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 REPLY BRIEF, AND SUPPLEMENTAL 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)

APRIL 2019

Attorneys for Respondent Oregon Public Utility Commission

Ellen F. Rosenblum, OSB #753239
Attorney General
Benjamin Gutman, OSB #160599
Solicitor General
Keith L. Kutler, OSB #852626
Sr. Assistant Attorney General
1162 Court Street, NE
Salem, OR 97301-4096
Telephone: (503) 378-4402
keithkutler@doj.state.or.us

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

Steven C. Berman, OSB #951769
Keil M. Mueller, OSB #085535
Nadia H. Dahab, OSB #125630
Stoll Stoll Berne Lockting and Schlachter P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
sberman@stollberne.com
kmueller@stollberne.com
ndahab@stollberne.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

PETITIONER'S REPLY BRIEF

SUMMARY OF ARGUMENT

This appeal is not moot. This Court can still grant Portland General Electric Company ("PGE") effectual relief, because upon reversal and remand, PGE can file revised standard contract forms, notwithstanding Public Utility Commission of Oregon ("Commission") approval of its current forms. Further, the regulations cited by Complainants[1] do not make this appeal moot because the regulation defining the "fixed rate term," does not set the start date for that term as scheduled commercial operations. That decision was intentional: the administrative history reveals that participants in the drafting process, which included the parties to this appeal, chose not to define the "fixed rate term" as beginning at scheduled commercial operations to preserve "pending litigation," *i.e.* this appeal.

On the merits, PGE and the Commission now agree that Order No. 05-584 did not set a start date for the fixed-price period. (PUC Resp Br 16.) PGE and the Commission also agree that the Commission "change[d]" this policy, at least as applied to PGE, in the Commission's

---

[1] Respondents on appeal include Northwest and Intermountain Power Producers Coalition ("NIPPC"), Community Renewable Energy Association ("CREA"), and Renewable Energy Coalition ("REC"). PGE refers to these respondents as they were designated in the proceedings below, as "Complainants." ORAP 5.15(1).

orders that are the subject of this appeal by setting the start date of the fixed-price period at the scheduled commercial operation date. (*Id.*) But, contrary to the Commission's assertions, this policy change cannot be justified by QFs' need for financing because (1) Order No. 17-256, Order No. 17-465, and Order No. 18-079 ("the Commission's Orders") did not mention QF financing; (2) the record contains no evidence regarding QF financing; (3) the Commission ignored the harm to utility customers of delaying the fixed-price period three years after contract execution; and (4) the Commission in Order No. 05-584 did not find that QFs must receive 15 years of fixed pricing to obtain financing, only that the maximum term of a standard contract be set at 20 years and that standard contract prices should be fixed for only the first 15 years of the 20-year term.

ARGUMENT

I. This appeal is not moot.

A. This Court can still grant PGE effectual relief, because upon reversal and remand, PGE can file revised standard contract forms.

A case becomes moot when a court decision will no longer have a practical effect on or concerning the rights of the parties and it is therefore impossible for the court to grant effectual relief. *WaterWatch of Oregon, Inc. v. Water Res. Dep't*, 259 Or App 717, 726, 316 P3d 330 (2013). This

appeal is not moot because this Court is still capable of granting PGE relief by reversing the Commission's erroneous rulings.

In Order No. 17-256, the Commission ordered PGE to file standard contracts that set the start date of the fixed-price period at the scheduled commercial date. (ER 4; *see also* App 14 (ruling that standard contract forms must be "consistent with the resolution of issues in * * * [the Commission's] past orders.").) PGE, as it was required to do under the terms of that order, complied.

That compliance does not render this appeal moot. In this appeal, PGE requests not just reversal, but also remand for "further proceedings" consistent with an order from this Court. (Opening Br 6.) The "further proceedings" in this case would involve PGE filing revised standard contract forms that once again begin the fixed-price period at execution. Reversal of the Commission's Orders will thus provide PGE with relief because the Orders are the only barrier to PGE filing revised standard contract forms beginning the fixed-price period at execution.

The Commission observes that PGE does not ask this Court to rescind the Commission's approval of PGE's current standard contract forms that PGE filed to comply with Order No. 17-256. (PUC Resp Br 10.) But rescission of the orders approving PGE's current standard contract forms is

not a precondition to PGE filing revised standard contract forms consistent with any order from this Court. The Commission's past practice is that when it issues an order creating or removing a requirement for standard contracts, it does not rescind its prior order approving the then-current forms. Instead, the Commission immediately permits utilities to file revised standard contract forms consistent with the new order.[2]

---

[2] *E.g.*, App 16-17, Docket No. 1129, Order No. 05-584 at 59-60; Docket No. 1129, Order No. 07-360 at 42-43 (Aug 20, 2007), available at https://apps.puc.state.or.us/orders/2007ords/07-360.pdf (ordering revisions without rescinding prior approval); Docket No. 1396, Order No. 11-505 at 12 (Dec 13, 2011), available at https://apps.puc.state.or.us/orders/2011ords/11-505.pdf (same); Docket No. 1610, Order No. 14-058 at 32-33 (Feb 24, 2014), available at https://apps.puc.state.or.us/orders/2014ords/14-058.pdf (same); Docket No. 1610, Order No. 15-130 at 4 (Apr 16, 2015), available at https://apps.puc.state.or.us/orders/2015ords/15-130.pdf (same); Docket No. 1610, Order No. 16-174 at 31 (May 13, 2016), available at https://apps.puc.state.or.us/orders/2016ords/16-174.pdf; ER 5 (same).

Similarly, in approving standard contract revisions, the Commission does not rescind its prior approval of the then-current forms. (See Docket No. UM 1129, Order No. 07-065 at 2 (Feb 27, 2007), available at https://apps.puc.state.or.us/orders/2007ords/07-065.pdf (approving revisions without rescinding prior approval); Docket No. UM 1637, Order No. 13-007 at 1 (Jan 15, 2013), available at https://apps.puc.state.or.us/orders/2013ords/13-007.pdf (same); Docket No. 1610, Order No. 14-435 at 1 (Dec 16, 2014), available at https://apps.puc.state.or.us/orders/2014ords/14-435.pdf (same); Docket No. UM 1728, Order No. 15-251 at 1 (Aug 25, 2015), available at https://apps.puc.state.or.us/orders/2015ords/15-251.pdf (same); Docket No. UM 1610, Order No. 15-289 at 1 (Sept 22, 2015), available at https://apps.puc.state.or.us/orders/2015ords/15-289.pdf (same); Docket No. UM 1728, Order No. 16-220 at 1 (June 8, 2016), available at

The Commission also observes that it could reach the same result after reversal pursuant to its authority to "order a prospective change to PGE's contracts." (PUC Resp Br 10.) To be sure, the Commission might open a separate proceeding to investigate the start date for the fixed-price period and give stakeholders, including PGE, the opportunity to present evidence. But, if given the opportunity to present evidence, PGE may persuade the Commission not to expand the fixed-price period. Regardless, the fact that an agency could have reached the same result in a well-reasoned order on a full record does not moot the appeal of an order that lacks substantial reason. *See generally Gearhart v. Pub. Util. Comm'n of Oregon*, 255 Or App 58, 88, 299 P3d 533 (2014) (affirming Commission order on remand that reached the same result as original order because on remand an agency must only "appl[y] the correct principle of law and exercise[] its typical authority") (internal citation omitted). Accordingly, this appeal is not moot.

B. The Commission's view of mootness would insulate most of its decisions from judicial scrutiny.

Under the Commission's statutes, and the APA generally, a discretionary stay of an erroneous order is the exception, not the rule. *See* ORS 756.610(2) (standard for stay of Commission order);

---

https://apps.puc.state.or.us/orders/2016ords/16-220.pdf (same); Rec 2082, Order No. 16-377 at 1 (same); Rec 1554, Order No. 17-346 at 1 (same).)

ORS 183.482(3)(a) (standard for stay of an agency order generally). Absent a stay, the aggrieved party must comply with the erroneous order prior to appealing. The Commission takes the view that an aggrieved party forfeits its appellate rights by complying with an erroneous order before appealing. (PUC Resp Br 10-11.) Adopting the Commission's view would frustrate this Court's ability to review agency orders in the typical case in which the petitioner has complied with the order prior to appealing.

This case demonstrates the challenges created by the Commission's position. After ordering PGE to revise its standard contracts, the Commission approved PGE's compliance filings on September 14, 2017. (Rec 1554, Order No. 17-346 at 1.) The Commission contends that PGE forfeited its appellate rights on November 13, 2017, when PGE failed to timely appeal the order approving of *its own* compliance filings. (PUC Resp Br 10.) But the Commission did not even issue order No. 17-465 until November 13, 2017, that same day, and did not issue Order No. 18-079 until March 5, 2018, over three months later.

The Commission's position would mean that PGE forfeited its appellate rights hours after the Commission issued Order No. 17-465, three months before the Commission issued Order No. 18-079, and five months before PGE's deadline to file a petition for review. The Commission's

position would also mean that PGE forfeited its appellate rights before this Court even had jurisdiction to issue a stay of Order No. 17-256. *See* ORS 756.610(2) (stating that a petitioner can seek a stay of a Commission order only "after filing a petition for judicial review"). This Court should reject the Commission's unworkable theory of mootness.

C. The Commission's new regulations do not moot this appeal because they did not set a start date for the fixed-price period.

1. In defining "fixed rate term," the Commission did not set a start date for the fixed-price period.

The Commission's new regulations define "fixed rate term," but make no mention of the start date for the fixed rate term. (*See* OAR 860-029-0010(16) (defining "fixed rate term" as "the period of a power purchase agreement during which the public utility pays the qualifying facility avoided cost rates determined either at the time of contracting or at the time of delivery.") The administrative history reveals that the regulation's silence as to a start date was intentional.

In January 2018 in a separate rulemaking proceeding, the Commission issued Order No. 18-016, which adopted a staff recommendation to begin an investigation with the goal of issuing new rules regarding multiple QF issues. (Docket No. AR 593, Order No. 18-016 at 1 (Jan 17, 2018), available at https://apps.puc.state.or.us/orders/2018ords/18-016.pdf.)

In the attached report, Commission staff identified three dockets—UM 1610, UM 1725, and UM 1734—that addressed QF-related issues, which the new rules would codify. (*Id.*, App A at 2 n 3 & n 4.) The report did not mention UM 1805 or Order No. 17-256.

Commission staff's initial draft of the regulations defined the "fixed price term" as "start[ing] on the scheduled commercial operation date." (Suppl App 2-4, Docket No. AR 593, June 1, 2018 Draft Regulations;[3] *see also* Docket No. AR 593, Order No. 18-272, App A at 2-4 (July 18, 2018), available at https://apps.puc.state.or.us/orders/2018ords/18-272.pdf (referencing June 1, 2018, draft regulations).) After a meeting with all stakeholders, including PGE and Complainants CREA and REC, Commission staff circulated revised rules that eliminated the rule changes that "stakeholders believed to be outside the scope or that presupposed the outcome to pending litigation." (*Id.*, App A at 3.) Critically for the purposes of this case, the revised rules deleted the verbiage setting the start date of the "fixed rate term"[4] as the "scheduled commercial operation date."

[3] The June 1, 2018 draft regulations were provided via email, but they were not added to the docket. PGE has submitted an unopposed Motion to Supplement the Record or Take Judicial Notice to add this document as part of the Supplemental Appendix.

[4] The revised rules also changed the defined term "fixed price term" to "fixed rate term." Complainants and PGE agree that these two phrases are

(*See id.*, App A at 9, 10.) This history confirms that the regulations did not set a start date for the fixed-price period to preserve "pending litigation," *i.e.* this appeal.

Notably, the Commission itself does not cite this new regulatory definition of "fixed rate term" in its own mootness briefing. That the Commission does not rely on its own rules in support of its mootness arguments demonstrates that the rules do not set a start date for the fixed-price period.

2. In defining "purchase term," the Commission did not set a start date for the fixed-price period.

The definition of "purchase term" in the new regulations also does not moot this appeal. The new regulations define purchase term as "the period of a power purchase agreement during which the qualifying facility is selling its output to the public utility." OAR 860-029-0010(26). The definition of "purchase term" does not speak to the start date of the fixed-price period. Further, because a QF commits to selling all of its "Net Output" starting at execution, the definition of "purchase term" does not even set a start date for the purchase term itself. (*See* Rec 386, Att 4 to PGE Summ J Mot ("Commencing on the *Effective Date* and continuing through the Term of

---

synonymous. (*See* Complainants Resp Br n 11 ("'Fixed-price term' and 'fixed-rate term' have the same meaning under the PUC's rules.").)

this Agreement, Seller shall sell to PGE the entire Net Output delivered from the Facility at the Point of Delivery.") (emphasis added).)

Complainants cite a comment in Commission staff's redlined revisions to this new rule as a definitive Commission interpretation of the rule. (Complainants Resp Br 17-18.) Commission staff is not the Commission, and a sentence fragment in a comment from redlines of a proposed regulation is not a binding regulatory interpretation. Complainants overstate the importance of this staff comment by describing it as a Commission "order[]." (Complainants Resp Br 17 (describing staff report as "orders accompanying those rules").) In its actual order, the Commission adopted staff's recommendation that the Commission file the proposed rules with the Secretary of State. The Commission did *not* adopt the staff report, let alone the redlined revisions attached to the report. (*See* Order No. 18-272 at 1 ("This order memorializes our decision * * * to adopt Staff's recommendation in this matter. The Staff Report with the recommendation is attached * * *.").)

Regardless, staff's comment did not interpret the regulations as setting a start date for the purchase term. In the comment, staff states that the new regulations "clarify [that] the 20-year term of a contract generally does not start on the effective date of the contract." (*Id.*, App A at 11.) The 20-year

period "generally" does not start on the effective date because the two other utilities in Oregon permit QFs to select contract terms that extend 20 years from initial deliveries and commercial operations, respectively. This "general[]" statement from Commission staff says nothing about PGE's contrary practice. Indeed, the phrase "purchase term" is used only twice in the revised regulations: OAR 860-029-0120(3) and OAR 860-029-0130(2). Staff's comments note that these rules were meant to codify Order No. 14-058, not the Commission's Orders under appeal in this proceeding. (Order No. 18-272, App A at 35, 38.)

II. The Commission's Orders lacked substantial reason.

As explained in PGE's opening brief, the Commission's Orders lack substantial reason because they misstated the policy of Order No. 05-584, which did not require that PGE offer fixed prices for 15 years following the scheduled commercial operation date. (Opening Br 24-27.) Contrary to its position in Order No. 18-079, the Commission now agrees that it "did not specify in its 2005 order when the 15-year period of fixed prices should begin." (PUC Resp Br 12.) The Commission and Complainants contend that the Commission's Orders are well reasoned anyway. But the reasons they proffer—QF financing and an industry-specific meaning of the word "term"— are insufficient to sustain the Commission's Orders.

A. QFs' need for financing cannot sustain the Commission's Orders, because none of the Commission's Orders mention QF financing.

The Commission's financing rationale is insufficient for four reasons. First, it is black-letter law that the substantial reason standard is meant to aid appellate review, and therefore an agency's reasons must appear on the face of the agency's order. *See, e.g.*, *City of Roseburg v. Roseburg City Firefighters, Local No. 1489*, 292 Or 266, 272, 639 P2d 90 (1981) ("[W]e will not assume the existence of a rationale. Rather, we look to the order to state the rational basis of the agency's inference."). The Commission's Orders never mention QF financing. The word "financing" literally never appears in the Commission's Orders.

Second, contrary to the Commission's and Complainants' assertions, Order No. 05-584 did not find that a QF must *receive* a guaranteed 15 years of fixed pricing to obtain financing. (PUC Resp Br 12-13; Complainants Resp Br 8-11.) By capping fixed prices at 15 years, the Commission intended to protect utility customers from "divergence between forecasted and actual avoided costs" over a lengthy standard contract term. (App 13, Docket No. 1129, Order No. 05-584 at 20.) As the Commission itself now agrees, Order No. 05-584 permitted utilities to offer standard contracts that began the fixed-price period at execution. (*See* PUC Resp Br 18.)

Complainants quote from Order No. 05-584's discussion of the total 20-year term to create the appearance that the Commission discussed QF financing when setting the 15-year limit on the fixed-price period. (Complainants Resp Br 10.) But the portion of Order No. 05-584 capping fixed prices at 15 years discussed price divergence, not QF financing:

> [D]ivergence 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.

(App 13, Docket No. 1129, Order No. 05-584 at 20.)

Third, subsumed within the substantial *reason* standard is the substantial *evidence* standard. *See Jenkins v. Bd. of Parole & Post-Prison Supervision*, 356 Or 186, 208, 335 P3d 828 (2014) (holding that the "substantial reason requirement" includes reliance on evidence that "qualif[ies] as substantial evidence") (internal citation omitted). Here, the Commission did not cite any evidence when expanding the fixed-price period other than a "belie[f]" that QFs should receive the "full benefit" of fixed prices. (ER 4.) Nor could it. There is no evidence in this record regarding QF financing, let alone evidence establishing that QFs need to

receive 15 years of fixed pricing from the scheduled commercial operation date to obtain financing.

Fourth, to meet the substantial evidence requirement, an agency's factual findings must be "reasonable in the light of countervailing as well as supporting evidence." *Reguero v. Teacher Standards & Practices Comm'n*, 312 Or 402, 418, 822 P2d 1171 (1991) (internal citation omitted). In seeking to "benefit" QFs, the Commission failed to acknowledge the "countervailing" harm to PGE's customers. Although accurately pricing power was the Commission's "primary" goal in Order No. 05-584, this goal went unmentioned in the Commission's Orders. (Order No. 05-584 at 19.) This failure to even consider the harm to utility customers is an independent basis for remand.

B. "Industry-specific" meaning of the word "term" in Order No. 05-584 cannot sustain the Commission's Orders, because the Commission did not use any industry-specific meaning.

As explained in PGE's opening brief, Order No. 05-584 did not set a particular start date for the fixed-price period. (Opening Br 24-27.) The Commission agrees with PGE on this point: "PGE is correct that Order No. 05-584 did not *require* the 15-year period to begin when the QF began delivering power * * *." (PUC Resp Br 18.) Complainants take the contrary view that Order No. 05-584 did "require" that the 15-year fixed-

price period begins "on the date the QF becomes operational." (Complainants Resp Br 18-19.) Complainants contend that the word "term" as used in Order No. 05-584 is a "term of art" that begins at commercial operations instead of execution. (*Id.*, 20, 22.) Complainants' invocation of this supposed "term of art" fails for four reasons.

First, Complainants are not the Commission, and cannot defend the Commission's Orders based on an interpretation of Order No. 05-584 that the Commission rejected. The Commission agrees with PGE that Order No. 05-584 permitted PGE to offer fixed prices beginning at execution. (PUC Resp Br 18.)

Second, as explained in PGE's Opening Brief, Order No. 05-584 speaks of the 15-year period as coinciding with the beginning of the "standard contract," not at the beginning of power purchases. (Opening Br 25-26.) On its face, Order No. 05-584 did not adopt Complainants' meaning of the word "term."

Third, there was no industry-specific meaning of the word "term" in Oregon when the Commission issued Order No. 05-584. To the contrary, in their 2007 filings to comply with Order No. 05-584, two out of three utilities in Oregon (PGE and Idaho Power) defined the word "Term" in their standard contract forms as beginning at execution. (*See* Rec 383, Att 4 to

PGE Summ J Mot; Rec 590, Att B to Complainants Resp to PGE Summ J Mot.)[5]

Finally, Complainants are mistaken in concluding that a power purchase agreement's "term" begins only at power deliveries because the fixed prices are only "important" when the prices are being paid. (Complainants Resp Br 20.) The fixed prices are important to a utility's customers beginning at execution. As explained in PGE's opening brief, by law, prices are fixed at execution. (*See* Opening Br 27-28 (citing 18 CFR § 292.304(d)(2)(ii); OAR 860-29-0040(3)(b)(B)).) If market conditions or avoided prices change between execution and scheduled commercial operations, the utility cannot adjust the fixed prices in the standard contract. The utility's customers must bear the economic cost of the outdated prices. Complainants fail to acknowledge this harm to PGE's customers, and the role that it played in Order No. 05-584.

[5] Complainants cite their definition of the word "term" to a section of their own motion for summary judgment, a motion that the Commission correctly denied. (*See* Complainants Resp Br 20; ER 4 (Order No. 17-256 (denying motion)).)

C. The Commission's prior approval of PGE standard contract forms that explicitly began the fixed-price period at execution demonstrates that no pre-existing policy barred this practice.

As explained in PGE's opening brief, Order No. 05-584 could not have set a policy that required PGE to begin the fixed-price period at the commercial operation date, because the Commissioners who issued Order No. 05-584 twice approved of PGE's standard contract forms that explicitly began the fixed-price period at "execution." (Opening Br 31-33.) Complainants do not contest that PGE's original standard contract forms initially began the fixed-price period at execution, or that the Commissioners who issued Order No. 05-584 approved those forms.

Instead, Complainants contend that the Commission should ignore its own prior approval of PGE's forms because the Commission does not "construe" the forms to determine if they are "consistent with Commission policy." (Complainants Resp Br 23.) Complainants are mistaken. As the Commission recently stated, its approval of standard contract forms establishes that those forms are "consistent with our own orders and rules to implement state and federal PURPA policy." (Docket No. UM 1894, Order No. 18-025 at 6 (Jan 25, 2018), available at https://apps.puc.state.or.us/orders/2018ords/18-025.pdf.

Further, Complainants' position means that the Commission, in approving PGE's (and other utilities') standard PPA forms, ignored its directive in Order No. 05-584 that the forms should comply with that order, and abdicated its responsibility to check that they do so. This Court should not hold that the Commission ignored its own responsibilities when it approved PGE's prior standard PPA forms and that the Commission's approval of those forms was meaningless and pointless. The Commission itself, in its response brief, has not taken this extreme position.

As relevant here, after issuing Order No. 05-584, the Commission initiated an exhaustive investigation that lasted 14 months and resolved over 80 separate compliance questions to determine whether utilities' standard contract forms indeed complied with Order No. 05-584. (*See* Docket No. UM 1129, Order No. 06-538 at 1 (Sept 20, 2006), available at https://apps.puc.state.or.us/orders/2006ords/06-538.pdf (describing and resolving "thirty general issues * * * and over eighty separate questions" regarding utility compliance with Order No. 05-584); Docket No. UM 1129, Order No. 07-065 at 1 (approving PGE's compliance filings). In 2005, before the investigation began and immediately after Order No. 05-584, the Commission approved PGE's standard form PPA. (Docket No. UM 1129, Order No. 05-899 at 3 (Aug 9, 2005), available at

https://apps.puc.state.or.us/orders/2005ords/05-899.pdf.) In 2007, after this investigation concluded, the Commission again approved PGE's standard contract forms, which explicitly began the fixed-price at "execution," as complying with Order No. 05-584. (*See* Docket No. UM 1129, Order No. 07-065 at 1.)

Complainants are also incorrect in their assertion that no Commission order acknowledged that PGE's forms began the fixed-price period at execution. (Complainants Resp Br 23.) In Order No. 17-256, as amended by Order No. 17-465, the Commission stated: "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." (ER 3; *see* ER 9.) Thus, the Commission reviewed and approved standard contracts that began the fixed-price period at execution.

III. The Commission acted outside the Commission's delegated discretion because the Commission issued a new policy in a complaint proceeding without notice and contrary to past practice.

A. The Commission issued a new policy in Order No. 17-256.

The Commission contends that it did not issue a generally applicable policy in Order No. 17-256, but instead "ordered a change applicable solely to PGE." (PUC Resp Br 19.) Setting aside the due process concerns with issuing a "policy" that applies to one utility but not the others, by its plain

terms Order No. 17-256 applied to all "[s]tandard contracts, whether prepared by PGE, Idaho Power or PacifiCorp." (ER 4.) Prior to Order No. 17-256, utilities could offer 15 years of fixed prices beginning at execution, and after Order No. 17-256 they could not. Thus, the Commission changed its policy. The Commission observes that Idaho Power and PacifiCorp historically offered standard contracts with longer fixed-price periods, but does not and cannot identify any pre-2017 statement of Commission policy that required those more generous-to-QFs terms. (PUC Resp Br 18.)

B. In issuing a new policy in a complaint proceeding, the Commission departed from prior practice without explanation.

As explained in PGE's opening brief, the Commission impermissibly departed from its prior practice by issuing a new policy in a bilateral complaint proceeding instead of an investigative docket. (Opening Br 33-37.) *See also* ORS 183.482(8)(b)(B) (requiring remand where agency action is "inconsistent with * * * a prior agency practice, if the inconsistency is not explained by the agency."). Neither the Commission nor Complainants respond to this independent basis for remand.

C. The Commission did not give the parties notice that it would issue a new policy.

As explained in PGE's opening brief, the Commission cannot change existing policies in a complaint proceeding without notice. (Opening Br 36-37.) The Commission's complaint statute states "[t]he complaint shall state *all grounds* of complaint on which the complainant seeks relief." ORS 756.500(3) (emphasis added). The Commission can amend the complaint to state new grounds for relief, but only "by order" and after giving the defendant an opportunity to investigate the amendments. ORS 756.500(4). The statute that the Commission cites for the authority to issue a new policy in a complaint proceeding similarly states that the Commission can issue a new policy only "in disposing of a contested case." (PUC Resp Br 20 (citing ORS 183.355(6)).)

The Commission observes that the complaint requested that PGE reform its standard contracts, but ignores that the complaint requested that relief only as part of a complaint that alleged that PGE violated *existing* "orders and policy." (Complainants SER 15.) The Commission "dispos[ed]" of the complaint by correctly interpreting its existing policy as permitting PGE to offer 15 years of fixed prices beginning at execution. After dismissing the complaint, the Commission took the "opportunity" to gratuitously change its policy. (ER 4.) No statute permitted the

Commission to issue a new policy where the complaint only sought an application of existing policy, and the Commission dismissed that complaint.

IV. PURPA does not require that the start date for the fixed-price period begin at the commercial operation date.

In a footnote, Complainants contend that PGE's interpretation of Order No. 05-584 is "inconsistent" with PURPA's implementing regulations. (Complainants Resp Br 22 n 16.) That is not correct, because PURPA granted states wide latitude in implementing PURPA. As the Ninth Circuit has explained, "the states play the primary role * * * in overseeing the contractual relationship between QFs and utilities." *Indep. Energy Producers Ass'n, Inc. v. California Pub. Utils. Comm'n*, 36 F3d 848, 856 (9th Cir 1994) (internal citation omitted). Other states have implemented a wide variety of different rules.

For example, in some states a QF cannot even execute a standard contract containing fixed prices until *after* it has built its facility. *Power Res. Grp., Inc. v. Pub. Util. Comm'n of Texas*, 422 F3d 231, 233 (5th Cir 2005) (upholding Texas rule that a QF cannot execute a standard contract unless it is able to deliver power within 90 days); *Great Divide Wind Farm 2 LLC, Great Divide Wind Farm 3 LLC*, 166 FERC ¶ 61090 (FERC Feb 4, 2019) (stating New Mexico rule that a QF cannot execute a

standard contract until its facility is built and able to interconnect); *see also Mid-S. Cogeneration, Inc. v. Tennessee Valley Auth.*, 926 F Supp 1327, 1336 (ED Tenn 1996) (holding that unbuilt facility could not execute a standard contract under Tennessee's implementation of PURPA). Nothing in PURPA requires that a utility's customers bear the economic cost of paying outdated prices that are fixed three years before the QF builds its facility.

CONCLUSION

This Court should reverse the Commission's Orders and remand for further proceedings, including the filing of revised standard contract forms.

Dated April 2, 2019.

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

The court granted a motion to exceed the length limit for this brief. The order granting that motion was dated April 2, 2019 and permits a brief of up to 5,000 words. I certify that (1) this brief complies with that order and (2) the word count of this brief is 4,873.

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 SUPPLEMENTAL APPENDIX

Division 29- **Regulations Related to Agreements between** Electric Utilities ~~Interconnection with~~ **and** Electric Cogeneration and Small Power Production Facilities
OAR 860-029-0001 Purpose
OAR 860-029-0005 Applicability of rules
OAR 860-029-0010 Definitions for ~~Electric Interconnection~~ **Division 029** Rules
OAR 860-029-0020 Obligations of Qualifying Facilities to Public Utilities
OAR 860-029-0030 Obligations of the Public Utility to the Qualifying Facility
OAR 860-029-0040 ~~Rates~~ **Prices** for Purchase
OAR 860-029-0043 Standard Prices for Purchase
OAR 860-029-0046 Intermittent Resource Integration Charges
OAR 860-029-0050 Rates for Sales
OAR 860-029-0060 Interconnection Costs
OAR 860-029-0070 System Emergencies
OAR 860-029-0080 Electric System Cost Data
OAR 860-029-0085 Standard Avoided Cost Prices
OAR 860-029-0090 Qualifying Cogeneration and Small Power Production Facilities
OAR 860-029-0100 Resolution of Disputes for Proposed Power Purchase Agreements
OAR 860-029-0110 Eligibility for Standard Power Purchase Agreement and Standard Prices
OAR 860-029-0120 Standard Power Purchase Agreements
OAR 860-029-0130 Nonstandard Power Purchase Agreements

	This rule is intended to identify the "effective" date when the obligation to purchase and sell is based on a "legally enforceable obligation" that is not a PPA. If there is the expectation that the QF and utility will execute a PPA after the Commission determines there is a "LEO," the portion of the rule that refers to a date determined by the Commission can be deleted.
~~(10)~~ **(12)** "Electric utility" means a nonregulated regulated utility or a public utility as defined in ORS 758.005. ~~(11)~~ **(13)** "Energy" means electric energy, measured in kilowatt hours (kWh). ~~(12)~~ **(14)** "Energy costs" means: (a) For nonfirm energy, the incremental costs associated with the production or purchase of electric energy by the electric utility, which include the cost of fuel and variable operation and maintenance expenses, or the cost of purchases energy. (b) For firm energy, the combined allocated fixed costs and associated variable costs applicable to a displaced generating unit or to a purchase.	
(15) "Environmental attributes" means any and all claims, credits, benefits, emissions, reductions, offsets, and allowances, resulting from the avoidance of the emission of any gas, chemical or other substance to the soil or water.	**New Subsection (15). "Environmental attributes."** Add definition approved for PacifiCorp's standard contract in Commission Order No. 14-295.
~~(13)~~ **(16)** "Firm energy" means a specified quantity of energy committed by a qualifying facility to an electric utility.	
(17) "Fixed price term" means for qualifying facilities electing to sell firm energy or firm capacity or both, the period of a power purchase agreement that starts on the scheduled commercial operation date and ends on the	**New subsection (17). "Fixed price term."** Add definition to clarify that there can be a term of contract during which fixed prices are

date selected by the qualifying facility, but no more than 15 years after the scheduled commercial operation date.	paid, that is distinct from "total term" (effective date to termination date) and "purchase term." over which the utility pays for output, which includes last five years of 20-year contract with 15-year fixed price term. Staff believes this rule is consistent with the current practice, which is that all utilities do not pay the QF the full avoided cost price for energy/capacity provided to the scheduled commercial operate date. This was the practice prior to the time the Commission issued Order 17-256 re: the 15-year fixed price term, and has been after. (See Idaho Power Agreement: Section 1.42 Defining "Surplus Energy" as "All Net Energy Produced by the Seller's Facility and delivered by the Facility to the Idaho Power electrical system prior to the Operation Date" and Section 7.2 specifying that the "Surplus Energy Price" is 85 percent of a combined market price. PacifiCorp's PPA for small QFs, Section 5.4, QF receives 93 percent of a blended market rate for all net output delivered prior to the "scheduled initial delivery date." At its September 19, 2017 public meeting, the Commission rejected an objection to PGE's form of contract under which PGE does not pay the QF full avoided cost prices for net output delivered prior to the scheduled commercial operate date. The objection was based on assertion that Order No. 17-256 re: the commencement of the 15-year fixed price

	term, meant PGE had to pay fixed prices to QF for net output delivered to PGE prior to scheduled commercial operation date.
~~(14)~~ **(18)** "Index rate" means the lowest avoided cost approved by the Commission for a generating facility for the purchase of energy or energy and capacity of similar characteristics including on-line date, duration of obligation, and quality and degree of reliability. ~~(15)~~ **(19)** "Interruptible power" means electric energy or capacity supplied by a public utility to a qualifying facility subject to interruption by the electric utility under certain specified conditions.	
(20) "Nameplate capacity rating" means the maximum capacity of the qualifying facility as stated by the manufacturer, expressed in kW.	**New subsection (20). "Nameplate capacity rating."**
(21) "Net output" means all energy expressed in kWhs produced by the qualifying facility, less station and other onsite use and less transformation and transmission losses.	**New subsection (21). "Net output."** Add definition to clarify what utilities are required to purchase.
~~(16)~~ **(22)** "Nonfirm energy" means: (a) Energy to be delivered by a qualifying facility to an electric utility on an "as available" basis; [*or*] (b) Energy delivered by a qualifying facility in excess of its firm energy commitment, **or** **(c) Energy delivered by a qualifying facility prior to the scheduled commercial operation date.**	**Subsection (22). "Nonfirm energy."** Modify definition to include energy delivered to utility prior to scheduled commercial operation date to clarify that utility does not pay fixed prices for this energy.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that I served the foregoing **PETITIONER PORTLAND GENERAL ELECTRIC COMPANY'S REPLY BRIEF, AND SUPPLEMENTAL APPENDIX** on April 2, 2019, 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
Steven C. Berman Keil M. Mueller Nadia H. Dahab Stoll Stoll Berne Lockting and Schlachter P.C. 209 SW Oak Street, Suite 500 Portland, OR 97204 *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
Ellen F. Rosenblum Benjamin Gutman Keith L. Kutler 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 REPLY BRIEF, AND SUPPLEMENTAL APPENDIX,** with the Appellate Court Administrator on April 2, 2019, via the Oregon Appellate Court eFiling system

s/ Anna M. Joyce

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