

IN THE COURT OF APPEALS OF THE STATE OF OREGON

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 – UM 1805

A167707

**PETITIONER PORTLAND GENERAL ELECTRIC COMPANY'S
OPENING BRIEF, EXCERPT OF RECORD, AND APPENDIX**

Appeal from the Public Utility Commission of Oregon's Order No. 18-079,
dated March 5, 2018, which denied reconsideration of Order 17-465, which in
turn amended and clarified Order No. 17-256

*Attorneys for Petitioner Portland
General Electric Company*

Anna M. Joyce, OSB #013112
Dallas S. DeLuca, OSB #072992
Anit K. Jindal, OSB #171086
Markowitz Herbold PC
1211 SW Fifth Avenue, Suite 3000
Portland, OR 97204-3730
Telephone: (503) 295-3085
AnnaJoyce@MarkowitzHerbold.com
DallasDeLuca@MarkowitzHerbold.com
AnitJindal@MarkowitzHerbold.com

*Attorneys for Respondents Northwest
and Intermountain Power Producers
Coalition, Community Renewable
Energy Association, and Renewable
Energy Coalition*

Irion A. Sanger, OSB #003750
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: (503) 756-7533
irion@sanger-law.com

(attorney information cont'd next page)

*Attorneys for Respondent Oregon Public
Utility Commission*

Denise G. Fjordbeck, OSB #822578
Attorney-in-Charge
Civil/Administrative Appeals
1162 Court Street, NE
Salem, OR 97301-4096
Telephone: (503) 378-4402
denise.fjordbeck@doj.state.or.us

TABLE OF CONTENTS

STATEMENT OF THE CASE	1
I. Nature of the Action.....	2
II. Nature of the Orders.....	2
III. Basis for Appellate Jurisdiction	4
IV. Timeliness of Appeal	4
QUESTIONS PRESENTED.....	4
SUMMARY OF ARGUMENT	5
STATEMENT OF FACTS	7
I. By law, utilities must offer to purchase power from qualifying facilities.....	7
II. In Order No. 05-584, the Commission ordered that standard contracts offered by utilities to qualifying facilities include a 20-year contract term with prices fixed for “only the first 15 years” of the term.....	9
III. The Commission approved standard contracts that set the 15-year period of fixed prices as beginning at contract execution.	11
IV. The Commission consistently interpreted Order No. 05-584 as only requiring fixed prices during the first 15 years of the term.....	12
V. Complainants asked the Commission to interpret Order No. 05-584 as requiring that the 15-year period of fixed prices begin at commercial operation.....	14
VI. In Order No. 17-256, the Commission ruled that Order No. 05- 584 permitted PGE to offer standard contracts that began the 15- year period of fixed prices at contract execution, but “clarified” its policy to foreclose such a result going forward.....	16

VII.	In Order No. 17-465, the Commission granted Complainants’ petition for clarification and amended Order No. 17-256 to remove its interpretation of specific PGE contract terms.....	18
VIII.	In Order No. 18-079, the Commission denied PGE’s application for reconsideration, but in doing so stated for the first time that Order No. 17-256 “affirmed” a pre-existing policy embedded within Order No. 05-584.....	19
	ASSIGNMENT OF ERROR	20
I.	Preservation of Error.....	20
II.	Standard of Review	23
	ARGUMENT	24
I.	The Commission’s Orders are not supported by substantial reason because they are based on a misinterpretation of prior Commission policy.	24
A.	Order No. 05-584 permits a utility to enter a contract that begins the 15-year period of fixed prices at execution.....	24
B.	Order No. 05-584 did not contain an unstated policy guaranteeing that QFs receive 15 years of fixed prices.....	27
C.	The Commission could not have had a pre-existing policy requiring that the 15-year fixed price period begin at scheduled commercial operation, because the Commission approved PGE’s prior contracts that measured the 15-year period from execution.....	31
II.	To the extent that the Commission announced a new policy, it acted outside the discretion delegated to it by law and acted inconsistently with past practice.	33
	CONCLUSION.....	38
	CERTIFICATE OF COMPLIANCE.....	
	INDEX TO EXCERPT OF RECORD	

INDEX TO APPENDIX.....

CERTIFICATE OF SERVICE AND FILING.....

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Becklin v. Bd. of Examiners for Eng'g</i> , 95 Or App 186, 97 P3d 1216 (2004), <i>rev den</i> , 338 Or 16 (2005).....	23
<i>Gordon v. Bd. of Parole & Post-Prison Supervision</i> , 343 Or 618, 175 P3d 461 (2007)	23
<i>Jenkins v. Bd. of Parole & Post-Prison Supervision</i> , 356 Or 186, 335 P3d 828 (2014)	23
<i>Keystone RV Co-Thor Indus. v. Erickson</i> , 277 Or App 631, 373 P3d 1122 (2016)	24, 25
<i>Knutson Towboat Co. v. Bd. of Maritime Pilots</i> 131 Or App 364, 885 P2d 746 (1994), <i>rev den</i> , 321 Or 94 (1995).....	24
<i>McGee Plumbing, Inc. v. Bldg. Codes Div., Div. of Dep't of Consumer & Bus. Servs.</i> , 221 Or App 123, 188 P3d 420 (2008)	8
<i>Power Res. Grp., Inc. v. Pub. Util. Comm'n of Tex.</i> , 422 F3d 231 (5th Cir. 2005)	29
<i>Priestley v. Paulus</i> , 287 Or 141, 597 P2d 829 (1979)	8
<i>Snow Mountain Pine Co. v. Maudlin</i> , 84 Or App 590, 734 P2d 1366 (1987), <i>rev den</i> , 303 Or 591 (1987).....	7, 27, 28
<i>Util. Reform Project v. Or. Pub. Util. Comm'n</i> , 215 Or App 360, 170 P3d 1074 (2007)	8

Statutory Authorities

16 USC § 824.....	7
18 CFR § 292.101	8
18 CFR § 292.303	7
18 CFR § 292.304	9, 27
ORS 40.015.....	8

ORS 40.090.....	8
ORS 183.482.....	4, 33, 35, 36
ORS 756.500.....	5, 33, 34, 37
ORS 756.515.....	34
ORS 756.610.....	4, 23

Rules & Regulations

OAR 860-29-0040	7, 27
ORAP 5.15.....	3

Other Authorities

Webster's Third New Int'l Dictionary (unabridged 2002 ed).....	25
--	----

PETITIONER’S OPENING BRIEF
STATEMENT OF THE CASE

Federal law requires that public utilities offer to purchase power from certain qualifying facilities (“QFs”). The Public Utility Commission of Oregon (the “Commission”) has the authority to set terms for the utilities’ purchase of power from QFs. Prices offered by utilities to QFs must be based on a utility’s avoided costs, *i.e.* the costs the utility would have otherwise paid for the power. In 2005, the Commission ordered utilities to offer QFs standard contracts with 20-year terms. For the first 15 years of the contract’s term, the utility would pay fixed prices taken from a schedule, on file with the Commission and included in the contract, of the utility’s estimated avoided costs. For the remaining five years the utility would pay the actual avoided costs—the actual market price for energy at the time the energy is delivered. The Commission recognized that, over time, actual avoided costs would diverge from the fixed prices estimated before contract execution and chose not to saddle utilities’ customers with the financial burden of paying outdated prices in the final five years of a contract’s term.

In a recent series of orders outside of any usual policy setting procedure, the Commission reversed course and ruled that utilities must offer the schedules of fixed prices until 15 years after a QF is scheduled to

begin commercial operations, which can be up to three years after contract execution. The Commission relied on no evidence, but instead cited a “belie[f]” that QFs should receive the “full benefit” of the 15-year period irrespective of when they are scheduled to begin operations. The Commission’s orders lacked substantial reason and therefore should be vacated.

I. Nature of the Action

Portland General Electric Company (“PGE”) seeks review of three final orders entered by the Commission. Those orders purported to “clarify” and “affirm[]” Commission policy that the 15-year period of fixed prices in PGE’s standard contracts commences “at the time the qualifying facility begins operations[,]” and not from the time of contract execution.

(*See* ER 1-5, 11-14.)

II. Nature of the Orders

This case involves three orders: Order No. 17-256, Order No. 17-465, and Order No. 18-079 (the “Commission’s Orders”). Order No. 17-256 granted PGE’s motion for summary judgment. (ER 1-5.) The Commission concluded that PGE did not violate any statute, rule, or Commission order by offering standard contracts that included a 15-year period of fixed prices beginning on the contract’s execution date, rather than on the date that the

QF begins to transmit power. (ER 4.) The Commission acknowledged that it had previously approved such standard contract forms. (ER 3.) In Order No. 17-256, the Commission also “clarif[ied] its policy in Order No. 05-584 to explicitly require standard contracts, on a going-forward basis, to provide for 15 years of fixed prices that commence when the QF transmits power to the utility.” (ER 4.)

Complainants¹ sought reconsideration, and in Order No. 17-465 the Commission granted reconsideration and amended its earlier order to state that the Commission had not interpreted the terms of any particular standard contract forms or executed contracts based on the standard contract forms, but stood prepared to do so if a party so asked. (ER 6-10.)

PGE then sought reconsideration of that order. (*See* ER 11-14.) The Commission denied reconsideration in Order No. 18-079, concluding that it was “affirm[ing]” the policy from Order No. 05-584 that the 15-year fixed price begins from the date of scheduled commercial operation, rather than the date of contract execution, and declining to interpret any of PGE’s standard contract forms. (ER 13-14.)

¹ Respondents on appeal are Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition. PGE refers to respondents on appeal as they were designated in the proceedings below, as “Complainants.” ORAP 5.15(1).

III. Basis for Appellate Jurisdiction

This court has jurisdiction to review a final order of the Commission in a contested case proceeding under ORS 183.482.

IV. Timeliness of Appeal

The Commission issued its final orders on July 13, 2017, November 13, 2017, and March 5, 2018. PGE's appeal was timely under ORS 183.482, because PGE filed its petition for judicial review on May 3, 2018, within 60 days of the March 5, 2018, final order on its petition for rehearing. *See also* ORS 756.610(1)(a) (final orders of the Commission are subject to review as orders under the provisions of ORS 183.480 to ORS 183.497).

QUESTIONS PRESENTED

1. The Commission's Orders required PGE to alter the start date for the 15-year period of fixed prices for all future PGE standard contracts with QFs and, in doing so, changed Oregon policy. The Commission did not rely on any evidence but instead based its decision on a construction of Order No. 05-584. Were the Commission's Orders supported by substantial reason?
2. The Commission's investigative statute grants the Commission broad authority to investigate matters related to public utilities. By contrast,

ORS 756.500—the statute that Complainants filed their proceeding under—does not grant the Commission authority to decide and issue new policy.

Were the Commission’s Orders consistent with past practice and within the range of discretion delegated to the agency by law?

SUMMARY OF ARGUMENT

In a 2005 order, the Commission required that utilities such as PGE offer QFs standard contracts with a 20-year term and prices that are “fixed for only the first 15 years of the 20-year term.” (App 13.) The Commission issued that order, Order No. 05-584, after hearing extensive testimony from various stakeholders and making robust findings of fact about the competing goals of encouraging QF financing and limiting the divergence between fixed prices and actual avoided costs that results from any period of fixed prices. In the years since issuing that order, the Commission has consistently approved standard contracts filed by PGE that provided for 15 years of fixed prices beginning at execution.

In this complaint proceeding, the Commission ruled in PGE’s favor and dismissed the underlying complaint. But it also reversed 10 years of prior practice and interpreted Order No. 05-584 as requiring that, on a going-forward basis, PGE begin the fixed price period when the QF is scheduled to begin commercial operation. Because scheduled commercial operation can

be years after contract execution, the Commission's Orders necessarily result in prices fixed beyond the first 15 years of the standard contract. Given Order No. 05-584's plain meaning and the Commission's past applications of it, in which it approved PGE standard contracts that offered 15 years of fixed prices beginning at execution, the Commission's Orders lack substantial reason.

Further, the Commission's decision to issue new policy, without notice, and in a complaint proceeding, exceeded the discretion delegated to it by law and departed from prior agency practice without explanation. The Commission's past practice was to set new policies that govern standard contract terms in investigative proceedings on a full record, after taking testimony from all relevant stakeholders (including consumer groups, which were absent from this proceeding). By contrast, a complaint proceeding permits the Commission only to remedy a party's past violations of legal duties, not issue new policy pronouncements. This Court should vacate Orders 17-465 and 18-079, vacate the portion of Order No. 17-256 that required PGE to revise its standard contracts on a going-forward basis, and remand for further proceedings.

STATEMENT OF FACTS

I. By law, utilities must offer to purchase power from qualifying facilities.

The legal framework for this case begins with the federal Public Utility Regulatory Policies Act of 1978 (“PURPA”). PURPA encourages the development of renewable energy technologies by non-utility power producers called “qualifying facilities,” or “QFs.” *See generally Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 593-94, 734 P2d 1366 (1987), *rev den*, 303 Or 591 (1987) (describing PURPA’s purpose and implementation). PURPA requires the Federal Energy Regulatory Commission (“FERC”) to develop and review rules that require utilities like PGE to offer to purchase energy from QFs. 16 USC § 824a-3(a). PURPA then vests state regulatory agencies with authority to implement FERC’s rules. 16 USC § 824a-3(f)(1).

Pursuant to this authority, the Commission adopted rules setting each utility’s “avoided costs” as the rate for purchases of energy by the utility from QFs. OAR 860-29-0040(2)(a); *see also* 18 CFR § 292.303(a) (FERC rule requiring that utilities purchase energy from QFs.) Avoided costs are “the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the [QF], such utility would generate

itself or purchase from another source.” 18 CFR § 292.101(b)(6); (*see also* App 13).²

Power purchases from QFs will make up a substantial portion of PGE’s overall capacity. From January 2015 through September 2018, PGE entered into 127 standard contracts with QFs.³ These contracts provided for nearly 560 megawatts of electrical capacity. If these projects become operational, they would represent 10 percent of PGE’s owned and contracted plant capacity for 2021. PGE passes its power purchase costs on to customers in retail rates. Thus, increased prices from standard contracts with QFs necessarily have a significant impact on the rates that PGE’s customers pay.

² ORS 40.090(2) permits the Court of Appeals to take judicial notice of “official acts of the legislative, executive and judicial departments of this state.” *See also* ORS 40.015(1) (applying OEC to “all courts in this state”). “An agency decision is an official act within the scope of this evidentiary rule.” *McGee Plumbing, Inc. v. Bldg. Codes Div., Div. of Dep’t of Consumer & Bus. Servs.*, 221 Or App 123, 131, 188 P3d 420 (2008). In *Util. Reform Project v. Or. Pub. Util. Comm’n*, the Court of Appeals took judicial notice of several Commission orders, citing ORS 40.090(2), 215 Or App 360, 365 n 1, 170 P3d 1074 (2007); *see also* *Priestley v. Paulus*, 287 Or 141, 144 n 2, 597 P2d 829 (1979) (taking judicial notice of an official opinion of the Attorney General).

³ PGE’s contracts are filed with the Oregon Public Utilities Commission at Docket No. RE-143, available at <https://apps.puc.state.or.us/edockets/docket.asp?DocketID=19098>.

II. In Order No. 05-584, the Commission ordered that standard contracts offered by utilities to qualifying facilities include a 20-year contract term with prices fixed for “only the first 15 years” of the term.

In 2004, the Commission opened Docket No. UM 1129 to investigate the terms and conditions of standard contracts offered by utilities for the purchase of electricity from QFs. (*See* App 6.) A standard contract describes “a standard set of rates, terms and conditions that govern a utility’s purchase of electrical power from QFs at avoided cost.” (App 13.) Among other issues, the Commission investigated the length of standard contracts and whether to adopt model standard contract forms for all utilities. (App 4-5, 10-15.) The Commission heard evidence from various stakeholders, including public agencies, consumer groups, utilities, and QFs, before issuing its order. (App 7-8.) That order—and the Commission’s subsequent interpretation of it—form the basis for the orders at issue here.

In setting the standard contract length in that order, the Commission sought to “balance” two competing goals. The Commission’s “primary goal” was ensuring that the standard contracts accurately price QF power. (App 12.) By regulation, a utility must offer to purchase power from QFs for a “specified term” at the fixed avoided cost rates set “at the time the obligation [by the QF to sell power] is incurred.” 18 CFR § 292.304(d)(2)(ii). As the Commission acknowledged, lengthening the

“specified term” of fixed prices posed a problem: “divergence between forecasted and actual avoided costs must be expected” over a lengthy contract term. (App 13.) However, the Commission believed that a short overall contract term conflicted with the Commission’s other goal, ensuring that QFs obtain financing.

The Commission ultimately balanced these goals by bifurcating the term of the standard contract. The Commission set “the maximum term” as 20 years, but ruled that “standard contract prices should be fixed for only the first 15 years of the 20-year term” with market prices for the “final five years.” (*Id.*) Limiting fixed prices to “the first 15 years” served the Commission’s primary goal in limiting price divergence, while providing market prices for the “final five years,” for a total term of 20 years, helped QFs guarantee financing.

The Commission also declined to adopt a model standard contract form. The Commission determined instead that each utility “should draft its own standard contract rates, terms, and conditions” and directed the utilities to file standard contract forms within 60 days. (App 14.) The Commission explained that standard contracts did not have to include identical wording if the terms were consistent with “present or past decisions.” (*Id.*)

Thus, individual utilities draft their own standard contract forms, which the Commission then approves as compliant with state and federal laws and regulations and the Commission's prior orders interpreting those laws and regulations. (*See id.*) When the Commission issues new orders dictating new standard contract requirements, the utilities file revised standard contracts with the Commission. The utilities also periodically file revised avoided cost schedules with updated estimates of avoided costs in future years.

III. The Commission approved standard contracts that set the 15-year period of fixed prices as beginning at contract execution.

The standard contract forms that PGE submitted to the Commission in 2007 to comply with Order No. 05-584 provided for 15 years of fixed prices beginning at contract execution. (*See generally* Rec 310-351 (2007 Compliance Filings, submitted as Atts. 1 and 2 to PGE Summ. J. Mot. (Apr 24, 2017)).) The Commission reviewed and approved these standard contract forms. (*See* Docket No. UM 1129, Order No. 07-065 (Feb 27, 2007), available at <https://apps.puc.state.or.us/orders/2007ords/07-065.pdf>.)

IV. The Commission consistently interpreted Order No. 05-584 as only requiring fixed prices during the first 15 years of the term.

The Commission reiterated its reasons for establishing the 15-year fixed price term in several recent orders. In two related dockets, two other utilities, PacifiCorp and Idaho Power, sought to limit the 15-year term's application to negotiated contracts with QFs.⁴ The Commission rejected the utilities' attempts to limit Order No. 05-584's application and expounded on its reasons for establishing the 15-year fixed price period in the first place. (See Docket No. UM 1725, Order No. 16-129 (Mar 29, 2016), available at <https://apps.puc.state.or.us/orders/2016ords/16-129.pdf>; see also Docket No. UM 1734, Order No. 16-130 at 5 (Mar 29, 2016), available at <https://apps.puc.state.or.us/orders/2016ords/16-130.pdf> (incorporating by reference the reasoning of Order No. 16-129).)

The Commission stated that its current policy “provides for 20-year contracts, with prices fixed at avoided cost rates in place *at the time of signing* remaining in effect for a 15-year period, and indexed pricing [*i.e.*, market prices] for the remaining five years.” (Docket No. UM 1725, [Order No. 16-129](#) at 8 (emphasis added).) The Commission then explained the

⁴ A negotiated contract contains terms that differ from the standard contracts approved by the Commission, but are still subject to the Commission's regulatory oversight.

public interest benefit of requiring QFs to accept market rates for the final five years of a contract:

“By specifying index-based rates for the final five years, QF developers will be given an incentive to realistically address future projects and manage their operations in ways that will maximize efficiency. These factors bring down the cost of renewable energy, making it more competitive with less environmentally-friendly alternatives and thereby further the public interest.”

(Id.) Thus, the Commission explained that Order No. 05-584 provided QFs with market prices in the final five years of the standard contract to incentivize QFs to “maximize efficiency” and bring down renewable energy prices. *(Id.)*

In response to that order, two of the Complainants here, who were interveners in those dockets, sought clarification that the Commission did not intend to alter the start date of the 15-year period in Idaho Power’s standard contracts, which explicitly started the 15-year term from commercial operations, not contract execution. In a March 2016 order, the Commission clarified that it did not intend to alter the terms of Idaho Power’s contracts, which began the 15-year period at commercial operation, but noted “PGE’s standard QF contract differs with regards to when the 15-year period commences.” (Docket No. UM 1725, Order No. 16-175 at 3 (May 16, 2016), available at <https://apps.puc.state.or.us/orders/2016ords/16->

[175.pdf.](#))⁵ The Commission did not issue any general policy in that proceeding, because the proceeding was “not one to address overall QF policy.” (*Id.*)

In an unrelated order two months later, the Commission reiterated that Order No. 05-584 “dictates” that “market prices replace avoided cost prices during the last five years of a 20-year standard contract.” (Docket No. UM 1610, Order No. 16-174 at 5 (May 13, 2016), available at <https://apps.puc.state.or.us/orders/2016ords/16-174.pdf>.) Thus, four times the Commission has stated that the 15-year period can begin at execution: (1) Order No. 05-584; (2) each time the Commission approved PGE standard contracts; (3) Docket No. UM 1725, [Order No. 16-129](#); and (4) Docket No. UM 1610, [Order No. 16-174](#).

V. Complainants asked the Commission to interpret Order No. 05-584 as requiring that the 15-year period of fixed prices begin at commercial operation.

Against that regulatory and procedural framework, this appeal arises.

In December 2016, Complainants, comprised of several organizations

⁵ In that order, the Commission stated that PacifiCorp’s standard contracts contain language “similar” to the language in Idaho Power’s standard contracts with respect to the start date of the 15-year period. (Docket No. 1725, [Order No. 16-175](#) at 3.) PacifiCorp begins the 15-year period when a QF is scheduled to make an initial delivery of power for testing purposes, not commercial operations. (Rec 1661, Order No. 17-373 at Appx A at 4 (Sept 28, 2017).)

representing the interests of independent power producers and developers of local energy projects, filed the complaint at issue here against PGE.

(Rec 6-7, Compl. (Dec 6, 2016).) Complainants alleged that PGE's practice of beginning the 15-year period of fixed prices from the contract execution date, rather than the commercial operation date, "violate[d] the plain terms and intent of the Commission's Orders and policy[.]" (Rec 15, Compl.)

Complainants asserted that the Commission's policy, as stated in Order No. 05-584, required that the 15-year period of fixed prices begin on a QF's commercial operation date. (Rec 7-9, Compl.) Complainants asked the Commission to order PGE to cease from engaging in any business practice inconsistent with that purported policy, and declare that PGE's standard contract forms obligated PGE to make fixed-price payments for 15 years after a QF begins commercial operation. (Rec 16, Compl.)

Both parties moved for summary judgment. PGE argued that Order No. 05-584 authorized utilities to limit the availability of fixed prices to the first 15 years of a standard contract. (Rec 273, PGE Summ. J. Mot. (Apr 24, 2017).) Complainants contended that "the Commission's policy" entitled QFs to be paid 15 years of fixed prices starting at commercial operation. (Rec 231-32, Complainants' Summ. J. Mot. (Apr 24, 2017).) Complainants argued at length about whether "policy" militated in favor of a 15-year

period of fixed prices beginning at commercial operation. (Rec 236-60, Complainants' Summ. J. Mot.)

In response, PGE observed that “this is not a proceeding to adopt a new QF policy. This is a proceeding in which PGE has been accused of violating the Commission’s **existing** orders on contract length.

Complainants’ policy arguments are irrelevant. The relevant question is:

What has the Commission ordered PGE to do and has PGE complied?”

(Rec 478, PGE Resp. in Opp. to Complainants’ Summ. J. Mot. (May 8,

2017) (emphasis in original).) That statement of the issue was consistent

with the parties’ joint statement stipulating to the following legal issue: “Has

PGE violated any statute, rule or Commission order regarding when the

15-year fixed price period begins under QF standard contracts?” (Rec 176,

Att. A to Joint Filing at 2 (Mar 10, 2017).)

VI. In Order No. 17-256, the Commission ruled that Order No. 05-584 permitted PGE to offer standard contracts that began the 15-year period of fixed prices at contract execution, but “clarified” its policy to foreclose such a result going forward.

The Commission, at least concerning past practice, agreed with PGE. It concluded that PGE has “lawfully offered standard contracts to operators of qualifying facilities (QFs) that have 15-year periods of fixed prices that begin on the date of execution, rather than on the date that the QF begins to transmit power.” (ER 1.) The Commission stated that in Order No. 05-584,

the Commission “did not specify the date on which that 15-year term begins.” (ER 3.) The Commission further ruled that Order No. 05-584 presumed that utilities would set their own start dates for the beginning of the fixed-price period, and the utilities’ contract forms would not be “identical” on this point. (*Id.*)

Consistent with this reading of Order No. 05-584, the Commission acknowledged that it had approved “standard QF contracts [from different utilities] that have used, as the triggering event, both the date of [contract] execution and the date of power delivery.” (*Id.*) The Commission further stated that PGE’s standard contracts “limited the availability of fixed prices to the first fifteen years measured from contract execution” and it approved these standard contracts. (*Id.*) The Commission thus concluded that PGE did not violate any prior orders, including Order No. 05-584, and granted summary judgment to PGE. (*Id.*)

Although it had resolved the only dispute in the proceeding, the Commission went further to “take this opportunity” to “clarify [its] policy in Order No. 05-584 to explicitly require standard contracts, on a going-forward basis, to provide for 15 years of fixed prices that commence when the QF transmits power to the utility.” (ER 4.) The Commission cited no evidence in support of this new policy, other than a “belie[f]” that QFs

should receive the “full benefit” of the 15-year period. (*Id.*) In issuing this order, the Commission made no mention of its reason for establishing the 15-year fixed-price period in the first place: protecting utilities’ customers from price divergence over the 20-year contract term. (*See* App 13.)

Similarly, the Commission made no mention of the previously stated public interest benefit of transitioning to market prices in the final five years of a standard contract, encouraging QF efficiency. (*See* Docket No. UM 1725, [Order No. 16-129](#).) The Commission ordered PGE to file revisions to its standard contract with language consistent with this “clarif[ied]” policy.

(*Id.*)

VII. In Order No. 17-465, the Commission granted Complainants’ petition for clarification and amended Order No. 17-256 to remove its interpretation of specific PGE contract terms.

Complainants moved for reconsideration, arguing that Order No. 17-256 was ambiguous in its scope and meaning. (Rec 1530, Complainants’ Mot. for Recon. (Sept 8, 2017).) They asked the Commission to clarify that it did not interpret any of PGE’s previously effective standard contract forms or any of its executed standard contracts. (Rec 1531, Complainants’ Mot. for Recon.)

The Commission granted this motion in part and amended Order No. 17-256 to remove any interpretation of PGE’s standard contracts.

(ER 9.) The Commission left intact the portion of Order No. 17-256 that acknowledged the Commission had previously approved “standard contracts that have used, as the triggering event, both the date of [contract] execution and the date of power delivery.” (*See id.*; *see also* ER 3.) Thus, the Commission continued to interpret Order No. 05-584 as permitting PGE to offer standard contracts with fixed-price terms beginning at execution. The Commission simply amended its order to make clear that it had not interpreted any particular PGE standard contracts in so ruling. (*See* ER 9 (“We recognize that the actual terms of PGE’s standard contract forms have varied over time, and we did not undertake a review of all those forms prior to rendering our decision.”).)

VIII. In Order No. 18-079, the Commission denied PGE’s application for reconsideration, but in doing so stated for the first time that Order No. 17-256 “affirmed” a pre-existing policy embedded within Order No. 05-584.

PGE sought reconsideration of the Commission’s second order. PGE argued that Order No. 17-465 lacked in substantial reason were it to stand: The Commission could not both order PGE to revise its standard contract forms (as it did in Order No. 17-256) and then conclude that the Commission had not actually reviewed those same forms (as it did in Order No 17-465). (*See* Rec 1803-04, PGE Mot. for Recon. (Jan 12, 2018).) In making this argument, PGE also observed that the Commission’s

requirement that PGE offer fixed prices for 15 years from the date of commercial operation was not a clarification of a policy but rather a new policy. (Rec 1804, PGE Mot. for Recon.)

The Commission disagreed. It rejected PGE's argument that before ordering PGE to revise its standard contracts, it needed to review those contracts for compliance with existing policies. (ER 13.) It also rejected PGE's argument that the Commission's decision constituted the adoption of a "new policy." (*Id.*) Instead, the Commission reasoned that in mandating that the fixed-price period begins at scheduled commercial operation, it simply "affirmed and made explicit [the] policy adopted in Order No. 05-584." (*Id.*) Order No. 18-079 was the first instance in which the Commission interpreted Order No. 05-584 as "adopt[ing]" a policy that required PGE to pay QFs 15 years of fixed prices beginning at scheduled commercial operation. (*Id.*)

ASSIGNMENT OF ERROR

I. Preservation of Error

Subsumed within this claim of error are multiple issues, each of which was preserved below. In its summary judgment briefing before the Commission, PGE contended that Order No. 05-584 "allows a utility to limit fixed prices to the first 15 years of a standard contract term that is measured

from contract execution.” (Rec 281, PGE Summ. J. Mot.) In particular, PGE argued that the Commission’s “express purpose in limiting fixed prices to the first 15 years of the contract term was to prevent more than 15 years of divergence between forecasted avoided costs (once they become fixed contract prices) and a utility’s actual avoided costs.” (Rec 279, PGE Summ. J. Mot.) Thus, PGE argued that the “15-year limit on fixed prices must begin to run when the contract is executed (and the forecasted rates become fixed prices).” (Rec 280, PGE Summ. J. Mot.) Further, PGE contended that its 2007 compliance filings, which the Commission approved as complying with Order No. 05-584, “clearly limited fixed prices to the first 15 years of a contract term that begins at contract execution.” (Rec 281-84, PGE Summ. J. Mot.)

PGE also repeatedly sought to limit the scope of the proceeding to exclude any new statement of Commission policy. In the parties’ March 10, 2017 Statement Listing the Facts and Issues Upon Which the Parties Agree Are Relevant to the Resolution of the Proceeding, PGE stipulated only to a single, backwards-looking legal issue: “Has PGE violated any statute, rule or Commission order regarding when the 15-year fixed price period begins under QF standard contracts?” (Rec 176, Att. A to Joint Filing (Mar 10, 2017).) The additional legal issues that PGE submitted to the Commission

all sought rulings as to whether PGE's past filings complied with the Commission's past orders. (Rec 194, Att. B to Joint Filing (Mar 10, 2017).)

Complainants' own statement of the legal issues similarly sought interpretations of existing Commission policy. Complainants presented the following question regarding Commission policy: "Does the Commission's policy require PGE to offer 15 years of fixed prices from the time of power deliveries?" (Rec 204, Att. C to Joint Filing (Mar 10, 2017).) Complainants also sought an interpretation of PGE's standard contracts, and an order directing PGE to revise its standard contract forms to offer 15 years of fixed prices starting at commercial operation. (*See id.*) These legal issues submitted by Complainants were consistent with the complaint, which sought an order barring PGE from disputing its obligation to offer 15 years of fixed prices starting at commercial operation, a declaration interpreting PGE's standard contract form, and an order requiring PGE to revise its standard contract forms to offer 15 years of fixed prices starting at commercial operation. (Rec 16, Compl.)

When Complainants sought a new statement of policy in their summary judgment briefing, PGE asked the Commission to exclude new policy pronouncements from any ruling. PGE observed that "this is not a proceeding to adopt a new QF policy. This is a proceeding in which PGE

has been accused of violating the Commission's **existing** orders on contract length. Complainants' policy arguments are irrelevant. The relevant question is: What has the Commission ordered PGE to do and has PGE complied?" (Rec 478, PGE Resp. to Summ. J. Mot. (emphasis in original).)

PGE made each of these arguments before the Commission with enough specificity to ensure that the Commission could fully "consider the point and avoid committing error." *Becklin v. Bd. of Examiners for Eng'g*, 195 Or App 186, 199-200, 97 P3d 1216 (2004), *rev den*, 338 Or 16 (2005) (internal citation omitted).

II. Standard of Review

An agency's order must be supported by "substantial reason." *Jenkins v. Bd. of Parole & Post-Prison Supervision*, 356 Or 186, 195, 335 P3d 828 (2014) (internal citation omitted); *see also* ORS 756.610(1) (allowing judicial review of PUC orders as orders in contested cases in accordance with ORS 183.480 to ORS 183.497). The agency must articulate a "rational connection between the facts and the legal conclusions it draws from them." *Jenkins*, 356 Or at 195 (internal citation omitted). This Court reviews to determine if the PUC's "findings, reasoning, and conclusions demonstrate that it acted in a rational, fair, and principled manner[.]" *See Gordon v. Bd. of Parole & Post-Prison Supervision*, 343 Or 618, 634, 175 P3d 461 (2007).

The Court also reviews whether the order exceeds the agency's delegated discretion or is inconsistent with a prior agency position or practice. *See, e.g., Knutson Towboat Co. v. Bd. of Maritime Pilots*, 131 Or App 364, 378, 885 P2d 746 (1994), *rev den*, 321 Or 94 (1995) (board did not exceed its discretion to establish reasonable and just rates by not considering actual cost in determining the cost of pilot boat service).

ARGUMENT

I. The Commission's Orders are not supported by substantial reason because they are based on a misinterpretation of prior Commission policy.

The Commission's Orders in UM 1805 lack substantial reason. In its order on reconsideration, the Commission declared that it "affirmed" a policy contained in Order No. 05-584 that the 15-year period of fixed prices commences upon scheduled commercial operation. (ER 11.) But the Commission could not have "affirmed" a policy that was not, in fact, its policy. Therefore, the Commission's Orders lack substantial reason.

A. Order No. 05-584 permits a utility to enter a contract that begins the 15-year period of fixed prices at execution.

The Commission's Orders lack substantial reason because they rely on a misinterpretation of Order No. 05-584. *See, e.g., Keystone RV Co-Thor Indus. v. Erickson*, 277 Or App 631, 637, 373 P3d 1122 (2016) ("Because the board's order relies on a misinterpretation of [a medical expert's]

opinion, we conclude that the order is not supported by substantial reason.”). The Commission purported to “clarify” and then to “affirm” a policy—that fixed prices run from scheduled commercial operations—which it purportedly “originally addressed” in Order No. 05-584. (ER 4, 11.)

But Order No. 05-584 provides no support for the Commission’s newfound policy. Order No. 05-584 set the initial 15-year period of fixed prices, but did not require that this period begin with scheduled commercial operation as opposed to contract execution. In Order No. 05-584, the Commission concluded that “standard contract prices should be fixed for only the first 15 years of the 20-year term.” (App 13.) A contract “term” generally means the period in which the contract is in effect, not some later milestone. (*See* Rec 335, Att. 2 to PGE Summ. J. Mot. (defining “Term” in PGE’s standard contract to mean the period beginning at the “Effective Date” and extending until “Termination”); *see also* Webster’s Third New Int’l Dictionary (unabridged 2002 ed) (defining “term” to mean “the time for which something lasts”).)

Throughout Order No. 05-584, the Commission confirms this common understanding of the word “term” by speaking interchangeably about the beginning of the contract “term” and the execution of the contract itself. For instance, the Commission stated that “the QF must take one of the

market pricing options * * * *for the final five years of the contract.*”

(App 13 (emphasis added).)

Similarly, the Commission stated that the QF was entitled only to “select fixed pricing *for the first fifteen years* of the standard contract.” (App 4-5 (emphasis added).) The “first fifteen years” spoke of the beginning of the contractual relationship, *i.e.* contract execution, not the beginning of the QF’s operations. Because 15 years plus 5 years equals the full 20-year term, the Commission-mandated “first fifteen years” of fixed prices necessarily began at contract execution, followed by “the final five years” of market pricing. There is no indication in Order No. 05-584 that the Commission intended, let alone required, that the standard contract “term” begin at scheduled commercial operation, instead of the standard meaning of “term,” the period in which an agreement is in effect.

Indeed, PGE filed, and the Commission approved, standard contract forms that defined “the Term” as “the period beginning on the Effective Date and ending on the Termination Date.” (Rec 332, 335, 337, Att. 2 to PGE Summ. J. Mot.) The standard contract forms in turn defined “Effective Date” as the date of the contract’s “execution.” (Rec 332, 335, Att. 2 to PGE Summ. J. Mot.) Thus, in 2007, the Commissioners that issued and

enforced Order No. 05-584 agreed that the contract's "term" could run, as defined within the contract, from its execution.

B. Order No. 05-584 did not contain an unstated policy guaranteeing that QFs receive 15 years of fixed prices.

The Commission's reasons for adopting the 15-year term, as stated in Order No. 05-584, confirm that the 15-year period can run from contract execution. When creating the 15-year period, the Commission worried about forcing utilities to offer outdated fixed prices to QFs in the later years of the contract. (*See* App 13 ("[W]e acknowledge that 20 years is a significant amount of time over which to forecast avoided costs.")) In particular, the Commission stated that "divergence between forecasted and actual avoided costs must be expected over a period of 20 years." (*Id.*) Thus, the Commission ruled that "avoided costs should not be fixed beyond 15 years." (*Id.*)

But the Commission's Orders here necessarily require a contrary result by requiring utilities to offer standard contracts with prices "fixed" beyond 15 years. The price schedule incorporated into each standard contract is "fixed" at contract execution, not some later date. By regulation, PGE must calculate its fixed avoided cost prices "at the time the [QF's obligation to provide energy] is incurred." 18 CFR § 292.304(d)(2)(ii); OAR 860-29-0040(3)(b)(B); *see also* *Snow Mountain Pine Co.*, 84 Or App

at 594 (interpreting regulations). To comply with this legal requirement, PGE incorporates the avoided costs schedule in effect “at the time the agreement is executed” into each standard contract. (*See, e.g.*, Rec 316, Att. 1 to PGE Summ. J. Mot.)

Yet under the Commission’s Orders, because the scheduled commercial operation date can be three years after execution, the 15-year period will often extend 18 years past execution. The utility will thus be required to offer fixed prices during years 16, 17, and 18 of the 20-year contract term. That new policy necessarily results in “avoided costs * * * fixed beyond 15 years,” directly contravening Order No. 05-584. (*See* App 13.) The Commission’s Orders also conflict with Order No. 05-584’s explanation that the QF would receive market prices “for the *final* five years of the contract.” (*Id.* (emphasis added).)

To be sure, in Order No. 05-584, the Commission was concerned with QFs’ ability to obtain financing. The Commission acknowledged that this goal of ensuring QF financing was at odds with its “primary goal” of accurately pricing power purchases. (App 12.) To balance these competing goals, the Commission established a total 20-year term, with fixed prices for the “first 15 years” and market prices for the “final five years.” (App 13.) In setting the 20-year term, the Commission relied on testimony of the

Oregon Department of Energy, indicating that in its experience a 20-year contract term would be sufficient for most QFs to obtain financing.

(App 11, 13.) The Commission enacted the 20-year total term to protect QFs' ability to obtain financing, but limited fixed prices to the "first 15 years" to protect utilities' customers from price divergence. (App 13.)

In its Orders, the Commission got this reasoning exactly backwards. The Commission interpreted the 15-year period as providing a "benefit" to QFs, not utilities' customers. (*See* ER 4.) From there, the Commission ruled that the 15-years term is not the "first 15 years" of the contract term, as stated in Order No. 05-584, but instead begins when the QF decides it will "transmit[] power to the utility." (*Id.* (internal citation omitted).) Nowhere in Order No. 05-584 did the Commission require that QFs receive fixed prices for 15 years starting once the QF elects to "transmit[] power to the utility." If a QF wants to ensure that it actually receives 15 years of fixed prices, it can defer signing a standard contract until shortly before commercial operations begin, as is required in other jurisdictions. *See Power Res. Grp., Inc. v. Pub. Util. Comm'n of Tex.*, 422 F3d 231, 238 (5th Cir 2005) (upholding rule requiring commercial operations to begin within 90 days of a QF's offer to sell power to the utility). The Commission's

Orders lack substantial reason because those orders inexplicably upended the delicate balance the Commission struck in Order No. 05-584.

In the last of its Orders, Order No. 18-079, the Commission reasoned that Order No. 05-584 must have required that a QF receive 15 years of fixed prices beginning at scheduled commercial operation because two other utilities' standard contracts (Idaho Power Company and PacifiCorp) explicitly begin the fixed price period at power delivery. (ER 13.) But Order No. 05-584 gave the utilities the flexibility to draft their own standard contract provisions. As the Commission stated in Order No. 05-584, when declining to adopt standard contract forms for all utilities, "[w]e expect that terms that are not specifically discussed in this order or past orders will vary among the utilities." (App 14.) As the Commission later explained, Order No. 05-584 "did not specify the date on which [the] 15-year term [of fixed prices] begins," and therefore the utilities "might not use identical" starting points for the 15-year period. (ER 3.) Indeed, in approving PGE's compliance filings in this proceeding, the Commission acknowledged that even after PGE complied with Order No. 17-256, no two utilities used the

same starting point for the 15-year period.⁶ (Rec 1662-63, Order 17-373 (Sept 28, 2017).) The fact that different utilities set different starting points for the 15-year period is not a substantial reason for interpreting Order No. 05-584 as requiring a particular starting point.

C. The Commission could not have had a pre-existing policy requiring that the 15-year fixed price period begin at scheduled commercial operation, because the Commission approved PGE’s prior contracts that measured the 15-year period from execution.

Consistent with this plain reading of Order No. 05-584, PGE submitted, and the Commission approved, standard contract forms that set the start date of the 15-year fixed price period at contract execution. (*See* Rec 310-51, Atts. 1 and 2 to PGE Summ. J. Mot.; Docket No. UM 1129, [Order No. 07-065](#) (approving revised standard contract forms).) PGE’s 2007 standard contract forms provided that “[c]ommencing on the Effective Date,” which was defined elsewhere as “execution by both Parties,” the QF must “sell to PGE the entire Net Output.” (Rec 332, 335, 337, Att. 2 to PGE Summ. J. Mot.)

⁶ Idaho Power begins the 15-year period at actual commercial operations. PGE begins the 15-year period at scheduled commercial operations. And PacifiCorp begins the 15-year period at the scheduled initial delivery of power for testing purposes. (Rec 1662-63, Order 17-373 (Sept 28, 2017).)

For this Net Output, the standard contract forms stated that “PGE shall pay the Seller the Contract Price.” (Rec 337, Att. 2 to PGE Summ. J. Mot.) For the Contract Price, the QF selected between the “Fixed Price” option and three market-based pricing options. (Rec 338-39, Att. 2 to PGE Summ. J. Mot.)

For QFs that selected the fixed-price option, the standard contract forms required the QF to select a market-based pricing option “for all Contract Years in excess of 15 until the remainder of the Term.” (Rec 338, Att. 2 to PGE Summ. J. Mot.) The standard contract forms defined “Contract Years” as “each [calendar year] falling at least partially in the Term of this Agreement.” (Rec 332, Att. 2 to PGE Summ. J. Mot.) The standard contract forms defined “the Term” as “the period beginning on the Effective Date [*i.e.*, execution] and ending on the Termination Date.” (Rec 335, Att. 2 to PGE Summ. J. Mot.)

In sum, the standard contract forms that the Commission contemporaneously approved as complying with Order No. 05-584 provided for market prices after the first 15 “Contract Years,” which were defined as coinciding with “the Term,” which was in turn defined as beginning upon

“execution.”⁷ Thus, prior to the Commission’s Orders, there was no pre-existing Commission policy requiring that the 15-year period begin at scheduled commercial operation. Indeed, in Order 17-256, the Commission itself stated that it had approved standard contracts that set “the triggering event” for the 15-year period as “the date of [contract] execution.” (ER 3.) Because the Commission purported to “affirm” a policy that was not, in fact, its policy, the Commission’s Orders lack substantial reason.

II. To the extent that the Commission announced a new policy, it acted outside the discretion delegated to it by law and acted inconsistently with past practice.

To the extent that the Commission announced a new policy that the 15-year limit should run from the date of scheduled commercial operation, rather than contract execution, it acted outside the discretion delegated to it under the law. *See* ORS 183.482(8)(b)(A).

Complainants initiated this case under ORS 756.500, which allows any person to file a complaint against a utility if the utility is in violation of law. (Rec 6-7, Compl.) ORS 756.500 circumscribes the Commission’s

⁷ Other terms in these contemporaneously approved forms confirm that 15-year period of fixed prices began at execution. For instance, the fixed prices in the standard contract forms were established “at the time the Standard Contract is executed.” (Rec 317, Att. 1 to PGE Summ. J. Mot.) And the “selection [between fixed price and market pricing options] is for the Term,” which, again, was defined elsewhere as beginning on “execution.” (Rec 332, 335, 338, Att. 2 to PGE Summ. J. Mot.)

authority in these cases to determining whether a past violation of law has occurred. ORS 756.500(3) (stating that complaint must state grounds for “relief” to which complainant “is entitled” or “violation of any law.”). ORS 756.500 also permits the Commission to interpret the terms of standard contracts or standard contract forms. (*See* Docket No. UM 1894, Order No. 18-025 (Jan 25, 2018), available at <https://apps.puc.state.or.us/orders/2018ords/18-025.pdf> (interpreting standard contract terms pursuant to ORS 756.500).)

But ORS 756.500 does not permit the Commission to create new policy. By contrast, the Commission’s investigative statute, ORS 756.515, permits the Commission to investigate “any matter relating to any public utility” and issue any necessary orders.

The distinction is important. The Commission’s past practice was to open an investigative docket when setting policy for new standard contract terms. (*See* App 6; Docket No. 1610, Order No. 14-058 at 1 (Feb 24, 2014), available at <https://apps.puc.state.or.us/orders/2014ords/14-058.pdf> (indicating Docket No. UM 1610 was opened “to continue our evaluation of policies and procedures to implement the Public Utility Regulatory Policies Act * * *”).) An investigative docket permits the Commission to develop a complete record and seek evidence from all relevant stakeholders before

issuing a decision. (*See* App 6-8 (describing breadth of evidence relied upon in issuing QF policy).)

In Order No. 05-584, for instance, the Commission opened an investigation regarding the purchase of QF output by electric facilities. (App 6.) The Commission identified the issues under investigation, received extensive testimony and briefing from the various stakeholders, conducted an evidentiary hearing, and conducted oral argument. (App 7-8.) The Commission heard testimony from 14 different intervenors representing various stakeholders, including electric utilities, QFs, consumer representatives, and public agencies concerned with state energy policies. (*Id.*) The Commission found the Oregon Department of Energy’s testimony “most persuasive” when setting the length of the period of fixed prices because ODOE facilitated and financed QF projects. (App 13.)

By contrast, in altering the application of the fixed-price period here, the Commission received no evidence other than the standard contracts themselves, and expressly disavowed any reliance on those contracts’ terms. The Commission exceeded its authority under law and inexplicably departed from past practice by setting new policy on a paltry record in a complaint proceeding. *See* ORS 183.482(8)(b)(A)-(B) (requiring remand where an agency action is “[o]utside the range of discretion delegated to the agency by

law” or “[i]nconsistent with * * * * a prior agency practice, if the inconsistency is not explained by the agency”).

Compounding this error, the Commission gave the parties no notice that it intended to set a *new* policy in UM 1129. Indeed, no party asked the Commission to issue a new policy. In their statement of undisputed legal issues, the parties presented the following question for resolution: “Has PGE violated any statute, rule or Commission order regarding when the 15-year fixed price period begins under QF standard contracts?” (Rec 176, Att. A to Joint Filing.) In their complaint, Complainants did not request that the Commission set any new policy; instead, Complainants maintained that PGE was in violation of *existing* Commission policy. (Rec 3, 14-16, Compl.) Complainants asked that PGE “conform its business practices to be consistent with * * * Commission orders and policy.” (Rec 3, Compl.) Similarly, in its motion for summary judgment, Complainants requested an order requiring PGE to revise its contracts as a remedy for PGE’s “refusal to follow” existing Commission policy. (Rec 261, Complainants’ Summ. J.

Mot. (seeking standard contract revisions to “reaffirm” and “confirm” existing policy).)⁸

No party asked the Commission to set a new policy regarding the start date of fixed prices under the standard contracts. Thus, nothing in the record would have put PGE on notice that the Commission would set a new policy requiring the fixed-price period to begin at scheduled commercial operation going forward.

ORS 756.500(4) permits the Commission to amend the complaint. But it may do so only “by order” and after giving the defendant “reasonable time to investigate the new charge and answer the amended complaint.” ORS 756.500(4). Even assuming the Commission could have expanded the scope of a complaint proceeding to set a new policy regarding standard contract terms, the Commission acted outside the discretion delegated to it by law in failing to follow the proper procedures for doing so.

⁸ In its motion for summary judgment, Complainants stated that it was posing “two simple legal questions: 1) whether the Commission’s policy entitles qualifying facilities (“QFs”) to 15 years of fixed prices from the time the facility becomes operational and begins delivering its net output under the standard contract” and “2) whether [PGE’s] standard contract can be implemented to provide QFs with 15 years of fixed prices from the time of deliveries.” (Rec 231-32, Complainants’ Mot. for Summ. J. (Apr 24, 2017).)

CONCLUSION

The Commission ordered a substantial revision to PGE's standard contract forms. The Commission cited no evidence, and instead relied on a misreading of a prior Commission order. This Court should vacate and remand because the Commission's Orders lack substantial reason, inexplicably depart from past agency practice of initiating full investigations prior to any such contract revision, and are outside the discretion delegated to the Commission by law under the complaint statute.

Dated December 4, 2018.

MARKOWITZ HERBOLD PC

/s/ Anna M. Joyce

Anna M. Joyce, OSB #013112
AnnaJoyce@MarkowitzHerbold.com
Dallas S. DeLuca, OSB #072992
DallasDeLuca@MarkowitzHerbold.com
Anit K. Jindal, OSB #171086
AnitJindal@MarkowitzHerbold.com
Attorneys for Petitioner
Portland General Electric Company

CERTIFICATE OF COMPLIANCE

Brief Length

I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 7,975.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

/s/ Anna M. Joyce

Anna M. Joyce, OSB #013112
Attorney for Petitioner Portland
General Electric Company

INDEX TO EXCERPT OF RECORD

Date	Description	Page
7/13/2017	Public Utility Commission of Oregon, Docket No. UM 1805, Order No. 17-256	ER 1
11/13/2017	Public Utility Commission of Oregon, Docket No. UM 1805, Order No. 17-465	ER 6
3/5/2018	Public Utility Commission of Oregon, Docket No. UM 1805, Order No. 18-079	ER 11
	OESI Register	ER 15

ORDER NO: 17 256

ENTERED: JUL 13 2017

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1805

NORTHWEST AND
INTERMOUNTAIN POWER
PRODUCERS COALITION,
COMMUNITY RENEWABLE
ENERGY ASSOCIATION, and
RENEWABLE ENERGY COALITION,

Complainants,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

ORDER

DISPOSITION: MOTION FOR SUMMARY JUDGMENT GRANTED;
ORDER NO. 05-584 CLARIFIED

I. SUMMARY

In this order, we grant the motion for summary judgment of Portland General Electric Company (PGE) and dismiss the complaint filed by Northwest Intermountain Power Producers Coalition (NIPPC), the Community Renewable Energy Association (CREA), and Renewable Energy Coalition (Coalition) (complainants). We find that PGE has lawfully offered standard contracts to operators of qualifying facilities (QFs) that have 15-year periods of fixed prices that begin on the date of execution, rather than on the date that the QF begins to transmit power.

We further conclude, however, that PGE must, on a going forward basis, offer standard contracts in which the 15-year period of fixed prices begins on the date that a QF begins to transmit power to the utility.

II. BACKGROUND

The Public Utility Regulatory Policies Act (PURPA) provides a market for the electricity produced by small power producers and co-generators. Although PURPA is a federal law,

states are responsible for implementing significant aspects of the law, and Oregon has enacted its own complementary legislation in ORS 758.505 *et al.*

In several dockets, we have revised the rates, terms, and conditions for QF power purchase agreements (PPAs) in Oregon. In one of these dockets, UM 1129, by Order No. 05-584, we provided QFs with nameplate capacity of 10 megawatts (MW) and below the opportunity to enter into standard contracts for up to 20 years, with 15-year fixed prices. The following sentence from that order lies at the heart of the dispute between the complainants and PGE:

Given our desire to calculate avoided costs as accurately as possible, and the testimony of several parties that avoided costs should not be fixed beyond 15 years, we are persuaded that standard contract prices should be fixed for only the first 15 years of the 20-year term.¹

III. DISCUSSION

A. Positions of the Parties

Complainants assert that PGE is implementing its standard contracts in a manner inconsistent with Commission policy. Complainants fault PGE for specifying that the 15 years of fixed prices begins when the contract between PGE and the QF is executed. Complainants contend that 15 years of fixed pricing commences when a QF achieves operation, *not* when the contract is executed. Alternatively, if the Commission determines that PGE's standard contracts did not violate any orders, but are still not consistent with Commission policy, Complainants request that we order PGE to file revised standard contracts clearly stating that the 15 years of fixed prices run from the delivery of net output.

Complainants note PGE's practice is inconsistent with that of other Oregon utilities. They emphasize that both PacifiCorp and Idaho Power have Commission-approved standard contracts that specify that the 15-year term of fixed prices begins on the date the QF begins to deliver power to the utility, not contract execution.

Intervenor Renewable Northwest (RNW)² supports the position of the complainants that the start date for the 15-year term of fixed prices begins when the QF starts to deliver power to the utility. RNW states that PGE's interpretation effectively makes it impossible for the QF to receive the full benefit of the 15-year offer and reduces the period of fixed prices that the QF is actually able to utilize. According to RNW, this is obviously not what the Commission must have intended.

¹ *In the Matter of Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 (May 13, 2005) at 20.

² RNW's December 21, 2016 petition to intervene was granted at the December 22, 2016 prehearing conference and memorialized in the prehearing conference memorandum, December 22, 2016 at 1.

PGE responds that its standard contracts are consistent with Commission policy and ask that the complaint be dismissed. The company argues that we should conclude as a matter of law that our orders and policies allow for a standard contract term to begin when the contract is executed. PGE notes that Order No. 05-584 requires only a 15-year term of fixed prices, and contains no language requiring a utility to pay fixed prices for 15 years from power delivery.

PGE also notes that the Commission has repeatedly reviewed and approved its standard contract forms. For example, PGE notes that its first standard contract approved by the Commission in Order No. 07-065 specified the date of execution of the standard contract as the 15-year fixed prices start date. PGE adds that no party ever objected to subsequent standard contract filings that “unambiguously provided for a maximum term of 20-years measured from contract execution and unambiguously limited the availability of fixed prices to the first 15-years of that term.”³

B. Resolution

When we concluded that QFs should receive 15 years of fixed prices under standard contracts in Order No. 05-584, we did not specify the date on which that 15-year term begins. Rather, as we later explained in Order No. 06-538, we acknowledged that utilities might not use identical standard contract templates:

In Order No. 05-584, we specifically declined to adopt a model standard contract form. Instead, we indicated that each utility should draft its own standard contract. We expected each standard contract form to contain terms and conditions that were consistent with the resolution of issues in Order No. 05-584, or past orders, as appropriate. We did not expect terms to be identical across all standard contract forms. We also recognized that standard contracts would contain terms addressing issues that were not addressed in the first phase of the docket, nor in any prior proceeding. We expected, however, that all of the terms in a standard contract, individually and collectively, would be consistent with, or in the spirit of, our general conclusions about implementation of PURPA.⁴

Due to this fact, Oregon utilities have filed, and we have approved, standard QF contracts that have used, as the triggering event, both the date of contract execution and the date of power delivery.

Because we approved PGE’s standard contract filings that limited the availability of fixed prices to the first fifteen years measured from contract execution, PGE cannot be found to have been in violation of our orders. Accordingly, PGE’s motion to dismiss the complaint should be granted.

³ *Id.* at 1.

⁴ Order No. 06-584 at 8 (Sept 28, 2006).

We take this opportunity, however, to clarify our policy in Order No. 05-584 to explicitly require standard contracts, on a going-forward basis, to provide for 15 years of fixed prices that commence when the QF transmits power to the utility.⁵ Standard contracts, whether prepared by PGE, Idaho Power or PacifiCorp, all contain QF performance benchmark event dates that must be achieved before the QF can offer power to the utility.

The 15-year period of fixed prices is, of necessity, tied to these benchmarks. Prices paid to a QF are only meaningful when a QF is operational and delivering power to the utility. Therefore, we believe that, to provide a QF the full benefit of the fixed price requirement, the 15-year term must commence on the date of power delivery.

Having found that PGE's past standard contracts have not been in violation of our orders, we shall not require that existing executed contracts be revised. However, PGE should promptly file revisions to Schedule 201 which shall include a revised standard contract PPA with language consistent with our requirement that the 15-year term of fixed prices commences when the QF transmits power to the utility.

IV. ORDER

IT IS ORDERED that:

1. The complaint filed by Northwest Intermountain Power Producers Coalition, the Community Renewable Energy Association and Renewable Energy Coalition against Portland General Electric Company is dismissed.

⁵ See *In the Matter of Public Utility Commission of Oregon Investigation into Qualifying Facilities Contracting and Pricing*, Docket No. UM 1610 Phase II, Order No. 15-130, entered April 16, 2015, adopting a stipulation of the parties, including, among others, PGE, the Coalition and CREA. Among the provisions described at page 2 of the order is the agreement that the scheduled commercial operation date chosen by the QF must be within three years of the date of the execution of the standard contract, subject to certain conditions.

ORDER NO. 17 256

- 2. Within five business days of the date of this order, Portland General Electric Company shall file revisions to Schedule 201 of its tariffs consistent with this order.

Made, entered, and effective JUL 13 2017.

Lisa D. Hardie

Lisa D. Hardie
Chair



Steve Bloom

Stephen M. Bloom
Commissioner

Megan W. Decker

Megan W. Decker
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.

ORDER NO. 17 465

ENTERED NOV 13 2017

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1805

NORTHWEST AND INTERMOUNTAIN
POWER PRODUCERS COALITION,
COMMUNITY RENEWABLE ENERGY
ASSOCIATION, and RENEWABLE
ENERGY COALITION,

Complainants,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

ORDER

DISPOSITION: PETITION TO AMEND ORDER NO. 17-256 GRANTED;
APPLICATION FOR REHEARING OR RECONSIDERATION
DENIED

I. SUMMARY

In this order, we amend and clarify Order No. 17-256 and deny the request for rehearing or reconsideration filed by Northwest Intermountain Power Producers Coalition, Community Renewable Energy Association and Renewable Energy Coalition (complainants).

II. PROCEDURAL HISTORY

In Order No. 17-256, we clarified Order No. 05-584 with regard to the date upon which the 15-year period of fixed prices paid to qualifying facilities (QFs) may begin under standard contracts. We addressed both a policy question *and* a legal question. The complainants framed the forward-looking policy issue as follows:

Complainants respectfully request the Commission reaffirm its policy and direct PGE to conform its business practices to be consistent with the terms of its standard contract and Commission orders and policy to pay 15 years of fixed prices after the QF begins delivering its net output to the utility. The Commission can resolve this Complaint without altering or revising any existing contracts or PGE's current standard contract, and only needs to confirm that Commission policy and PGE's standard

ORDER NO. 17 465

contract require PGE to pay 15 years of fixed prices after the QF begins delivering its net output.¹

In a subsequent joint filing, complainants and PGE presented the following legal issue: “Has PGE violated any statute, rule or Commission order regarding when the 15-year fixed price period begins under QF standard contracts?”²

We answered the legal question as follows:

Because we approved PGE's standard contract filings that limited the availability of fixed prices to the first fifteen years measured from contract execution, PGE cannot be found to have been in violation of our orders.³

We then addressed the policy question by stating that, we would:

explicitly require standard contracts, on a going-forward basis, to provide for 15 years of fixed prices that commence when the QF transmits power to the utility * * * we believe that, to provide a QF the full benefit of the fixed price requirement, the 15-year term must commence on the date of power delivery.⁴

We further added that, “[h]aving found that PGE’s past standard contracts have not been in violation of our orders, we shall not require that existing executed contracts be revised.”⁵

On September 11, 2017, complainants filed a joint “Petition for Clarification and Application for Rehearing or Reconsideration of Order No. 17-256.” PGE filed a response on October 24, 2017.

III. APPLICABLE LAW

Based on the nature of complainants’ request and the legal authority they cite in support, we interpret the motion as both a request to amend an order under ORS 756.568, and an application for rehearing or reconsideration under ORS 756.561.

ORS 756.568 provides, in part, that:

The Public Utility Commission may at any time, upon notice to the public utility or telecommunications utility and after opportunity to be heard as provided in ORS 756.500 to 756.610, rescind, suspend or amend any order made by the commission.

¹ Complaint at 3 (Dec 6, 2016).

² Joint Filing, Attachment A at 2 (Mar. 10, 2017).

³ Order No. 17-256 at 3.

⁴ *Id.* at 4.

⁵ *Id.*

ORDER NO. 17 465

ORS 756.561(1) provides that:

After an order has been made by the Public Utility Commission in any proceeding, any party thereto may apply for rehearing or reconsideration thereof within 60 days from the date of such order. The commission may grant such a rehearing or reconsideration if sufficient reason therefor is made to appear.

OAR 860-001-0720(3) further provides that we may grant an application for rehearing or reconsideration if the applicant shows that there is:

- (a) New evidence that is essential to the decision and that was unavailable and not reasonably discoverable before issuance of the order;
- (b) A change in the law or policy since the date the order was issued relating to an issue essential to the decision;
- (c) An error of law or fact in the order that is essential to the decision; or
- (d) Good cause for further examination of an issue essential to the decision.

IV. DISCUSSION

A. Positions of the Parties

Complainants specifically request that we clarify our order by stating that we did not interpret PGE's previously effective standard contract forms or any fully executed standard agreements. They claim that our order is vague and ambiguous with respect to binding interpretations on different versions of the standard contract form made available to QFs, because neither they nor PGE asked us to interpret prior standard contract forms or fully executed contract forms.⁶

Complainants are concerned that, in relying on the order, PGE could argue that we have provided a binding interpretation of the language of every QF contract on the issue of the start date of 15-year fixed prices. Complainants focus on two provisions in our order. First, they point to our language stating that we had earlier approved "PGE's standard contract filings that limited the availability of fixed prices to the first fifteen years measured from contract execution." Second, they point to our declaration that, "[h]aving found that PGE's past standard contracts have not been in violation of our orders * * *." Complainants note that we failed to identify any particular standard contract form on which to base these conclusions, explaining that the prior standard contract terms are highly variable.

PGE responds that we dismissed the underlying complaint based on our finding that PGE's contracts had been previously approved by the Commission and could thus not be found in violation of our orders, and that our clarification was clearly addressing our

⁶ Petition at 2 (Sept 11, 2017).

ORDER NO. 17 465

policy on a going-forward basis. PGE sees complainants' petition as essentially an attempt to relitigate the issue.

B. Resolution

We grant complainants' request to amend Order No. 17-256 and clarify that, although we concluded that PGE had not violated any Commission order with regard to its prior standard contracts, we did not interpret any terms of those standard contract forms or executed contracts.

In reaching our decision in Order No. 17-256, we relied on the fact that this Commission had repeatedly reviewed and approved PGE's standard contract forms submitted following our decision in Order No. 05-584 that QFs should receive 15 years of fixed prices. For that reason, we could not find that PGE's standard contract forms were in violation of Commission order.

In so doing, however, we neither examined nor addressed the specific terms and conditions of any past QF contract, either in standard form or executed agreement. We recognize that the actual terms of PGE's standard contract forms have varied over time, and we did not undertake a review of all those forms prior to rendering our decision.

To clarify this decision, we amend the last paragraph on page 3 of Order No. 17-256 to read, as follows:

Because we approved PGE's standard contract filings that **may have** limited the availability of fixed prices to the first fifteen years measured from contract execution, PGE cannot be found to have been in violation of our orders. Accordingly, PGE's motion to dismiss the complaint should be granted.

We also amend the third paragraph on page 4 of Order No. 17-256 to read, as follows:

In this decision, we do not address any existing executed contracts or PGE's current or existing standard contracts. ~~Having found that PGE's past standard contracts have not been in violation of our orders, we shall not require that existing executed contracts be revised.~~ However, PGE should promptly file revisions to Schedule 201 which shall include a revised standard contract PPA with language consistent with our requirement that the 15-year term affixed prices commences when the QF transmits power to the utility.

We deny complainants' request for rehearing or reconsideration of Order No. 17-256. Complainants' application does not meet the criteria set forth in OAR 860-001-0720(3). First, complainants do not allege that there is any new evidence that is essential to the decision that was unavailable before the order was issued, as required by subsection (a). Neither do they claim that there has been a change in law or policy since the issuance of Order No. 17-256, as required by subsection (b), nor do they claim an error of law or fact

ORDER NO. 17 465

in the order that is essential to the decision, as required by subsection (c). Finally, we find that, for the reasons discussed above with respect to pre-existing contracts, the complainants have failed to demonstrate good cause for further examination of an issue essential to the decision, as required by subsection (d).

V. ORDER

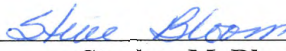
IT IS ORDERED that:

1. Order No. 17-256 entered July 13, 2017, is amended as indicated above.
2. The remainder of Order No. 17-256 is unchanged.
3. Complainants' Petition for Clarification is granted to the extent indicated above and denied in all other respects.
4. Complainants' Application for Rehearing or Reconsideration of Order No. 17-256 is denied.

Made, entered, and effective NOV 13 2017

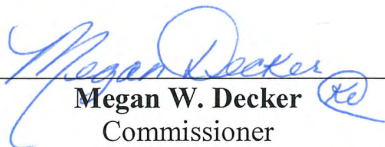


Lisa D. Hardie
 Chair



Stephen M. Bloom
 Commissioner





Megan W. Decker
 Commissioner

A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

ORDER NO. **18 079**

ENTERED MAR 05 2018

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1805

NORTHWEST AND INTERMOUNTAIN
POWER PRODUCERS COALITION,
COMMUNITY RENEWABLE ENERGY
ASSOCIATION, and RENEWABLE
ENERGY COALITION,

Complainants,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

ORDER

DISPOSITION: APPLICATIONS DENIED

We deny the request for rehearing or reconsideration and request to amend Order No. 17-465 filed by Portland General Electric Company (PGE).

I. INTRODUCTION

This order represents our third clarification of matters we originally addressed in Order No. 05-584 with regard to the date upon which the 15-year period of fixed prices paid to qualifying facilities (QFs) begin under standard contracts.

First, in Order No. 17-256, we affirmed our policy that the 15-year fixed price period begins with commercial operation, and indicated that PGE's standard contracts must, "on a going-forward basis, [] provide for 15 years of fixed prices that commence when the QF transmits power to the utility."¹ We also concluded that PGE's standard contracts had not violated any statute, rule or Commission order regarding when the 15-year fixed price period because we had approved PGE's prior standard contract filings.

Second, in Order No. 17-465, we addressed complainants' request for clarification of the scope and applicability of Order No. 17-256. We clarified that we had neither examined nor addressed specific terms and conditions of any past PGE QF contract, either in standard form or executed agreement. We also clarified that our decision that PGE had

¹ Order No. 17-256 at 3 (Jul 13, 2017).

ORDER NO. 18 079

not violated any Commission statute, rule, or order with regard to its prior contracts was based solely on the fact that we had approved PGE's standard contracts under Order No. 05-584, and was not based on a review of any standard contract.

PGE now seeks reconsideration or amendment of Order No. 17-465 because, in its view, our decision requires an examination and interpretation of the company's standard contract forms. PGE explains that:

Order No. 17-465 made it clear for the first time that the Commission did not interpret PGE's then-effective standard contract forms (the July 2017 forms) as part of rendering its decision in Order No. 17-256.²

PGE contends, however, that Order No. 17-465 did not make the self-evident but required determination that the July 2017 forms themselves limited the availability of fixed prices to the first 15 years immediately following contract execution, thus requiring revision on a going-forward basis. For these reasons, PGE contends that our decision is lacking substantial reason unless we affirmatively decide that the company's "July 2017 forms limited the availability of fixed prices to the first 15 years immediately following contract execution and therefore needed to be revised to comply with the Commission's new policy."³

In the alternative, PGE asks that we amend Order No. 17-465 to render an interpretation of PGE's standard contract forms in effect in July 2017 and conclude that those forms limited the availability of fixed prices to the first 15 years following contract execution.

Complainants oppose PGE's requests. Complainants contend that parties with executed standard contracts should be free to adjudicate individual contract disputes with PGE in the appropriate forum. Complainants contends that reopening the proceeding "would in fact be an attempt by PGE to impact the interpretation of executed versions of those forms."⁴

Complainants further contend that we lack the authority to interpret past contracts pursuant to a declaratory ruling, or to bind a non-party with respect to the interpretation of a contract to which it is a party. Complainants also argue that we lack the jurisdiction to resolve QF contract disputes.⁵

² Portland General Electric Company's Application for Rehearing or Reconsideration and Application to Amend Order 17-465 at 6 (Jan 12, 2018).

³ *Id.* at 6-7.

⁴ Complainants' Response to Portland General Electric Company's Application for Rehearing or Reconsideration and Application to Amend Order 17-465 at 2 (Jan 29, 2018).

⁵ On February 5, 2018, PGE filed a Reply to Complainants' Response, to which Complainants filed a Motion to Strike on February 8, 2018. Pursuant to OAR 860-001-0720(4), PGE's Reply is stricken as an unauthorized pleading.

ORDER NO. 18 079

II. DISCUSSION

PGE's application is denied. We find no grounds to either grant reconsideration under OAR 860-001-0720, or amend Order No. 17-465 under ORS 756.568.

Contrary to PGE's contention, our decision in Order No. 17-465 did not require a prerequisite interpretation of PGE's standard contracts. The scope of this proceeding was framed by complainant's initial filing requesting that we affirm our policy that the 15-year period of fixed prices for standard contracts commences at the time the qualifying facility begins operations. Complainants did not seek interpretation of any executed contract, and in fact clarified that we may resolve their complaint "without altering or revising any existing contracts or PGE's current standard contract."⁶

We answered complainants' request in Order No. 17-256, where we affirmed and made explicit our policy adopted in Order No. 05-584: "Prices paid to a QF are only meaningful when a QF is operational and delivering power to a utility. Therefore, we believe that, to provide a QF the full benefit of the fixed price requirement, the 15-year term must commence on the date of power delivery."⁷ As we made clear in Order No. 17-465, our decision to affirm our policy did not require, and was not based on, an examination of "any past QF contract, either in standard form or executed agreement."⁸

We also reject PGE's characterization that our decision constituted the adoption of a "new policy." Rather, as requested by complainants, our decision was simply to affirm the policy with respect to the commencement date for the 15-year period of fixed prices. This policy, which had been reflected explicitly in standard contract forms for PacifiCorp and Idaho Power Company, had been, up until the filing of PGE's most recent standard contracts, neither a source of controversy nor litigation by either a QF or a utility.

For these reasons, we reject PGE's arguments that our Order No. 17-465 was incomplete or erroneous. Our order merely affirmed Commission policy, and did not require the interpretation or review of any standard contract form.

We emphasize, however, that we continue to stand ready to interpret individual standard contract forms as they are brought to us and, accordingly, reject complainants' current argument that we lack primary jurisdiction over both the parties and the subject matter of executed standard contracts. Complainants' argument is inconsistent with their initial complaint, in which they recognized our authority to review standard contracts:

To the extent the Complaint requires interpretation of contractual obligations incurred prior to the filing of this complaint (Prayer for Relief Pars. 1 & 2), the Commission possesses primary or concurrent jurisdiction over interpretation of such contracts.⁹

⁶ Complaint at 3 (Dec 6, 2016).

⁷ Order No. 17-256 at 4 (Jul 13, 2017).

⁸ Order No. 17-465 at 4 (Nov 13, 2017).

⁹ Complaint at 6 (Dec 6, 2016).

ORDER NO. 18 079

Furthermore, as we recently stated in Order No. 18-025, the compliance and interpretation of the terms and conditions in standard contracts that are the result of our policy decisions to implement PURPA are rightfully within our primary jurisdiction:

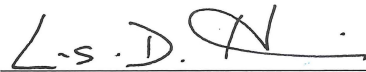
By law, the Commission sets the terms and conditions for contracts between QFs and public utilities. The terms and conditions of those contracts relate directly to the regulated rates and services of utilities subject to our oversight. The complaint raises an issue related to a provision of a standard power purchase agreement, which we reviewed and established consistent with our own orders and rules to implement state and federal PURPA policy. As such, we have the expertise and the authority to review the terms and conditions of the contract developed at the Commission after litigated proceedings.

PURPA is a federal statute that places the states in charge of implementing FERC's regulations pertaining to determining avoided costs and to setting rates paid to QFs. The obligation to enter into a PURPA contract is not governed by common law concepts of contract law, but rather an obligation created by statutes, regulations, and this Commission's administrative rules.¹⁰

III. ORDER


IT IS ORDERED that the Application for Rehearing or Reconsideration and Application to Amend Order No. 17-465, filed by Portland General Electric Company, is denied.

Made, entered, and effective MAR 05 2018

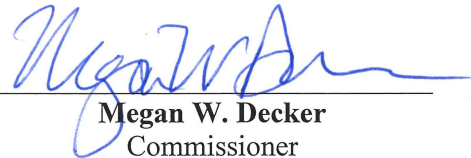


Lisa D. Hardie
Chair





Stephen M. Bloom
Commissioner



Megan W. Decker
Commissioner

A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

¹⁰ *Portland General Electric Company v Pacific Northwest Solar, LLC*, Docket No. UM 1894, Order No. 18-025 at 6. (Jan 25, 2018).

Summary Report**UM 1805 NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION ET AL
VS PGE****Category:** Miscellaneous**Filed By:** PORTLAND GENERAL ELECTRIC

UM 1805 - In the Matter of the Complaint of
 NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, COMMUNITY
 RENEWABLE ENERGY ASSOCIATION, and RENEWABLE ENERGY COALITION against
 PORTLAND GENERAL ELECTRIC COMPANY, Pursuant to ORS 756.500.
 Filed by...

Filing Date: 12/6/2016**Order:** 18-079 **Signed:** 12/6/2016**SCHEDULE:**

Date: 3/13/2018	Event: FINAL ORDER DUE DATE
Date: 2/23/2018	Event: COMMENTS/RESPONSES DUE
Date: 2/7/2018	Event: COMMENTS/RESPONSES DUE
Date: 1/31/2018	Event: COMMENTS/RESPONSES DUE
Date: 11/13/2017	Event: FINAL ORDER DUE DATE
Date: 10/2/2017	Event: COMMENTS/RESPONSES DUE
Date: 9/26/2017 9:30 AM Location: HEARING ROOM - PUC 201 HIGH ST SE , SALEM, OR	Event: PUBLIC MEETING
Date: 9/12/2017 9:30 AM Location: HEARING ROOM - PUC 201 HIGH ST SE , SALEM, OR	Event: PUBLIC MEETING
Date: 8/19/2017	Event: EFFECTIVE DATE/ STATUTORY DEADLINE
Date: 6/15/2017	Event: MISCELLANEOUS
Date: 5/15/2017	Event: COMMENTS/RESPONSES DUE
Date: 5/8/2017	Event: COMMENTS/RESPONSES DUE
Date: 4/24/2017	Event: OTHER FILING DUE
Date: 3/30/2017	Event: COMMENTS/RESPONSES DUE
Date: 3/20/2017 1:00 PM Location: VIA TELEPHONE-VALLEY CONF. RM	Event: TELEPHONE CONFERENCE
Date: 3/10/2017 5:00 PM	Event: OTHER FILING DUE
Date: 3/3/2017 10:30 AM Location: VIA TELEPHONE	Event: TELEPHONE CONFERENCE
Date: 2/6/2017	Event: COMMENTS/RESPONSES DUE

Summary Report**UM 1805 NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION ET AL
VS PGE**

Date: 1/5/2017	Event: OTHER FILING DUE
Date: 12/27/2016	Event: ANSWER DUE
Date: 12/22/2016 10:00 AM	Event: CONFERENCE
Location: MAIN HEARING ROOM - PUC 201 HIGH STREET SE, SUITE 100 , SALEM, OR	
ACTIONS:	
Date: 9/4/2018	Action: SERVICE LIST CHANGE COALITION's Service List Change, removing Sidney Villanueva and adding Marie Phillips Barlow. Filed by Min Hu.
Date: 7/13/2018	Action: APPEAL Transmittal of Shortened Record and Certificate of UM 1805, for Court of Appeals, Appellate Court No. A167707 routed via shuttle to Becky Rife, Department of Justice, Appellate Division. PUC appeal #18-03.
Date: 5/4/2018	Action: APPEAL PORTLAND GENERAL ELECTRIC COMPANY's Petition For Judicial Review of Agency Orders No. 18-079, No. 17-465, and No. 17-256; filed by David White.
Date: 3/5/2018	18-079 Action: ORDER Order No. 18-079, signed by Commissioners Lisa D. Hardie, Stephen M. Bloom, and Megan W. Decker; DISPOSITION: APPLICATIONS DENIED. Copies served on 3/5/18.
Date: 2/14/2018	Action: SERVICE LIST CHANGE PGE's Request to Change Service List. Filed by David F. White
Date: 2/14/2018	Action: COMMENTS/RESPONSE PGE's Response to Complainants' Motion to Strike and Motion To Waive OAR 860-001-0720(4). Filed by David F. White and Jeffrey S. Lovinger.
Date: 2/14/2018	Action: MOTION PGE's Motion To Waive OAR 860-001-0720(4) together with Response to Complainants' Motion to Strike. Filed by David F. White and Jeffrey S. Lovinger. (See 2/14/18 PGE's Response to Complainants' Motion to Strike filed 2/14/18 for electronic version.)
Date: 2/8/2018	Action: MOTION NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, COMMUNITY RENEWABLE ENERGY ASSOCIATION and RENEWABLE ENERGY COALITION'S MOTION TO STRIKE. Filed by Irion Sanger.
Date: 2/7/2018	Action: COMMENTS/RESPONSE PGE's Response to Bench Requested Dated February 5, 2018 filed by Jay Tinker for Robert Macfarlane.
Date: 2/5/2018	Action: LAW JUDGE RULING/MEMORANDA ALJ Allan J. Arlow issues Bench Request. Copies served on 2/5/18.
Date: 2/5/2018	Action: COMMENTS/RESPONSE PGE's Reply in Support of Application for Rehearing or Reconsideration and Application to Rescind, Suspend or Amend Order No. 17-465. Filed by V. Denise Saunders and Jeffrey S. Lovinger.
Date: 1/29/2018	Action: COMMENTS/RESPONSE COMPLAINANTS' Response to PGE's Application For Rehearing or Reconsideration and Application to Amend Order No. 17-465. Filed by Irion Sanger.
Date: 1/16/2018	Action: OTHER FILING/PLEADING PGE's Errata to page 5 of its January 12, 2018, Application for Rehearing or Reconsideration filed by V. Denise Saunders. Courtesy copy of the Application for Rehearing or Reconsideration with corrected page 5 follows the errata letter.
Responses due: 1/31/18. Order due: 3/18/18.	

Summary Report**UM 1805 NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION ET AL
VS PGE**

Date: 1/12/2018	Action: RECONSIDERATION
PGE's Application for Rehearing or Reconsideration and Application to Amend Order No. 17-465 filed by V. Denise Saunders and Jeffrey S. Lovinger. (NOTE: See 1/16/18 errata filing.) Responses due: 1/31/18. Order due: 3/18/18.	
Date: 11/13/2017	17-465 Action: ORDER
Order No. 17-465, signed by Commissioners Lisa D. Hardie, Stephen M. Bloom, and Megan W. Decker; DISPOSITION: PETITION TO AMEND ORDER NO. 17-256 GRANTED; APPLICATION FOR REHEARING OR RECONSIDERATION DENIED. Copies served on 11/13/17.	
Date: 11/1/2017	Action: SERVICE LIST CHANGE
Renewable NW Notice of Change to Service Lists filed by Silvia Tanner.	
Date: 10/24/2017	Action: COMMENTS/RESPONSE
PGE's Response in Opposition to Complainant's Petition for Clarification and Application for Rehearing or Reconsideration of Order No. 17-256. Filed by V. Denise Saunders and Jeff Lovinger.	
Date: 10/17/2017	Action: LAW JUDGE RULING/MEMORANDA
ALJ Allan J. Arlow issues Ruling; DISPOSITION: MOTION FOR LEAVE TO FILE SUR-REPLY AND SUR-REPLY DISMISSED AS MOOT. Copies served 10/17/17.	
Date: 10/16/2017	Action: MOTION
PGE's Motion For Leave to File Sur-Reply and Surreply to Petitioners' Reply in Support of Joint Petition; Filed by V. Denise Saunders.	
Date: 10/16/2017	17-418 Action: ORDER
Order No. 17-418, signed by Commissioners Lisa D. Hardie, Stephen M. Bloom, and Megan W. Decker; DISPOSITION: PETITION TO INTERVENE DENIED; APPLICATION STRICKEN. Copies served on 10/17/17.	
Date: 10/13/2017	Action: COMMENTS/RESPONSE
PGE's Response to Complainants' Motion to Set a Schedule filed by V. Denise Saunders and Jeffrey S. Lovinger.	
Date: 10/12/2017	Action: LAW JUDGE RULING/MEMORANDA
ALJ Allan J. Arlow issues Ruling; DISPOSITION: QUESTIONS CERTIFIED TO THE COMMISSION. Copies served on 10/12/17.	
Date: 10/9/2017	Action: COMMENTS/RESPONSE
Petitioners* (NEWSUN SOLAR PROJECTS') Response to Motion to Set Schedule. Filed by Gregory M. Adams. (*NOTE: See Order No. 17-418, entered 10/16/17.)	
Date: 10/6/2017	Action: MOTION
COMPLAINANTS' Motion to Set a Schedule for PGE's Response and Complainants' Reply. Filed by Irion Sanger.	
Date: 10/2/2017	Action: COMMENTS/RESPONSE
Petitioners* (NEWSUN SOLAR PROJECTS') Joint Reply to PGE's Objection to Joint Petition to Intervene. Filed by Gregory M. Adams. (*NOTE: See Order No. 17-418, entered 10/16/17.)	
Date: 9/28/2017	17-373 Action: ORDER
Order No. 17-373, signed by Commissioners Lisa D. Hardie, Stephen M. Bloom, and Megan W. Decker; DISPOSITION: STAFF'S RECOMMENDATION ADOPTED. Copies served on 9/29/17.	
Date: 9/27/2017	Action: MOTION
Petitioners* (NEWSUN SOLAR PROJECTS') Expedited Joint Motion For Extension of Time to File Reply to PGE's Objection to Joint Petition to Intervene. Filed by Gregory M. Adams. (*NOTE: See Order No. 17-418, entered 10/16/17.)	
Date: 9/27/2017	Action: LAW JUDGE RULING/MEMORANDA
ALJ Allan J. Arlow issues Ruling; DISPOSITION: EXTENSION OF TIME TO FILE REPLY GRANTED. Copies served 9/27/17.	

Summary Report**UM 1805 NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION ET AL
VS PGE**

Date: 9/26/2017	Action: LAW JUDGE RULING/MEMORANDA
ALJ Allan J. Arlow issues Erratum; DISPOSITION: ERRATUM ISSUED; PETITION TO INTERVENE STILL PENDING CONSIDERATION. Copies served on 9/26/17.	
Date: 9/25/2017	Action: COMMENTS/RESPONSE
NIPPC, CREA and Coalition Letter re PGE's Compliance Filing filed by Irion Sanger.	
Date: 9/22/2017	Action: STAFF REPORT
Staff Report for the September 26, 2017 Public Meeting, Item No. 4, filed by Nolan Moser. Copies served 9/22/17.	
Date: 9/20/2017	Action: COMMENTS/RESPONSE
Petitioners* (NEWSUN SOLAR PROJECTS') Joint Response To PGE's Expedited Request For Stay. Filed by Greg M. Adams. (*NOTE: See Order No. 17-418, entered 10/16/17.)	
Date: 9/20/2017	Action: COMMENTS/RESPONSE
Complainants' Response to PGE's Expedited Request For A Stay. Filed by Irion Sanger.	
Date: 9/20/2017	Action: LAW JUDGE RULING/MEMORANDA
ALJ Allan J. Arlow issues Ruling; DISPOSITION: RESPONSIVE PLEADINGS STAYED. Copies served on 9/20/17.	
Date: 9/19/2017	Action: MOTION
PGE's Request to Stay response to Petitioners' Joint Motion for Clarification and Application for Rehearing or Reconsideration and Complainant's Petition for Clarification and Application for Rehearing or Reconsideration until Petitioners' Joint Petition to Intervene Out of Time is Resolved filed by V. Denise Saunders and Jeffrey S. Lovinger.	
Date: 9/18/2017	Action: PROTEST/EXCEPTION/OBJECTION
PGE's Objection to Joint Petition to Intervene Out of Time; Filed by V. Denise Saunders and Jeffrey S. Lovinger.	
Date: 9/14/2017	17-346 Action: ORDER
Order No. 17-346, signed by Commissioners Lisa D. Hardie, Stephen M. Bloom, and Megan W. Decker; DISPOSITION: STAFF'S RECOMMENDATION ADOPTED. Copies served on 9/15/17.	
Date: 9/11/2017	Action: COMMENTS/RESPONSE
Complainants' comments; Filed by Irion Sanger.	
Date: 9/11/2017	Action: RECONSIDERATION
Complainants' Petition for Clarification and Application for Rehearing or Reconsideration; Filed by Irion Sanger. (Response Due: 9/26/17; Order Due: 11/13/17)	
Date: 9/11/2017	Action: COMMENTS/RESPONSE
PGE's Response to NIPPC Comments. Filed by V. Denise Saunders and Jeffrey S. Lovinger	
Date: 9/8/2017	Action: MOTION
Petitioners* (NEWSUN SOLAR PROJECTS') Joint Petition to Intervene Out of Time and Attachments; Filed by Gregory M. Adams. (*NOTE: See Order No. 17-418, entered 10/16/17.)	
Date: 9/8/2017	Action: RECONSIDERATION
Petitioners* (NEWSUN SOLAR PROJECTS') Joint Motion for Clarification and Application for Rehearing or Reconsideration; Filed by Gregory M. Adams. (*NOTE: See Order No. 17-418, entered 10/16/17.)	
Date: 9/7/2017	Action: STAFF REPORT
Staff Report for the September 12, 2017 Public Meeting (Item No. 2), filed by Brittany Andrus.	
Date: 7/20/2017	Action: COMPLIANCE
PGE Compliance Filing (Schedule 201) in compliance with Order No. 17-256, filed by V. Denise Saunders and Jeffrey S. Lovinger.	
Date: 7/13/2017	17-256 Action: ORDER
Order No. 17-256 signed by Commissioners Lisa D. Hardie, Stephen M. Bloom, and Megan W. Decker; Disposition: Motion for Summary Judgment Granted; Order No. 05-584 Clarified. Copies served electronically 7/13/17. (ALSO SEE Order No. 17-465 entered 11/13/17, amending Order No. 17-256.)	

Summary Report**UM 1805 NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION ET AL
VS PGE**

Date: 6/14/2017	Action: COMMENTS/RESPONSE PGE's Response to Complainants' Motion for Official Notice; Filed by V. Denise Saunders and Jeffrey S. Lovinger.
Date: 5/30/2017	Action: MOTION NIPPC's, CREA's, and The Coalition's Joint Motion for Official Notice; Filed by Irion Sanger.
Date: 5/15/2017	Action: COMMENTS/RESPONSE RENEWABLE NW's Reply to PGE's Motion for Summary Judgment; Filed by Silva Tanner.
Date: 5/15/2017	Action: COMMENTS/RESPONSE PGE's Reply to Complainants' Response in Opposition to PGE's Motion for Summary Judgment; Filed by V. Denise Saunders and Jeffrey S. Lovinger.
Date: 5/15/2017	Action: COMMENTS/RESPONSE NIPPC's, CREA's, and The Coalition's Joint Reply to PGE's Response in Opposition; Filed by Irion Sanger.
Date: 5/8/2017	Action: COMMENTS/RESPONSE PGE's Response in Opposition to Complainant's Motion for Summary Judgment. Filed by V. Denise Saunders and Jeffrey Lovinger.
Date: 5/8/2017	Action: COMMENTS/RESPONSE NIPPC, CREA, and THE COALITION's Response to PGE's Motion for Summary Judgment. Filed by Irion Sanger.
Date: 4/24/2017	Action: MOTION NIPPC's, CREA's, and The Coalition's Motion for Summary Judgment; Filed by Irion Sanger.
Date: 4/24/2017	Action: MOTION PGE's Motion for Summary Judgment, with Declaration of Shawn Davis in Support; Filed by V. Denise Saunders and Jeffrey S. Lovinger. (Attachments not posted to web, served electronically to parties on 4/24/17 separately).
Date: 3/28/2017	Action: COMMENTS/RESPONSE PGE's Answer; Filed by V. Denise Saunders and Jeffrey S. Lovinger.
Date: 3/22/2017	Action: LAW JUDGE CONFERENCE REPORT ALJ Allan J. Arlow issues Conference Memorandum and Ruling; DISPOSITION: PROCEDURAL SCHEDULE ADOPTED. Copies served on 3/22/17.
Date: 3/21/2017	Action: OTHER FILING/PLEADING Parties' joint proposed schedule; Rec'd electronically from Jeffrey S. Lovinger.
Date: 3/14/2017	Action: CONFERENCE NOTICE OF TELEPHONE CONFERENCE; Copies served 3/14/17. TELEPHONE CONFERENCE scheduled 3/20/2017 1:00 PM Room: VIA TELEPHONE--VALLEY CONF. RM Contact AHD at puc.hearings@state.or.us or 503-378-6678 to obtain the dial in number and reserve a port. Reporter: DIGITAL Law Judge: ARLOW, ALLAN
Date: 3/10/2017	Action: OTHER FILING/PLEADING PGE's, NIPPC's, CREA's, and The Coalition's Joint Statement; Filed by Jeffrey S. Lovinger and Irion Sanger.
Date: 3/3/2017	Action: LAW JUDGE CONFERENCE REPORT ALJ Allan J. Arlow Conference Memorandum; Statements of Facts and Issues due March 10, 2017. Copies electronically served 3/3/17.
Date: 3/1/2017	Action: CONFERENCE NOTICE OF TELEPHONE CONFERENCE; Copies served electronically 3/1/17. TELEPHONE CONFERENCE scheduled 3/3/2017 10:30 AM Contact AHD at puc.hearings@state.or.us or 503-378-6678 to obtain the dial in number and reserve a port. Room: VIA TELEPHONE Reporter: DIGITAL Law Judge: ARLOW, ALLAN

Summary Report**UM 1805 NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION ET AL
VS PGE**

Date: 1/31/2017	Action: COMMENTS/RESPONSE PGE's Reply to NIPPC's, CREA's, & The Coalition's Response to PGE's Motions to Strike, Make More Definite and Certain, Requesting More Time; Filed by V. Denise Saunders and Jeffrey S. Lovinger.
Date: 1/24/2017	Action: COMMENTS/RESPONSE NIPPC's, CREA's, and the Coalition's Joint Response to PGE's Motion to Strike, Motion to Make More Definite and Certain, and Requesting More Time; Filed by Irion Sanger.
Date: 1/19/2017	Action: LAW JUDGE RULING/MEMORANDA ALJ Allan J. Arlow's Ruling; DECLARATORY RULING PROCEDURE REJECTED AS VIOLATION OF STATUTE; COMPLAINANTS TO RESPOND TO PENDING MOTIONS. Copies served 1/19/17.
Date: 1/19/2017	Action: OTHER CORRESPONDENCE (ACKN, SVC, LTR) Legal Secretary Annette Scott's email to parties correcting due date in 1/19/17 ALJ Ruling. Sent electronically to parties 1/19/17.
Date: 1/5/2017	Action: COMMENTS/RESPONSE PGE's Comments and Recommendations Regarding the Appropriateness of Addressing the issues raised in the Complaint through a Declaratory Ruling; Filed by V. Denise Saunders and Jeffrey S. Lovinger.
Date: 12/30/2016	Action: COMMENTS/RESPONSE STAFF's Comments on Declaratory Ruling Option; Filed by Kaylie Klein.
Date: 12/29/2016	Action: COMMENTS/RESPONSE NIPPC's, CREA's, and The Coalition's Joint Comments on Declaratory Ruling Option; Filed by Irion Sanger.
Date: 12/22/2016	Action: LAW JUDGE CONFERENCE REPORT ALJ Allan J. Arlow issues Prehearing Conference Memorandum; Notice of Contested Case Rights pursuant to ORS 183.413 attached; Copies served 12/22/16.
Date: 12/21/2016	Action: PETITION TO INTERVENE RENEWABLE NORTHWEST's Petition to Intervene, with contacts of Silvia Tanner, Renewable NW Dockets, and Dina Dubson Kelley. Filed by Silvia Tanner.
Date: 12/20/2016	Action: CONFERENCE NOTICE OF EXPEDITED PREHEARING CONFERENCE; Copies served on 12/20/16. CONFERENCE scheduled 12/22/2016 10:00 AM City: SALEM Room: MAIN HEARING ROOM Building: PUC Address: 201 HIGH STREET SE, SUITE 100 Reporter: DIGITAL Law Judge: ARLOW, ALLAN Contact AHD at puc.hearings@state.or.us or 503-378-6678 to obtain dial in number and reserve a port.
Date: 12/19/2016	Action: MOTION PGE's Corrected Motion to Strike, and Motion to Make More Definite and Certain, and Motion Requesting More Time to Respond, filed by V. Denise Saunders and Jeffrey S. Lovinger.
Date: 12/16/2016	Action: MOTION PGE's Motion to Strike, and Motion to Make More Definite and Certain, and Motion Requesting More Time to Respond; Filed by V. Denise Saunders and Jeffrey S. Lovinger.
Date: 12/16/2016	Action: MOTION PGE's Motion to Make More Definite and Certain; Filed by V. Denise Saunders and Jeffrey S. Lovinger. (See other 12/16/16 entry for electronic document.)
Date: 12/16/2016	Action: MOTION PGE's Motion Requesting More Time to Respond; Filed by V. Denise Saunders and Jeffrey S. Lovinger. (See other 12/16/16 entry for electronic document.)

Summary Report**UM 1805 NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION ET AL
VS PGE**

Date: 12/12/2016	Action: LAW JUDGE RULING/MEMORANDA
Chief ALJ Michael Grant issues Ruling; DISPOSITION: ANSWER DUE DATE CLARIFIED. Copies electronically served 12/12/16.	
Date: 12/8/2016	Action: SERVICE LIST CHANGE
PGE's Change of Service List removing Barbara Halle and adding V. Denise Saunders and Jeffrey Lovinger filed by V. Denise Saunders.	
Date: 12/6/2016	Action: INITIAL (APPLICATION, COMPLAINT, PETITION)
UM 1805 - In the Matter of the Complaint of NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, COMMUNITY RENEWABLE ENERGY ASSOCIATION, and RENEWABLE ENERGY COALITION against PORTLAND GENERAL ELECTRIC COMPANY, Pursuant to ORS 756.500. Filed by Irion A. Sanger and Sidney Villanueva.	
Date: 12/6/2016	Action: OTHER CORRESPONDENCE (ACKN, SVC, LTR)
Administrative Specialist's e-mail correspondence to PORTLAND GENERAL ELECTRIC COMPANY, serving NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION's, COMMUNITY RENEWABLE ENERGY ASSOCIATION's, and RENEWABLE ENERGY COALITION's complaint filed on 12/6/16; filed by Cheryl Walker.	
Service/Acknowledgement letter electronically served 12/6/16. Notice of Contested Case Rights and Procedures provided to parties 12/6/16.	

INDEX TO APPENDIX

Date	Description	Page
5/13/2005	Excerpts of Order No. 05-584	App 1

ORDER NO. 05-584

ENTERED 05/13/05

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1129

In the Matter of)
)
PUBLIC UTILITY COMMISSION OF)
OREGON)
)
Staff's Investigation Relating to Electric)
Utility Purchases from Qualifying Facilities.)

ORDER

ORDER NO. 05-584

TABLE OF CONTENTS

I.	SUMMARY	1
II.	INTRODUCTION	
	A. PROCEDURAL BACKGROUND	4
	B. HISTORICAL BACKGROUND	5
	C. SCOPE AND FRAMEWORK OF THIS ORDER	10
III.	STANDARD CONTRACT TERMS AND CONDITIONS	
	A. ELIGIBILITY TO RECEIVE STANDARD CONTRACT	
	1. Overview	12
	2. Parties' Positions	12
	3. Resolution	15
	B. STANDARD CONTRACT LENGTH	
	1. Parties' Positions	17
	2. Resolution	18
	C. CALCULATION OF STANDARD AVOIDED COSTS	
	1. Overview	20
	2. Parties' Positions	20
	3. Resolution	25
	D. FREQUENCY OF SETTING AVOIDED COSTS	
	1. Parties' Positions	28
	2. Resolution	28
	E. ADDER ON AVOIDED COSTS	
	1. Parties' Positions	29
	2. Resolution	30
	F. PRICING	
	1. Parties' Positions	31
	2. Resolution	34
	G. FORECASTING NATURAL GAS PRICES	
	1. Parties' Positions	35
	2. Resolution	36
	H. COSTS INCURRED DUE TO NATURAL GAS PRICE VOLATILITY	
	1. Parties' Positions	36
	2. Resolution	37
	I. PRICING ADJUSTMENTS FOR STANDARD CONTRACTS	
	1. Parties' Positions	38
	2. Resolution	38
	J. DETERMINING ELIGIBILITY TO RECEIVE A STANDARD CONTRACT	
	1. Parties' Positions	39
	2. Resolution	40

ORDER NO. 05-584

K. STANDARD CONTRACT FORM	
1. Parties' Positions	40
2. Resolution	41
L. SECURITY, CONSTRUCTION CREDIT, INSURANCE AND INDEMNITY REQUIREMENTS	
1. Overview	41
2. Default Terms	
a. Overview	42
b. Parties' Positions	42
c. Resolution	44
3. Construction Credit	
a. Overview	45
b. Parties' Positions	46
c. Resolution	46
4. Indemnity and Liability Insurance Requirements	
a. Overview	47
b. Parties' Positions	47
c. Resolution	49
IV. ISSUES OF GENERAL APPLICABILITY TO STANDARD AND NEGOTIATED QF CONTRACTS	
A. SIMULTANEOUS PURCHASE AND SALE OPTION	
1. Parties' Positions	51
2. Resolution	52
B. DISPUTE RESOLUTION	
1. Overview	53
2. Parties' Positions	53
3. Resolution	54
C. APPROVAL OF INDIVIDUAL QF CONTRACTS	
1. Parties' Positions	54
2. Resolution	55
D. REPEAL OF PURPA	
1. Parties' Positions	56
2. Resolution	56
E. ADMINISTRATIVE RULES REVISION	
1. Overview	56
2. Parties' Positions	57
3. Resolution	57
F. TARIFF CONTENT	
1. Parties' Positions	57
2. Resolution	58
ORDER	59

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1129

In the Matter of)	
)	
PUBLIC UTILITY COMMISSION OF)	
OREGON)	ORDER
)	
Staff's Investigation Relating to Electric)	
Utility Purchases from Qualifying Facilities.)	

DISPOSITION: PURPA POLICIES ADOPTED

I. SUMMARY

In this order, we evaluate specific policies and procedures to determine whether Commission goals relating to the Public Utility Regulatory Policies Act (PURPA)¹ could be more effectively implemented and achieved. A basic purpose of PURPA is to provide a market for the electricity produced by small power producers and cogenerators. This Commission's goal has been to encourage the economically efficient development of these qualifying facilities (QFs), while protecting ratepayers by ensuring that utilities pay rates equal to that which they would have incurred in lieu of purchasing QF power.²

Our decisions in this proceeding are consistent with this goal, and apply primarily to standard contract rates, terms and conditions for QF power. These decisions include the following:

Eligibility for and Term of Standard Contracts

- Establishing a 10 MW standard contract eligibility threshold.
- Adopting the manufacturer's nameplate capacity for a QF project as the measure of eligibility for standard contracts.
- Establishing a maximum standard contract term of twenty years. Allowing a QF to select fixed pricing for the first fifteen years of

¹ The United States Congress passed PURPA in 1978, as codified in the United States Codes (USC) at 16 U.S.C. § 824a-3.

² See Order No. 81-319 at 3.

ORDER NO. 05-584

the standard contract, but requiring the selection of a market pricing option for the last five years.

Calculation of Avoided Costs

- Requiring PacifiCorp and Portland General Electric (PGE) to use the historical methodology to calculate avoided costs rates when either utility is in a resource deficient position.
- Requiring PacifiCorp and PGE to use monthly on- and off-peak forward market prices, as of the utility's avoided cost filing, to calculate avoided costs when either utility is in a resource sufficient position.
- Allowing Idaho Power to use the surrogate avoided resource (SAR) methodology to calculate avoided rates, regardless of the utility's resource position.
- Requiring payment of full avoided costs pursuant to the appropriate methodology for all energy, whether intermittent or firm, that is delivered by a QF under a standard contract to a utility up to the nameplate rating of the project.
- Requiring payment for energy only for all energy delivered over the nameplate rating for a QF under standard contract.

Pricing

- Requiring utilities to offer three pricing options for standard QF contracts: (1) the Fixed Price Method; (2) the Deadband Method; and (3) the Gas Market Method. Requiring PGE to also offer its proposed Mid-C Index Rate Option.

Security, Construction Credit, Insurance and Indemnity Requirements

- Requiring all QFs to establish creditworthiness by making a set of representations and warranties that the QF has good credit, including that it is current on existing debt obligations and has not been a debtor in a bankruptcy proceeding within the preceding two years.
- If a QF cannot establish creditworthiness, requiring the QF to provide a reasonable amount of default security, as determined by the utility—but subject to Commission review—by one of the

ORDER NO. 05-584

- In the event of the inability of a QF to establish creditworthiness, determination of an appropriate amount of default security to be required.
- Further exploration of how the calculation of avoided cost should reflect the nature and quality of QF energy.
- Further exploration of a Mechanical Availability Guarantee (MAG).
- Further exploration of market pricing options and alternatives to using nameplate capacity to determine the size of a QF project for standard contract eligibility purposes.
- Cap on amount of default losses that can be recouped, pursuant to future QF contract payment reductions.
- Liability insurance for QFs with a design capacity at or under 200 kW.
- Negotiation parameters and guidelines for “simultaneous sale and purchase” QF contract.
- Negotiating “net output sales” for non-standard contracts.
- Further exploration of Staff’s role in the informal dispute resolution of QF contract disputes.

II. INTRODUCTION

A. PROCEDURAL BACKGROUND

On January 20, 2004, the Commission opened an investigation related to electric utility purchases from qualifying facilities (QFs). We opened the investigation due to concerns raised by industrial and rural developers and operators of QF projects about the availability of standard rates and the terms and conditions of contracts for purchases of electricity from QF projects.

On February 11, 2004, an initial prehearing conference was held and a partial procedural schedule was established. Pacific Power & Light, dba PacifiCorp (PacifiCorp), Portland General Electric Company (PGE) and Idaho Power Company (Idaho Power) (collectively “the electric utilities”) filed Informational Filings to provide foundational information about the current state of their respective tariffs and contracts relating to qualifying facilities. A workshop to discuss the filings followed on March 23, 2004. On June 18, 2004, a second prehearing conference was held and a full procedural schedule was established. In addition, parties agreed to address six issues in the first

ORDER NO. 05-584

phase of this investigation.³ Other issues that had been identified by the Commission Staff (Staff) for potential consideration were left to be taken up in a subsequent phase of the proceeding or in a separate proceeding.⁴

On August 3, 2004, Staff and several Intervenors filed testimony. Intervenors fall into three general categories—the electric utilities, current and potential cogenerators and small power producers, and consumer representatives and public agencies concerned with state energy policies—and include the following entities: Ascentergy Corporation; Central Oregon Irrigation District; Columbia Energy Partners; the Fair Rate Coalition (FRC); J. R. Simplot Company (Simplot); Idaho Power; the Industrial Customers of Northwest Utilities (ICNU); Middlefork Irrigation District; PacifiCorp; PGE; the Oregon Department of Energy (ODOE); the Sherman County Court

³ Parties addressed the following issues in this proceeding: (1) Contract length and price structure: What is the appropriate contract length which is consistent with the Federal PURPA law standards and which will balance the interests of the QF developers and the utility's customers? Current practice is a five-year term. What is the appropriate pricing structure (e.g., prices that vary by year, prices that are levelized over the contract term) and should the Commission specify that structure? Current practice varies by utility, size of customer, and date of agreement; (2) Size threshold for standard rates: What size facilities should be eligible for standard purchase rates and a standard power purchase agreement which is consistent with the Federal PURPA law standards and which will balance the interests of the QF developers and the utility's customers. The current threshold is one MW; (3) Utility tariff content: What prices, terms and conditions should be included in utility tariffs? How should the Commission ensure that all terms and conditions it approves in the avoided cost filings are publicly available? Current practice is to include only basic pricing, terms and conditions in the tariff for small qualifying facilities (1 MW or less). The other avoided cost information approved by the Commission is contained in the utility's filing; (4) Avoided cost calculation methods: What is the appropriate method for calculating avoided costs? Current practice is to use (a) the variable costs of operating existing generating facilities until projected supply deficits occur and (b) when new resources are needed, their estimated capacity and energy costs; (5) Applicability of Oregon PURPA administrative rules: Since federal PURPA still applies to all electric companies and the Commission is responsible for its implementation, what is the practical effect of the ORS 757.612 exemption for PGE and Pacific? The administrative rules need further review to differentiate the rules that implement federal PURPA from the rules that were specific to Oregon PURPA law; (6) Dispute mediation: What should be the Commission and staff roles in mediating or litigating PURPA-related disputes? Current practice is described above.

⁴ Potential issues identified by Staff that were deferred until a subsequent phase or separate proceeding include the following: (1) Alternative forms of regulation: Do utilities have a financial incentive to discourage the development of qualifying facilities due to reduced sales? If so, should the Commission use other types of regulation (e.g., decoupling) to mitigate the disincentives; (2) Filing cycle for avoided cost studies and related tariffs: Currently the companies file avoided cost studies about every two years following IRP acknowledgement and they update standard purchase rates and contract terms accordingly. In addition, OAR 860-029-0080(4) requires electric utilities contracting to buy non-firm power from a qualifying facility to submit quarterly filings of avoided energy costs. PGE is the only Oregon investor-owned utility with such a contract. Even though the rule no longer applies to PGE, the company files, and staff reviews, quarterly avoided cost filings. Staff recommends consideration of this issue in the context of the Commission's review of Least-Cost Planning (Docket No. UM 1056); (3) Net metering: Net metering allows customers, in essence, to run their meter backwards and receive credit on the electric bill when their generation exceeds their use. Currently, eligibility is limited to customers with a generating capacity of 25 kW or less from certain types of resources. In the future, the Commission may want to consider raising this threshold; (4) Interconnection procedures and agreements: Staff is monitoring federal proceedings related to these issues. At a later date, staff plans to ask the Commission to open a proceeding to establish state interconnection standards; (5) Standby rates: The Commission addressed PGE's standby tariffs in Docket No. UE 158.

(Sherman County); Symbiotics, LLC; and Weyerhaeuser Corporation. On September 17, 2004, the electric utilities filed rebuttal testimony. Supplemental rebuttal testimony was submitted on September 30, 2004. On October 14, 2004, Staff and Intervenors filed surrebuttal testimony. A hearing was conducted on October 27, 2004, and October 28, 2004. The parties filed opening briefs on December 23, 2004, and reply briefs on January 27, 2005. On February 7, 2005, oral argument was held.

B. HISTORICAL BACKGROUND

Sections 201 and 210 of PURPA encourage resource competition and the development of cogeneration and renewable energy technologies by non-utility power producers called “qualifying facilities” or “QFs.”⁵ PURPA requires the Federal Energy Regulatory Commission (FERC) to prescribe and periodically revise rules that “require electric utilities to offer to . . . purchase electric energy from [QFs].”⁶ PURPA further specifies that the rates paid by utilities for electric energy purchased from QFs may not exceed “the incremental cost to the electric utility of alternative electric energy.”⁷ PURPA defines incremental costs as “the cost to the electric utility of the electric energy which, but for the purchases from such [QF], such utility would generate or purchase from another source.”⁸ PURPA also requires electric utilities to purchase power from QFs at rates that are just and reasonable to the utility’s customers and in the public interest and that do not discriminate against QFs, but that are not more than avoided costs.⁹

FERC complied with its PURPA obligation by promulgating Title 18, Part 292 in the Code of Federal Regulations (CFR).¹⁰ In so doing, FERC stated that “a basic purpose of section 210 of PURPA is to provide a market for the electricity generated by small power producers and cogenerators.”¹¹ Regulations adopted by FERC seek to create this market by requiring utilities to purchase electricity from QFs at the utility’s “full avoided costs” and to adopt non-discriminatory interconnection and back-up power policies and pricing. FERC’s full avoided cost rule was unanimously upheld by the Supreme Court in 1983.¹²

⁵ A “qualifying facility” refers to a cogeneration facility or a small power production facility. OAR 860-029-0010(22). *See also* OAR 860-029-0010(25). PURPA defined two types of qualifying facilities: (1) a cogeneration facility that produces electric energy and steam or forms of useful energy (such as heat) that can be used for industrial, commercial, heating or cooling purposes. Cogenerators may be any size, so long as plant thermal output is at least five percent of total energy output. If fueled by oil or gas, the plant must meet certain efficiency criteria; and (2) A small power production facility that produces electric energy using biomass, waste or renewable resources as the primary energy source. Such facilities must have a nameplate capacity of 80 MW or less. In addition, at least three-fourths of the plant’s energy must be derived from renewable resources or waste products.

⁶ 16 U.S.C. § 824a-3(a).

⁷ 16 U.S.C. § 824a-3(b).

⁸ 16 U.S.C. § 824a-3(d).

⁹ *Id.* § 824a-3(b)(1) and (2).

¹⁰ 18 CFR §292.101 et seq.

¹¹ Federal Register, Vol. 45, No. 38, (February 25, 1980) (hereinafter, “Federal Register”), p. 12221.

¹² *Federal Energy Regulatory Commission v. American Electric Power Service Corporation*, 76 L. Ed. 2d 22, 34 (May 16, 1983).

In keeping with how issues were framed and the nature of evidence introduced in this proceeding, the bulk of policy decisions made in this order exclusively apply to standard contracts. Certain issues, however, have consequences for the negotiation of non-standard contracts. For example, decisions regarding the calculation of avoided costs will have ramifications for the negotiation of non-standard contracts since these avoided costs are the starting point for negotiations of such contracts. Other issues were general in nature from the start. For example, dispute resolution procedures and the applicability of PURPA administrative rules are issues that have general applicability to all QF contracts and negotiations. A number of sub-issues were also identified in this proceeding having general consequences for both standard and non-standard QF contracts alike.

To be clear about the applicability of our decisions to standard contracts versus non-standard contracts, we indicate, where warranted, how such decisions affect negotiation of non-standard contracts. We also identify when it is appropriate to take an issue up, as it relates to either standard or non-standard contracts, or both, in a second phase of this proceeding.

III. STANDARD CONTRACT TERMS AND CONDITIONS

The term, “standard contract,” has been widely used by parties since passage of the federal PURPA law. The term is used to describe a standard set of rates, terms and conditions that govern a utility’s purchase of electrical power from QFs at avoided cost. Standard contracts are made available to a defined class of QFs that are deemed eligible under federal or state law to receive standard rates.

Parties raised a range of issues regarding standard contracts in this proceeding, including calculation of avoided costs, standard contract pricing and the appropriate length of a standard contract. A particularly contentious issue in this proceeding concerned eligibility to receive a standard contract. We address each issue and sub-issue raised during this proceeding, making policy decisions on many of the issues, and deferring or dismissing other issues as appropriate.

A. SIZE ELIGIBILITY TO RECEIVE STANDARD CONTRACTS

1. Overview

Most parties propose continuing to divide QFs into two categories: QFs that are eligible to sell power pursuant to a standard contract, and QFs that are not eligible for a standard contract. Standard contracts have pre-established rates, terms and conditions that an eligible QF can elect without any negotiation with the purchasing utility. If a QF is not eligible for a standard contract, a utility is still obligated to purchase a QF’s net output at the utility’s avoided cost, but the QF must negotiate the rates, terms and conditions of a power purchase contract with the purchasing utility.

ORDER NO. 05-584

We deem the recommendation of Staff and ODOE to raise the standard contract eligibility threshold to 10 MW to be reasonable.³² We rely, in particular, on the facts that Staff's proposed threshold of 10 MW took into account the extent to which market barriers prevented successful negotiation of a contract and that ODOE, which has significant experience with the development of QF projects, indicated that 10 MW represented a point at which the costs of negotiation become a reasonable fraction of total investment costs.

We are persuaded that QFs greater in size than 10 MW face market barriers, such as asymmetric information and an unlevel playing field, that impede negotiation of a viable QF power purchase contract with electric utilities. We agree with PacifiCorp and PGE, however, and conclude that such market barriers will be best overcome for those QFs by improved negotiation parameters and guidelines and greater transparency in the negotiation process.

Although some of the evidence presented in this case could potentially support adoption of specific QF contract negotiation parameters and guidelines, as requested by Weyerhaeuser, the parties did not address the evidence from this standpoint. Even the evidence presented by Weyerhaeuser was initially introduced for the purpose of supporting appropriate standard contract terms and conditions that would be available to QFs as large as 100 MW. We conclude that the evidence in this proceeding did not receive the analysis and examination that would be needed to support the adoption of negotiation guidelines for non-standard contracts. Consequently, we direct parties to take up the issue of negotiation guidelines and parameters for non-standard contracts in the second phase of this proceeding. Although Staff identified certain issues, such as contract duration, that could potentially be resolved with regard to both standard and non-standard contracts, we conclude that it is preferable to address the full scope of non-standard rates, terms and conditions on a collective basis. Consequently, we decline to adopt rates, terms and conditions, or associated parameters or guidelines, for non-standard contracts, except to the extent that we do so explicitly.

B. STANDARD CONTRACT LENGTH

1. Parties' Positions

All parties proposed a significant increase in the term of standard contracts. Proposals to increase the maximum standard term from five years ranged up to thirty years and beyond for some QF technologies. Most parties advocate increasing the maximum standard term from five to either fifteen or twenty years. Parties preferring a fifteen year term for standard contracts raise concerns that standard rates will not track avoided costs over too long of a term. They caution that the risks are great, pointing to past history when high QF rates were locked in for terms up to thirty-five years. Parties that favor an increase to twenty years, however, express concern that financing for many QF projects requires the longer term.

³² Having raised the eligibility threshold to 10 MW, we decline to distinguish between wind and non-wind QF resources by instituting a higher eligibility threshold for wind resources.

ORDER NO. 05-584

PacifiCorp, PGE, Idaho Power³³ and Staff each propose that the maximum standard contract term be fifteen years, with QFs having the discretion to request any term up to the maximum. The consensus of these parties is that the maximum standard contract term should be no longer than necessary to facilitate QF financing. All indicate that a term of fifteen years represents an appropriate balance between attracting QF financing and limiting the risks that accompany long range power price forecasting.

A primary basis for Staff's recommendation for a 15-year maximum term are past representations by the ODOE that fifteen years is a sufficient financing period for some QF projects, and that certain QF project developers have requested 15-year loans in the recent past. Staff particularly relies on a letter sent in December 2003 from the loan program manager for ODOE's SELP to the Commission that indicates 15 years was a usual term for QF contracts.³⁴ Staff is reluctant to support a contract term longer than 15 years due to the likelihood that fixed avoided cost rates would diverge over time from actual avoided costs. Moreover, Staff recognizes that utilities must enter into must-take QF contracts without the full evaluation of cost and risk that would be associated with other power resources. PacifiCorp and PGE concur. While PGE observes that it is inappropriate to compare terms for QF contracts with terms for other utility resources due to the discretion and safeguards associated with those resources, all three parties note that 15 years is within the range of other utility resources.

ODOE recommends a maximum term of 20 years, noting that such time frame generally represents the middle point of typical terms for other utility resources. ODOE disagrees with Staff's claim that a term of fifteen years is sufficient to attract financing. ODOE indicates that since 1980, ODOE's loan program has financed twenty-one QF projects. Of those, sixteen projects have been financed for periods of twenty to twenty-five years, three for shorter terms, and two for longer. ODOE asserts that "twenty years should allow for adequate financing of the majority of QF projects our program has reviewed,"³⁵ and notes that some QF projects will be economically feasible only with a twenty-year term. Sherman County, Simplot Company and Weyerhaeuser concur that the maximum standard contract term should be twenty years. Weyerhaeuser adds that the Commission should provide that existing standard contracts may be renewed for ten years.

Two parties argue that the maximum term for standard contract term should be, in many cases, much longer than twenty years. FRC does not specify what the

³³ Observing that the Idaho Commission has authorized twenty year QF contracts in Idaho, Idaho Power notes that 20-year terms in Oregon would provide administrative ease for the Company. Idaho Power further observes, however, that the QF contracts have protections that may not be authorized in Oregon. Consequently, Idaho Power requests that it be allowed to implement some of the same provisions authorized by the Idaho Commission in Oregon should a maximum standard contract term of 20 years be adopted in Oregon.

³⁴ The letter stated: "As a lender, it is important to have a power purchase contract that equals the loan term, usually fifteen years." Staff 200 at 6; See Staff 202 at 1.

³⁵ ODOE 3 at 2.

ORDER NO. 05-584

initial term of a QF contract should be, other than to say it should be as long as reasonably possible. FRC does, however, seek an evergreen provision that would effectively extend a QF contract over the entire economic life of a QF project. An evergreen provision would allow a QF, at its sole discretion, to continually renew a QF contract, presumably as long as the QF was able to economically operate under the contract. ICNU, on the other hand, asserts that QF contracts should extend, from the start, through the economic life of a facility. For example, a hydro QF project would be eligible to receive a standard contract for a term of up to fifty years, while a biomass QF would be eligible to receive a standard contract with a term between ten and fifteen years. ICNU asserts that financing is difficult and more expensive to obtain when contract lives are less than economic lives, and that matching QF contract life with economic life treats QF projects on par with how other utility resources are addressed.

2. Resolution

We conclude that establishing an appropriate maximum term for standard contracts requires us to balance two goals. A primary goal in this proceeding is to accurately price QF power. We also seek, however, to ensure that QF projects that are deemed eligible to receive standard contracts have viable opportunities to enter into a standard contract. To achieve this latter goal, it is necessary to ensure that the terms of the standard contract facilitate appropriate financing for a QF project. Consequently, we agree with Staff and other parties that our fundamental objective is to establish a maximum standard contract term that enables eligible QFs to obtain adequate financing, but limits the possible divergence of standard contract rates from actual avoided costs.

In adopting this objective, we implicitly reject the position advocated by FRC and ICNU that the life of a QF contract should extend, at the discretion of the QF developer, over the entire economic life of the project. We observe that neither FRC nor ICNU presented evidence indicating that the economic viability of a QF project requires financing that is equal to the economic life of the QF facility. Although ICNU represented that such financing would put QFs on par with utility resources, ICNU did not assert that such financing was *required* for the viability of QF projects. Although a QF project may have an economic operating life of up to 50 years, it is probable that the project may be initially financed over a period far less than its economic life.

We conclude that the contract term length minimally necessary to ensure that most QF projects can be financed should be the maximum term for standard contracts. The evidence presented in this proceeding is inconclusive, however, about whether that length of term is 15 or 20 years. No party was definitive regarding a recommendation. For example, although PacifiCorp consistently recommended that 15 years be established as the maximum standard contract, PacifiCorp did so with some ambiguity, stating: “[a] contract term of 15 years *should be* adequate to address the financiability concerns raised in this proceeding.”³⁶

³⁶ PacifiCorp Opening Brief at 4; PacifiCorp 100 at 5 (emphasis added).

ORDER NO. 05-584

No party, other than ODOE which finances QF projects through SELP, presented testimony about the appropriate term for QF contracts from entities that are likely to finance the projects. Although Staff presented evidence that ODOE has represented in the recent past that 15 years is an appropriate term, ODOE itself argued in this proceeding that 20 years is minimally adequate.

Given its role as a facilitator and financier of QF projects, we find ODOE's testimony to be the most persuasive in this proceeding. Consequently, we adopt ODOE's recommendation that the maximum term of a standard contract be raised to 20 years. In so doing, however, we acknowledge that 20 years is a significant amount of time over which to forecast avoided costs. Indeed, divergence between forecasted and actual avoided costs must be expected over a period of 20 years. Given our desire to calculate avoided costs as accurately as possible, and the testimony of several parties that avoided costs should not be fixed beyond 15 years, we are persuaded that standard contract prices should be fixed for only the first 15 years of the 20-year term. Tariffs and standard contract terms should provide that, in the event a QF opts for a standard contract with a 20-year term, the QF must take one of the market pricing options that we address later in this order for the final five years of the contract.³⁷

C. CALCULATION OF STANDARD AVOIDED COSTS

1. Overview

FERC defines a utility's full avoided costs as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source."³⁸ Thus, the goal of calculating avoided costs is to accurately estimate the costs a utility would incur to obtain an amount of power that it purchases from a QF, either by the utility's self-generation or by purchase from a third party. Each utility serving customers in the state of Oregon currently utilizes an individualized methodology to calculate avoided costs.

QFs with design capacities larger than the relevant standard contract threshold are still entitled to sell power to a utility at avoided costs, but receive avoided cost rates that are individually negotiated with a utility to reflect specific characteristics of the project and its interconnection with the utility. Negotiations typically start with the standard avoided costs, however.³⁹ Consequently, in setting standard avoided costs, we

³⁷ See *discussion*, page 34.

³⁸ 18 C.F.R. § 292.101(b)(6).

³⁹ 18 C.F.R. § 292.304(e). Non-standard avoided cost rates deviate from standard avoided costs in order to reflect the following considerations set forth by FERC:

- (1) The utility's system cost data;
- (2) The availability of capacity or energy from a QF during the system daily and seasonal peak periods, including:
 - (i) The ability of the utility to dispatch the qualifying facility;
 - (ii) The expected or demonstrated reliability of the qualifying facility;
 - (iii) The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance;

ORDER NO. 05-584

additional evidence on this issue, they are invited to do so in the second phase of this proceeding.

K. STANDARD CONTRACT FORM

1. Parties' Positions

Two parties recommend that we adopt model standard contracts created or approved by an independent organization or another state public utility commission. FRC recommends that the Commission adopt a model standard contract endorsed by the National Association of Regulatory Utility Commissioners (NARUC), while Weyerhaeuser suggests that the Edison Electric Institute (EEI) Master Agreement or standard contract forms approved by the California Public Utilities Commission be used to draft default standards for non-rate terms and conditions.⁵⁸

Staff and three other parties recommend that each utility draft its own standard contract within the framework that we adopt in this order. PacifiCorp indicates that it currently has three separate standard contract forms: one form addresses projects up to 100 kW, another addresses projects up to 1 MW and a third addresses projects over 1 MW. Although the terms of the three contracts are similar, selected terms vary to address particular characteristics of projects of a certain size. PacifiCorp states that additional contract forms may be necessary should the Commission adopt pricing options and recommends that the Commission allow flexibility in the form and number of standard contracts. Observing that it is consistency across the utilities on essential contract terms that matters, not variations on non-essential terms, Sherman County and Simplot agree with PacifiCorp that each utility should draft compliant standard contract forms. Staff recommends that each utility file standard contract forms with the Commission for approval, and advises that approved forms should be made publicly available in the same manner as tariffs.

2. Resolution

For reasons presented by Sherman County, Simplot, and PacifiCorp, we decline to adopt a model standard contract form and agree that each utility should draft its own standard contract rates, terms and conditions. We therefore direct the electric utilities to draft and file one or more standard contract forms as necessary to comply with our decisions in this order. Standard contract forms should accompany revised tariffs. We direct utilities to file standard contract forms with revised tariffs within sixty days of this order. We expect each standard contract form to contain terms and conditions that are consistent with the resolution of issues in this order or past orders, as appropriate. It is not necessary, however, that particular terms be identically worded across all standard contract forms, so long as the meaning of each term is consistent with the present or past decisions. We expect that terms that are not specifically discussed in this order or past orders will vary among the utilities. Staff will review each standard contract form and work with each utility to ensure the compliance of submitted standard contract forms.

⁵⁸ Weyerhaeuser submitted a California Standard Offer No. 1 QF Contract as Exhibit 102.

ORDER NO. 05-584

Filed standard contract forms will be subject to the same suspension and approval process as tariffs.

L. SECURITY, CONSTRUCTION CREDIT, INSURANCE AND INDEMNITY REQUIREMENTS

1. Overview

The parties engaged in significant discussion regarding what terms should be included in standard contracts to address a variety of recognized contractual risks. Recognized risks include the timely construction of a QF project and its online availability by the start of scheduled power deliveries, the failure of a QF to provide promised power due to operational interruption, and third-party liabilities arising from a QF accident or failure. Although interconnected in many ways, each risk must be separately addressed.

2. Default Terms

a. Overview

Under a standard contract, a QF agrees to provide a certain amount of power to a utility in exchange for payment of avoided cost rates. After the QF project is operational, there are a number of reasons why a QF might not deliver the promised amount of power, including weather-related reductions in resource availability, operating problems which may be extended due to vendor repair problems, mismanagement, or bankruptcy. Parties debate whether it is necessary to include terms and conditions in standard contracts that delineate what constitutes a default and provide for compensation to the utility in the event that costs are incurred to replace the QF power.

Standard contracts currently require QFs to demonstrate creditworthiness, or to make a specified amount of funding available to the utility party as “default security.” The default security would typically be in the form of a letter of credit or a cash escrow that could be used as reimbursement in the event the QF defaults after it begins operation. Only PacifiCorp provided detailed information about current security requirements in standard contracts.

To demonstrate creditworthiness to PacifiCorp, a QF with a design capacity up to 99 kW in size must make a series of representations and warranties, including that it is current on debt repayment and has not been a debtor in a bankruptcy proceeding. A QF that is sized between 100 kW and 999 kW must provide evidence of operating history for five years, or meet a financial test and have no material change in financial condition in the past two years. A QF with a design capacity greater than 1,000 kW must meet a published credit rating test.

Sample standard contract forms filed as part of the utilities’ informational filings in this proceeding did not specify the amount of required default security that is typically required. PacifiCorp states that its credit and security requirements are

ORDER NO. 05-584

available upon request or electronically at a utility's website. Staff counters that the Commission's rules favor making all relevant information available through tariffs.⁷⁹

2. Resolution

The goal of tariffs is to provide sufficient information about the terms, rates and conditions of utility service to an inquiring third party. We have already determined that information provided in tariffs will be supplemented with filed standard contract forms that contain full information about the terms, rates and conditions governing the sale and transfer of electrical energy between a utility and a QF project with a design capacity at or under 10 MW. We conclude, therefore, that the pertinent tariffs should provide information that will not be provided in the standard contract forms. Our objective is to ensure that the combination of tariffs and standard contract forms will provide a potential QF developer with readily accessible information that facilitates a decision by the QF developer about whether to contact a utility for further information.

We expect tariffs to contain information including the following: (1) full details about the process to enter into a standard contract or a negotiated contract, including instructions to contact a utility for further information; (2) specification of avoided costs including how they are calculated; (3) details about how non-standard contracts are negotiated, including a statement that the starting point for negotiation of price is standard avoided costs and that standard avoided costs may be modified to address specific factors mandated by federal and state law; (4) delineation of these factors; and (5) general information about pricing options.

ORDER

IT IS ORDERED that:

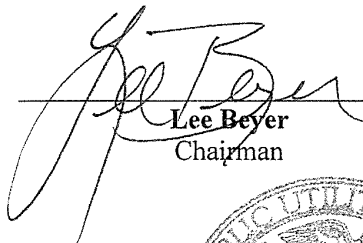
1. Within sixty days of the effective date of this order, each electric utility shall file by application, and serve upon all parties to this proceeding, one or more standard contract forms that set forth standard rates, terms and conditions that are consistent with the policy decisions made in this order.
2. The standard contract form shall become effective 30 days after the date of filing, unless otherwise suspended by the Commission. Prior to effectiveness, the standard contract forms shall be considered initial offers.
3. A QF or electric utility which signs an initial offer may not modify such offer until the term of the resulting contract expires. Any later modifications to a standard contract form will be prospective only and will not alter the terms of the initial offer.

⁷⁹ See, e.g., OAR 860-022-0010.

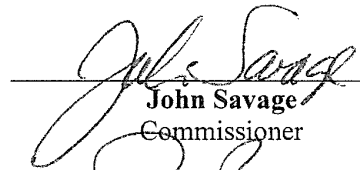
ORDER NO. 05-584

4. Each electric utility shall also file, with its standard contract forms, revised tariffs that implement the resolutions made in this order.
5. Tariffs shall become effective 30 days after the date of filing, unless otherwise suspended by the Commission.
6. A subsequent phase of this proceeding will be opened to address issues previously identified by the parties, as well as those identified in this order.
7. Rate recovery of hedging costs to mitigate indexed QF rates may be addressed in appropriate future dockets, such as a utility's general rate case.
8. A rulemaking will be opened at a later date to revise, on a permanent basis, the Commission's PURPA regulations at Division 29 of the Oregon Administrative Rules.

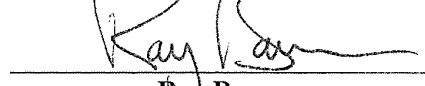
Made, entered, and effective MAY 13 2005



Lee Beyer
 Chairman



John Savage
 Commissioner



Ray Baum
 Commissioner



A party may request rehearing or reconsideration of this order pursuant to 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 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that I served the foregoing **PETITIONER PORTLAND GENERAL ELECTRIC COMPANY’S OPENING BRIEF, EXCERPT OF RECORD, AND APPENDIX**, on December 4, 2018, on the parties listed below in the manner indicated:

Irion A. Sanger
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Attorneys for Respondents Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, Renewable Energy Coalition

U.S. Mail
 Facsimile
 Hand Delivery
 Email:
 Oregon Appellate Court eFiling system

Denise G. Fjordbeck
Attorney-in-Charge
Civil/Administrative Appeals
1162 Court Street, NE
Salem, OR 97301-4096
Attorneys for Respondent The Oregon Public Utility Commission

U.S. Mail
 Facsimile
 Hand Delivery
 Email:
 Oregon Appellate Court eFiling system

I further certify that I filed the foregoing **PETITIONER PORTLAND GENERAL ELECTRIC COMPANY’S OPENING BRIEF, EXCERPT OF RECORD, AND APPENDIX** with the Appellate Court Administrator on December 4, 2018, via the Oregon Appellate Court eFiling system

/s/ Anna M. Joyce

Anna M. Joyce, OSB #013112
Attorney for Petitioner Portland
General Electric Company