schedule 201, which contains specific timelines for the various benchmark events to be met by PGE and the QF during the contracting process.

As required by the Commission, persons who are interested in selling power to PGE may go directly to the PGE website, which has links to Schedule 201 via the webpage captioned "Sell Power to PGE," along with links to downloadable copies of current Schedule 201 contracts.³ Schedule 201 provides an explanation of the contracting process, the telephone number of the Power Production Coordinator who may be reached "to obtain more information about being a Seller or how to apply for service under this schedule," and a checklist of the contracting process requirements. The relevant Schedule 201 language at the heart of this dispute is as follows:

**GUIDELINES FOR 10 MW OR LESS FACILITIES ELECTING
STANDARD PPA**

To execute the Standard PPA the Seller must complete all of the general project information requested in the applicable Standard PPA.

When all information required in the Standard PPA has been received *in writing* from the Seller, the Company will respond within 15 business days with a draft Standard PPA.

² See OAR Chapter 860, Division 029.

³ Pursuant to OAR 860-001-0460(1)(a), we take official notice of the following webpage: <https://www.portlandgeneral.com/business/power-choices-pricing/renewable-power/install-solar-wind-more/sell-power-to-pge>.

The Seller may request in writing that the Company prepare a final draft Standard PPA. The Company will respond to this request within 15 business days. In connection with such request, the QF must provide the Company with any additional or clarified project information that the Company reasonably determines to be necessary for the preparation of a final draft Standard PPA.

When both parties are in full agreement as to all terms and conditions of the draft Standard PPA, the Company will prepare and forward to the Seller a final executable version of the agreement within 15 business days. Following the Company's execution, an executed copy will be returned to the Seller.⁴

III. PROCEDURAL HISTORY

On January 11, 2019, KHG filed a complaint against PGE claiming that it is entitled to a standard PPA with Schedule 201 rates in effect on September 1, 2017. On February 14, 2019, PGE filed a Motion to Dismiss and, in the Alternative, Motion to Strike. A prehearing conference was held on February 25, 2019, and on March 15, 2019, KHG filed its Opposition to PGE's motions. On April 3, 2019, PGE filed a reply to the KHG opposition.

IV. LEGAL STANDARD

A complaint may be dismissed under section 21A (8) of the Oregon Rules of Civil Procedure (ORCP) for "failure to state ultimate facts sufficient to constitute a claim." In applying ORCP 21A, a complaint must be viewed solely in the context of our jurisdiction.⁵

In addressing a motion to dismiss, we consider the facts presented in the complaint in a light most favorable to the complainant. However, in our deliberations, we do not consider any conjecture, assumption or legal opinion included in the complaint. In this docket, the disposition of PGE's motion to dismiss turns on whether KHG has stated

⁴ Portland General Electric Company, Tariff Sheet No. 201-2, effective for service on and after August 12, 2016.

⁵ See *In Re Portland Gen. Elec. Co.*, No. 02-121, 2002 WL 480564 (Feb 25, 2002) at 3 (granting motion to strike because "courts are the proper venue for contract and tort issues"); see also *Wah Chang*, Petitioner, No. 09-343, 2009 WL 2845580 (Sept 2, 2009) at 15 ("rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier"); ORS 756.500 (Commission complaint statute).

ultimate facts that, if proved, would demonstrate that KHG established a LEO, entitling it to the Schedule 201 avoided cost prices in effect on the date the LEO was established.

V. FACTUAL BACKGROUND

We take the facts from KHG's complaint, viewed in the light most favorable to KHG. The complaint concerns KHG's plans to construct a 9.7 MW geothermal QF (referred to as the "Barnes Project") in Klamath Falls, Oregon. KHG began development of the project in 2012.⁶ In December 2012, KHG's predecessor in interest, Entiv Organic Energy, LLC, bid into a PGE request for proposals (RFP) with a 12 MW geothermal project; the project was not selected out of the RFP and was not awarded a PPA.⁷ Then, as now, the 12 MW project would not have qualified for a standard QF contract under Schedule 201, as it exceeds the 10 MW threshold. KHG continued development work on the Barnes Project during the 2013-2016 period.⁸

KHG retained Evolution Markets, Inc. (EMI) and its employee, Ben Rees, as its "exclusive power marketing agent" to handle negotiations with potential power purchasers regarding the Barnes Project.⁹ In September 2016, KHG and EMI developed a "term sheet" to market the Barnes Project, along with five 10 MW solar facilities. The term sheet stated that the buyer would purchase "all Energy" (presumably 59.7 MW) "pursuant to a Power Purchase Agreement to be negotiated."¹⁰

In October 2016, KHG executives learned of "very attractive" pricing available in PGE's Schedule 201, and instructed Rees to secure a PPA from PGE with Schedule 201 prices.¹¹ PGE and Rees negotiated over the terms for a PPA with KHG from October 2016 until August 2017. KHG executives advised PGE during conference calls about their interest in obtaining Schedule 201 PPAs.¹²

On August 18, 2017, PGE applied to update its Schedule 201 to modify the start date of the Renewable Resource Deficiency Period from 2020 to 2029.¹³ KHG's executives were unaware of this impending change.¹⁴ On September 12, 2017, in a public meeting,

⁶ Complaint at 7.

⁷ *Id.*

⁸ *Id.* at 7-8.

⁹ *Id.* at 8 and Affidavit of Kevin W. Keck, Exhibit C in support of Complaint (Keck affidavit).

¹⁰ Complaint Exhibit B, at 2.

¹¹ Complaint at 8.

¹² Complaint at 12.

¹³ *In the Matter of Portland General Electric Company, Application to Update Schedule 201 Qualifying Facility Information*, Docket No. UM 1728, Order No. 17-347, Appendix A (September 7, 2017 Staff Report) at 2, 3 (Sept 14, 2017).

¹⁴ Complaint at 18.

we approved the change to the start of the deficiency period from 2029 to 2025, effective September 18, 2017.¹⁵

VI. DISCUSSION

A. KHG Allegations Relevant to PGE's Motion to Dismiss

KHG claims that PGE purposely delayed and withheld issuing a standard, renewable, non-variable, off-system PPA for the Barnes Project until lower avoided cost pricing under PGE's Schedule 201 had gone into effect.¹⁶ KHG alleges that, despite PGE's legal obligation to purchase the power from the Barnes Project under PURPA and Schedule 201, PGE deliberately and falsely misrepresented to KHG at the end of March of 2017 that no power purchase agreement could be issued by PGE to KHG for the Barnes Project unless and until PGE had submitted and secured Commission approval of a new renewable standard avoided cost prices, when, in fact, PGE knew that KHG had an immediate right to a QF PPA under Schedule 201 without any further OPUC approvals.¹⁷

The complainant further states that it suspects that PGE conspired with EMI to conceal from KHG its legal rights.¹⁸ KHG alleges that PGE conspired with KHG's "faithless agent," EMI, to conceal critical information from KHG so as to "effectively kill" the Barnes Project.¹⁹ Complainant argues that "[e]ven if there is no formal, written evidence of such collusion, PGE had a duty to advise KHG of the Schedule 201 application process when it learned during the February 3, 2017, webinar that KHG intended to develop the Barnes Project as a QF, that it potentially qualified for a standard QF PPA under Schedule 201 based on KHG's written representation that the nameplate capacity of the project would be less than 10 MW."²⁰

B. Positions of the Parties

PGE states that KHG's complaint should be dismissed for failure to state ultimate facts sufficient to constitute a claim as required by ORCP 21A (8). PGE contends that the Commission must assume the truth of facts alleged in a complaint, but the complaint may not "merely plead in a vague and conclusory manner" that the elements of a claim have

¹⁵ *In the Matter of Portland General Electric Company, Application to Update Schedule 201 Qualifying Facility Information*, Docket No. UM 1728, Order No. 17-347 at 1 (Sept 14, 2017); and Order No. 17-347, Appendix A (September 7, 2017 Staff Report) at 1 (Sept 18, 2017) (confirming PGE compliance with Order No. 17-347 and a September 18, 2017 effective date for PGE's revised Schedule 201).

¹⁶ Complaint at 1-2.

¹⁷ Complaint, 2-4, 10-18.

¹⁸ Complaint at 3, 4, 10, 14, 23.

¹⁹ Complaint at 2-3.

²⁰ *Id.* at 22-23.

been met. Instead, the complaint must plead sufficient facts to allow the Commission to draw a “reasonable inference” that each element of the claim has been met.

Assuming that all the facts offered by KHG are true, PGE asserts that KHG still cannot establish that a foundation has been laid to prove that a LEO existed as of September 1, 2017. PGE cites thirteen separate paragraphs in the complaint which it claims indicate that KHG did not initiate the requisite application process before that date and therefore failed to even begin to meet the specific standards and tests that the Commission has mandated in order to form a LEO.^{21,22}

PGE also argues that KHG cannot establish a LEO based on the theory that its agent colluded with PGE to prevent KHG from obtaining a standard PPA because KHG does not state ultimate facts supporting its collusion theory. “An inferable conclusion is more than a suspicion, a suggestion, a speculation, or a conjecture; a conclusion is inferable from facts if the conclusion can be logically deduced from the facts.”²³ PGE further states that it is not in a fiduciary relationship with KHG and thus no LEO can be established by alleging conspiracy theories.²⁴

Finally, PGE argues in the alternative that, if its motion to dismiss is denied, the Commission should strike those portions of the complaint relating to settlement negotiations, conflict of interest, attorney fees, data requests and monetary damages as being irrelevant, redundant or impermissible.²⁵

KHG states that the PGE motion to dismiss is defective because it relies on unsworn statements of fact. KHG observes that PGE ignores the fact that KHG and its predecessor submitted detailed information regarding the Barnes Project “that was more than sufficient to satisfy the requirements set out in Schedule 201 for a draft, standard renewable QF PPA, even if KHG had made no formal application for such PPA.”²⁶ KHG notes that PGE also failed to correct a misrepresentation, made by PGE representative John Morton, regarding the need for Commission approval to offer a PPA to KHG for the Barnes Project or the need to file a formal written application under Schedule 201.²⁷ KHG asserts that this misrepresentation created a LEO in March 2017. KHG also asserts that PGE’s conspiracy with KHG’s agent is, in and of itself, sufficient

²¹ PGE Motion at 9, 13-14 and citations to the complaint therein.

²² PGE Reply at 3-4.

²³ PGE Motion at 9-10 citing *Bernards v. Summit Real Estate Mgmt., Inc.*, 229 Or App 357, 368 (2009).

²⁴ *Id.* at 14-15.

²⁵ PGE Motion at 24-27.

²⁶ KHG Opposition at 9.

²⁷ *Id.* at 10-11.

to form a LEO. Finally, KHG argues that PGE has an affirmative obligation to be forthcoming about the steps a QF must take in order to secure a standard PPA.²⁸

C. Resolution

We grant PGE's motion and dismiss the complaint without prejudice pursuant to ORCP 21A (8) for failure to state ultimate facts sufficient to constitute a claim. Accordingly, we do not address PGE's alternative motion to strike portions of the complaint and narrow the issues, as it is moot.

The Commission-approved Schedule 201, which is available on PGE's website, plainly establishes the process a seller must follow for PGE to be required to purchase power at fixed avoided cost prices:

A Seller choosing a Standard PPA will complete all informational and price option selection requirements in the applicable Standard PPA and submit the executed Agreement to the Company prior to service under this schedule. The Standard PPA is available at www.portlandgeneral.com. * * *

To execute the Standard PPA the Seller must complete all of the general project information requested in the applicable Standard PPA.

When all information required in the Standard PPA has been received in writing from the Seller, the Company will respond within 15 business days with a draft Standard PPA.

KHG does not allege that it, or its agent, completed the "informational and price option selection requirements in the applicable Standard PPA" to start the Schedule 201 contracting process,²⁹ even though the PPA forms and information were readily available to it at the time.³⁰ KHG states instead that it provided information sufficient to commence the Schedule 201 contracting process in meetings, even though KHG made no direct request to begin this process.³¹ The complaint cites the February 2017 video

²⁸ *Id.* at 13-16.

²⁹ "At the time [early February, 2017], KHG remained completely unaware of the formal QF PPA application process;" Complaint at 10.

³⁰ PGE Motion at 5-6.

³¹ KHG Opposition at 9: "In making these claims, PGE completely ignores the fact that KHG, and its predecessor in interest, Entiv, had submitted to PGE extensive information (beginning as early as 2012) regarding the Barnes Project, information that was more than sufficient to satisfy the requirements set out

conference, which featured a PowerPoint presentation that “made it very clear to PGE during that meeting that KHG was seeking a QF PPA under Schedule 201 * * * because the nameplate capacity of the Barnes Project would be limited to 9.7MW.”³²

Viewing these factual allegations in the light most favorable to KHG, we cannot conclude that KHG commenced the Schedule 201 contracting process. That process must begin with a QF selecting a standard PPA and providing all elements required in the standard PPA to PGE in writing. The complaint simply does not allege that KHG took this action.

The filed complaint states that the type of information required by Schedule 201 was essentially communicated to PGE by various means over the course of several years. KHG argues that it lacked experience in negotiating PPAs and was therefore at a disadvantage when dealing with PGE, and that PGE should have known that KHG desired to enter into a Schedule 201 PPA based on that information.

Sharing general information about a project with utility representatives is not equivalent to beginning the Schedule 201 process, or as making a binding commitment to deliver net output to a utility. To obtain a standard PPA, a QF must follow the steps in the Commission-approved Schedule 201 by selecting a PPA, providing the specific information it requires, and submitting that document to the utility. A claim against PGE for failure to adhere to its obligations in the Schedule 201 contracting process must fail if the contracting process was never commenced. Because KHG fails to allege that it commenced the contracting process, KHG has failed to state ultimate facts sufficient to constitute a claim establishing a LEO.

KHG’s complaint may be read to suggest that PGE’s asserted misrepresentations about the availability of a PPA or conspiracy with EMI were sufficient, in and of themselves, to establish a LEO—a commitment to sell power to PGE. However, if KHG’s theory is that it took actions that demonstrated a commitment to sell power to PGE outside the Schedule 201 process, then, even if it believes that PGE acted in bad faith, KHG must still plead sufficient facts to substantiate the claim of its binding commitment.

We dismiss KHG’s complaint without prejudice.

in Schedule 201 for a draft, standard renewable QF PPA, even if KHG had made no formal application for such PPA.”

³² Complaint at 9.

VII. ORDER

IT IS ORDERED that:

1. Portland General Electric Company's motion to dismiss the complaint filed by Klamath Hills Geothermal, LLC, is granted.
2. The complaint filed by Klamath Hills Geothermal, LLC, against Portland General Electric Company is dismissed without prejudice.
3. Portland General Electric Company's motion in the alternative to strike certain portions of the complaint is dismissed as moot.
4. This docket is closed.

Made, entered, and effective Aug 15 2019.



Megan W. Decker
Chair



Stephen M. Bloom
Commissioner



Letha Tawney
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.