



February 24, 2021

Via Email

Chair Megan Decker
Commissioner Letha Tawney
Commissioner Mark Thompson
Oregon Public Utility Commission
201 High Street SE, Suite 100
Salem, OR 97301-3398

RE: PURPA Contract Guidance
Docket Nos. UM 2000, AR 631 and UM 2151

Dear Commissioners:

I. INTRODUCTION

The Community Renewable Energy Association (“CREA”), Northwest & Intermountain Power Producers Coalition (“NIPPC”), and Renewable Energy Coalition (the “Coalition”) (collectively, the “QF Trade Associations”) submit these comments to respond in part to the Oregon Public Utility Commission’s (the “Commission’s”) 2021 PURPA Docket Strategy. The QF Trade Associations appreciate that the Commission is preparing to address many important issues in 2021. Given the substantial workload, it is more important than ever that the Commission also clarify what issues it is *not* addressing.

The QF Trade Associations assert that the Commission can and should affirmatively resolve and clarify what types of QF contractual disputes that it will not attempt to exercise jurisdiction over to prevent unnecessary expense of procedural litigation for all affected parties. The QF Trade Associations request that the Commission declare that that it will not adjudicate standard industry contract provisions like damages provisions and force majeure claims under standard power purchase agreements (“PPAs”).¹

¹ The QF Trade Associations understand that the Commission has historically—and consistently—ruled that it lacks jurisdiction to award damages. Clarifying that the Commission will not adjudicate damage provisions would simply maintain the Commission’s longstanding policy. The QF Trade Associations therefore focus the

These issues are best left to the courts. The QF Trade Associations' recommendations in this letter are two-fold: 1) issue immediate guidance now that force majeure and any other run-of-the-mill issues should be best left to the courts; and 2) include in the scope of AR 631 and/or UM 2000 clarification of the Commission's position on the types of issues that the Commission does not intend to attempt to exercise jurisdiction over. By providing clear and specific guidance, the Commission will reduce litigation over the appropriate forum for resolving post-contractual PURPA disputes.

The QF Trade Associations continue to believe that it is inappropriate and unnecessary for the Commission to exercise jurisdiction over disputes involving fully executed PPAs, no matter the issue. Developers would prefer to have judicial courts adjudicate all contractual disputes and are harmed by the Commission's continuing assertion of jurisdiction.

Without relitigating that general premise, the QF Trade Associations explain in these comments why the Commission should decline to exercise jurisdiction specifically over normal contract provisions that exist in ordinary power sales and other non-energy industry contracts, like force majeure disputes. The QF Trade Associations recognize that this is a live issue before the Commission in a contested case recently filed by Portland General Electric Company ("PGE"),² which underscores the need for the Commission to clarify this matter as soon as possible.

The QF Trade Associations recommend that the Commission immediately issue guidance that clarifies the Commission does not intend to attempt to exercise jurisdiction over all fully executed PPA disputes, and specifically does not intend to attempt to exercise jurisdiction over disputes involving force majeure. The Commission can issue this guidance readily in Docket No. AR 631, *the Rulemaking to Address Procedures, Terms, and Conditions Associated with QF Standard Contracts*, and in Docket No. UM 2000, *the Investigation into PURPA Implementation*. Alternatively, the Commission could resolve this issue *PGE v. Dayton Solar I LLC, et al.*, Docket No. UM 2151.

II. FORCE MAJEURE DISPUTES ARE BEST LEFT TO THE COURTS

The Commission first asserted jurisdiction over a dispute arising under a fully executed PURPA PPA approximately three years ago, in January 2018, in a case involving changes to a QF's capacity after contract execution.³ Shortly thereafter, the Commission twice affirmed its jurisdiction, both in cases involving the rates paid to a QF.⁴ In all three instances, the

remainder of these comments on force majeure, as an example of provisions that the Commission should clarify that it will *not* adjudicate.

² *PGE v. Dayton Solar I LLC, et al.*, Docket No. UM 2151, Complaint (Jan. 8, 2021).

³ *PNW Solar*, Docket No. UM 1894, Order No. 18-025 at 4-8 (Jan. 25, 2018).

⁴ *NIPPC, CREA, and Coalition v. PGE*, Docket No. UM 1805, Order No. 18-079 at 3-4 (Mar. 5, 2018); *PGE v. Alfalfa Solar I LLC et al.*, Docket No. UM 1931, Order No. 18-174 at 3-6 (May 23, 2018).

Commission rejected claims that those cases involved common-law contract interpretation and stated that the cases involved the implementation of PURPA, a matter delegated to the Commission.⁵ Further, the Commission asserted that it had primary jurisdiction (thus displacing the concurrent jurisdiction of the trial courts) based on the existence of three factors: 1) the issue benefiting from the Commission's specialized expertise; 2) uniform resolution being preferable; and 3) the risk that a judicial resolution could adversely impact the Commission's performance of its regulatory responsibilities.⁶ These are the factors that are to be applied by a court to determine if the court will defer resolution of the matter until after the agency has addressed the issue. However, to the extent the Commission determines these factors should guide its exercise of jurisdiction, none of these factors is applicable in a dispute over force majeure.

First, the interpretation of the force majeure provision does not benefit from the Commission's specialized expertise. In fact, the Commission and stakeholders to the Commission's PURPA proceedings barely considered the provision. In 2006, the Commission recognized that it had not defined the term when requiring standard PPA forms and clarified only that "[t]he term, force majeure, is a legal term, and standard contracts should incorporate the common legal definition."⁷ If ever there was a provision that the Commission could and should leave to the courts to interpret, it is force majeure—a provision that does nothing more than "incorporate the common legal definition" of a "legal term."

Second, force majeure disputes generally do not require uniform resolution. By their nature, force majeure disputes involve a highly specific set of facts involving events that were unexpected or unforeseeable. The decision too will almost certainly be grounded in those specific facts. Thus, each force majeure decision must necessarily stand on its own, and there is no need for, or benefit from, uniform resolution.

Third, a judicial decision involving force majeure is not likely to adversely impact the Commission's performance of its regulatory responsibilities. Force majeure disputes are, again, factually specific to circumstances involving the unforeseeable. To the extent a specific factual scenario was one where the Commission felt it could materially impact the Commission's performance, that scenario will likely be the exception rather than the rule. Further, the Commission would be free to intervene in such a judicial proceeding, pursuant to ORS 756.040(3).

⁵ *E.g.*, Docket No. UM 1931, Order No. 18-174 at 3-4.

⁶ *E.g.*, Docket No. UM 1931, Order No. 18-174 at 4-5.

The QF Trade Associations disagree that it was proper for the Commission to assert primary jurisdiction, which is a *judge-made* doctrine for when to ask an agency to initially address an issue that is before a *court*. These comments summarize the Commission's actions but should not be understood to endorse or approve of them. The QF Trade Associations reserve all rights to challenge and object to the Commission's actions in regard to asserting jurisdiction over fully executed PURPA PPAs.

⁷ *In re Staff's Investigation Relating to Electric Utility Purchases from QFs*, Docket No. UM 1129, Order No. 06-538 at 24 (Sept. 20, 2006).

The QF Trade Associations believe that force majeure disputes reflect the clearest possible example of a contractual dispute that the Commission could readily leave to a court to resolve. If the Commission disagrees, then it is difficult to imagine *any* contractual dispute falling beyond the Commission's purview. In other words, if the Commission wishes to expend time and resources on force majeure disputes, it should be prepared to expend time and resources on *all* disputes arising under fully executed PURPA contracts. Any Commission decision exercising jurisdiction over force majeure could only be understood as a demand for all claims to go to the Commission. Additionally, judging from PGE's voluminous complaint in UM 2151, the additional commitment of Commission resources required by opening the flood gates to such run-of-the-mill commercial claims will be substantial. As such disputes proliferate, the Commission would likely need to develop a whole new adjudicatory section with additional staff, attorneys, judges, and law clerks to resolve such disputes in a timely manner without compromising the Commission's core functions.

III. CONCLUSION

The QF Trade Associations appreciate the Commission's attention to PURPA matters and look forward to engaging in as many of the 2021 activities as time and resources will allow. The QF Trade Associations will be unable to participate in all Commission PURPA-related matters and urge the Commission to exercise restraint when deciding to expand its regulatory authority.

For the foregoing reasons, the QF Trade Associations recommend that the Commission promptly clarify that disputes over the validity of force majeure claims arising under fully executed PURPA PPAs are one issue that the Commission will *not* exercise jurisdiction over. Courts can resolve such disputes instead.

The QF Trade Associations also recommend that the Commission commit to issuing guidance at the conclusion of Dockets No. AR 631 and/or UM 2000 as to the other PPA disputes that the Commission will not attempt to exercise jurisdiction over. Such clarity will reduce uncertainty, facilitate the efficient resolution of disputes, and lead to a more effective and fair process for developers, utilities, and ratepayers. It will also alleviate the Commission's substantial workload.


Sincerely,



Mike McArthur
Executive Director
Community Renewable Energy Association

A handwritten signature in black ink, appearing to read "S Gray".

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