BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

UM 1610

PHASE II

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON, Investigation into Qualifying Facility Contracting and Pricing	)	**RESPONSE TESTIMONY OF JOE BENGA ON BEHALF OF GARDNER CAPITAL SOLAR DEVELOPMENT, LLC**

RESPONSE TESTIMONY OF JOE BENGA ON BEHALF OF GARDNER CAPITAL SOLAR DEVELOPMENT, LLC

July 24, 2015

Q. State your name and business address.

A. Joe Benga, 1414 East Primrose, Suite 100, Springfield, Missouri 65804.

Q. Are you the same Joe Benga that previously provided direct testimony in this docket?

A. Yes, on behalf of Gardner Capital Solar Development, LLC ("Gardner Solar").

Q. What issues do you address in this Response Testimony?

A. As in with direct testimony, Gardner Solar here provides background from a developer perspective for the Commission regarding the issue of when a "legally enforceable obligation" is created and responds to Staff's testimony on this issue. This was listed as Issue No. 8 in the ALJ's March 26, 2015 ruling establishing a procedural schedule for the second phase in Commission Docket UM 1610 ("Phase II"). By not responding to the comments and testimony of other parties, Gardner Solar is not agreeing with their positions.

Q. Do you agree with Staff that OAR 860-029-0010(29) should be changed?

A. Yes. As Staff witness Brittany Andrus notes, the text of this rule as currently formulated implies that a utility must agree in writing as to the creation of a LEO. As I understand it, courts have ruled that this is not an appropriate requirement to determine the date of the creation of a LEO and thus as currently drafted the rule is out-of-date. I agree with Staff that the correct policy, at least in part, would allow that "a LEO can be established upon the QF's execution and tendering of a final executable draft contract, if the utility itself does not timely execute this final draft and create an enforceable PPA." *Staff/500/Andrus/39*.

Q. Staff testimony addresses a situation where a utility has not met the deadlines imposed upon it in the QF contracting process. Do you believe the Commission should address this situation in its rules?

A. Yes. Gardner Solar has directly experienced this situation and is experiencing how the current rules can be used by the utility to squeeze an inappropriate advantage from a developer. As Staff stated, "non-contractual LEOs are intended to prevent a utility from circumventing its obligation to purchase QF power by refusing to enter into a contract with the QF." *Staff/500/Andrus/41*. This is what Gardner Solar is currently experiencing with Idaho Power. Thus I know from firsthand experience that Staff witness Andrus is correct in stating that a "utility's failure to comply with the timelines in its tariff or form of standard contract for entering into a standard contract could circumvent the QF's ability to enter into a PPA." *Id*.

Q. Do you have any comments on Staff's recommendation?

Yes. Staff has recommended as follows: "that the Commission allow QFs the opportunity to establish a LEO earlier in the iterative contracting process described above (utility providing QF contract and QF commenting) if the QF can show that it has provided the information required by the utility's tariff or form of standard contract, the utility has not met the deadlines imposed under its [sic] or form of standard contract for providing draft standard contracts, and the QF is committed to deliver energy on the scheduled commercial on-line date and will be subject to the penalties specified in the form of standard contract for failure to do so." *Staff/500/Andrus/41*.

This is a sensible policy. Gardner Solar further suggests that a mechanism be specified by which the QF would "show" this information. Currently, the only process provided under Commission regulations to make such a showing requires the QF to file a formal complaint alleging the utility's failure to act and seeking appropriate redress. Because of the time and resource consuming nature of the complaint process, the Commission's goals for a process fair to developers and ratepayers could be enhanced by improving this process.

For example, the regulation could state that a LEO will be rebuttably established whenever a developer has filed a statement that (1) it has provided the utility with all information required by the utility's tariff or form of standard contract, that (2) the utility has not met the deadlines imposed under its tariff or form of standard contract, and (3) the developer is committed to deliver energy on a specified commercial operation date and agrees to be subject to any penalties specified in the form of standard contract for failure to do so. The utility should be limited to 10 days to file a responsive pleading providing any contrary evidence, with 5 days allowed for a developer response, followed by a Commission ruling.

Q. Why would such an expedited process be appropriate to this situation?

A. Time is often the enemy of a development project. Utilities know this. Indeed, that is why is so important for the QF contracting process to impose deadlines on the utility in the first place. Further, utilities are full time players in regulatory proceedings and are comfortable with the delays and time frames that typically apply. Having an expedited process applicable for the establishment of a LEO in situations where the utility has not abided by the rules governing the QF contracting process restores an even playing field to the process.

Q. Any other improvements to recommend for the QF contracting process?

A. Yes. Utilities should be required to maintain their standard form QF contract on line, and should only be allowed to make changes to it via Commission order. This will further enhance and speed up both regulatory oversight and the contracting process. To the extent that the Commission or Staff want to ensure that QFs face actual risk in agreeing to the terms of a standard contract via a liquidated damages approach for failure to perform, this would provide an appropriate venue.

Q. Any other comments on Staff's position regarding LEOs?

Yes. I appreciate the balanced approach Staff has taken on this issue. Staff appropriately quoted from the Oregon Court of Appeals: "[t]o permit a utility to delay the date to be used to calculate the purchase price simply by refusing to purchase energy would expose qualifying facilities to risks that we believe Congress and the Oregon Legislature intended to prevent." *Staff/500/Andrus/38* (quoting *Snow Mountain Pine Co. v. Maudlin*, 84 Or. App. 590, 599-600 (1987). While that decision dates from 1987, here in 2015 Gardner Solar is facing the same issue with Idaho Power. Oregon can do better.

Q. Does this conclude your Response Testimony?

A. Yes.

Dated this 24th day of July, 2015.

By */s/ Joe Benga*

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