BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1805

NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, COMMUNITY RENEWABLE ENERGY ASSOCIATION and RENEWABLE ENERGY COALITION, Complainants, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	)	**JOINT REPLY TO PORTLAND GENERAL ELECTRIC COMPANY'S OBJECTION TO THE JOINT PETITION TO INTERVENE OF DAYTON SOLAR I LLC, STARVATION SOLAR I LLC, TYGH VALLEY SOLAR I LLC, WASCO SOLAR I LLC, FORT ROCK SOLAR I LLC, FORT ROCK SOLAR II LLC, ALFALFA SOLAR I LLC, FORT ROCK SOLAR IV LLC, HARNEY SOLAR I LLC, AND RILEY SOLAR I LLC**

I. INTRODUCTION AND SUMMARY

Pursuant to OAR 860-001-0300(5), Dayton Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, Wasco Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Alfalfa Solar I LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, and Riley Solar I LLC (collectively the "NewSun Solar Projects") hereby submit their joint reply to Portland General Electric Company's ("PGE") objection to the NewSun Solar Projects' joint petition to intervene. For the reasons stated in the joint petition to intervene and the reasons stated herein, the Public Utility Commission of Oregon ("Commission" or "OPUC") should grant the joint petition to intervene.

PGE objects to the NewSun Solar Projects' attempt to intervene to ensure reasonable correction of Order No. 17-256 (hereafter "Order"), even though PGE simultaneously confirms

that it plans to use the ambiguities in the Order as a sword against the NewSun Solar Projects. But PGE's arguments are entirely misplaced.

Indeed, PGE's recent filings confirm the basis for the NewSun Solar Projects' significant interest in any proceeding related to the Order, which now include the pending clarification and rehearing requests filed by the Complainants as well as PGE's own untimely request for clarification of the Order contained in its objection (discussed further below). PGE's objection fails to refute the critical points in the joint petition to intervene.

Most notably, PGE overlooks that it is the *Order itself* – not the claims or any relief requested by the Complainants – which has made the NewSun Solar Projects an interested party in this proceeding. The applicable statute, ORS 756.561, therefore fully supports the NewSun Solar Projects' filing of an application for clarification and rehearing or reconsideration.

PGE is also incorrect that ORS 756.525 bars the Commission from granting late intervention. The statute contains no affirmative bar against intervention after the taking of evidence. Additionally, the record did not even contain the 2015 Standard Renewable Contract Form (approved by Order No. 15-289) or the NewSun Solar Project's executed agreements until the NewSun Solar Projects' placed those documents in the record at the time of their intervention filing. Thus, even if the statute bars intervention after the taking of evidence, the joint petition to intervene is not late to the extent that this is a proceeding to address the meaning of previously effective contract forms.

Under the unique circumstances of this case, the Commission should grant late intervention.

II. REPLY TO BACKGROUND

The background section of PGE's objection contains mischaracterizations of the underlying facts supporting intervention. Most significantly, PGE asserts: "Complainants sought such a ruling with regard to all versions of PGE's standard contract forms used by PGE after Order No. 05-584." *PGE's Objection* at 3. This assertion forms the basis of a theme throughout PGE's objection – that the NewSun Solar Projects should have intervened earlier because this was a proceeding to address all prior PGE contract forms and executed contracts instead of a proceeding to address PGE's current practices. PGE is demonstrably wrong.

In fact, the claims in the complaint did not request any binding interpretation of any of PGE's formerly effective contract forms or any executed contracts. The First Claim boiled down to an allegation that "PGE's *current* position is not consistent with the Commission's policy and has obvious detrimental impacts on the ability of QFs to negotiate a contract with PGE that is consistent with Commission policy." *Complaint* at ¶ 50 (emph. added); *see also id.* at ¶¶ 40-45 (regarding PGE's current practices). Likewise, the Second Claim alleged that "PGE's refusal to follow Commission policy that all QFs can obtain 15 years of fixed prices commencing on the Commercial Operation Date is arbitrary, and unjustly harms those QFs who PGE asserts are entitled to 15 years of fixed prices from the Effective Date." *Id.* at ¶ 56. The Prayer for Relief identified no previously effective contract form or any executed contract for which it sought interpretation, and instead focused on PGE's current practices and requested alternative relief that PGE be ordered to correct its current contract form. *Id.* at Prayer for Relief.

The Complainants consistently disavowed the need for a binding interpretation of any

previously effective forms. For example, one summary judgment brief asserted, "Finally, just as with the PaTu and OneEnergy contracts, Complainants *are not asking the Commission to interpret any of PGE's older standard form contracts*. These older form contracts are merely illustrative of PGE's inconsistent views on the Commission's policy and business practices." *Complainants' Reply to PGE's Response to Complaints' Motion for Summary Judgment*, at 12 (filed May 15, 2017) (emph. added). Complainants' position was consistent on this point. *See also Complainants' Response to PGE's Motion for Summary Judgment* at 17 (filed May 8, 2017) (in response to PGE's argument regarding the 2007 contract form, arguing "the Commission simply need not interpret this older contract form in this proceeding, but focus on interpreting its overall policy and current contract forms . . . ."); *id.* at 19 (asserting, "Complainants reiterate that they do not believe that any of PGE's older form PPAs or executed contracts need to be interpreted to resolve this case").

The NewSun Solar Projects provided extensive citations to the record on the same point in their clarification and rehearing filing. *See NewSun Solar Projects' Motion for Clarification and Application for Rehearing* at 4-7 (filed Sept. 8, 2017). PGE appears to argue that NewSun Solar Projects' motion for clarification and application for rehearing or reconsideration is a legal nullity that should be ignored, and therefore the background contained therein is necessary in this reply.

As explained therein, representatives of NewSun Energy, the developer of the NewSun Solar Projects, participated in the prehearing conference on December 22, 2016, because it appeared possible that the scope of this proceeding might be expanded to impact the NewSun

Solar Projects' executed standard contracts. *See ALJ Ruling* at 1 (Dec. 22, 2016). However, to the extent there was any ambiguity previously, the intent *not* to adjudicate the meaning of executed contracts became clear in the comments on the correct procedure. Complainants explained, "Complainants are not requesting that the Commission reform or otherwise impose wholesale contract interpretation on PGE's previously executed standard contracts." *Complainants Comments on Declaratory Ruling Option* at 4 (filed Dec. 29, 2016).

PGE also reiterated its concern regarding a perceived need to interpret existing contracts: "Of particular concern to PGE are ambiguous assertions that the relief requested will involve the interpretation of previously executed standard contracts. The complaint fails to identify the contracts to be interpreted or the language to be interpreted." *PGE's Comments on Declaratory Ruling Option* at 2 (filed Jan. 5, 2017). PGE expressly argued that the Commission could not interpret "*previously executed* standard contracts . . . because Complainants lack standing to seek adjudication of the private rights of contract represented by the executed contracts and because Complainants have failed to join indispensable parties (the QF counterparties to the executed contracts)." *Id.* at 4 (emph. in original).

Administrative Law Judge ("ALJ") Allan Arlow ultimately ruled the case should be processed by complaint procedures because the declaratory ruling statute, ORS 756.450, only allows the Commission to interpret "any rule or statute enforceable by the Commission" and does *not* allow declaratory rulings on the meaning of the Commission's orders. *ALJ Ruling* at 3 (Jan. 19, 2017). Thus, any objective non-party considering whether it should intervene would conclude that the proceeding was a complaint against PGE related to its *current* practices and

currently effective standard contracts, not a declaratory judgement action that one might file to obtain a binding determination of parties' rights under an executed contract prior to a breach of the contract. *See* ORS 28.030. Nor was there any basis to believe the proceeding was targeted at rendering a binding interpretation of any previously available standard contract forms, which PGE had stopped offering to QFs as of the time of the complaint.

Numerous other filings made abundantly clear that no party sought a binding interpretation of any executed standard contracts and that instead the focus of the complaint was on PGE's current practice and the Commission's policy. *See Complainants' Response to PGE's Motion to Strike* at 3 (filed Jan. 24, 2017) ("PGE's Motions incorrectly assume that Complainants seek interpretation of previously executed contracts between specific counter parties when the Complaint makes no such claim."); *id.* at 16 ("The Complaint does not, as PGE's Motions posit, ask the Commission to interpret any of PGE's previously executed contracts and Complainants do not wish to unnecessarily broaden the scope of this proceeding by litigating specific contracts."); *id.* at 17-18 ("To be clear, the Complaint's Prayer for Relief sets out three specific remedies, which PGE correctly understands are tied to success on either of the two claims, and none of which requires interpretation of any parties' individual contracts, 'meeting of the minds,' or intent at the time of signing.").

The Complainants and PGE jointly framed the sole issue in the proceeding as a question of the violation of any statute, rule, or Commission order. The exact question presented was: "Has PGE violated any statute, rule or Commission order regarding when the 15-year fixed price period begins under QF standard contracts?" *Joint Issues Statement*, at Attach. A at 2 (filed

March 10, 2017). PGE itself restated that issue as the sole issue to be resolved by its Motion for Summary Judgment. *See PGE's Motion for Summary Judgment* at 4-5 (filed April 24, 2017). The Joint Issues Statement even states that "[t]his proceeding does not seek any declarations interpreting or otherwise declaring the rights of the parties to PGE's executed standard contracts." *Joint Issues Statement*, at Attach. A at 2 (filed March 10, 2017).

If everyone agrees that the proceeding did not regard interpretation of PGE's executed standard contracts, the issue of the meaning of previously available contract forms could have no relevance either. The Complainants did not ask for a declaratory judgment on the meaning of PGE's previously available standard contract forms, and PGE filed no counter claims or other pleadings bringing such a claim or request for declaratory judgment into the proceeding. In sum, PGE's assertion in its objection (at p. 3) – that "Complainants sought . . . a ruling with regard to all versions of PGE's standard contract forms used by PGE after Order No. 05-584" – is unfounded and incorrect.

III. REPLY ARGUMENT

A. PGE Fails to Refute that If the Order Is Made Against the NewSun Solar Projects, ORS 756.561 Entitles the NewSun Solar Projects to Apply for Rehearing or Reconsideration

The joint petition to intervene explains that the Order itself has effectively made the NewSun Solar Projects parties to this proceeding, to the extent that it is issued against the NewSun Solar Projects by interpreting their contracts or the previously effective contract form upon which their contracts are based. *See NewSun Solar Projects' Petition to Intervene* at 6-7, ¶ 12. In short, the petition argues, "Although the NewSun Solar Projects perceived no reason to

intervene in this proceeding previously, the order itself appears to possibly make the NewSun Solar Projects a 'party thereto', i.e. a party to the order, and even possibly a 'party against whom the order has been made,' to the extent that its ambiguous language purports to interpret the NewSun Solar Projects' binding and fully executed contracts." *Id.* (quoting ORS 756.561(1) & (2)). Accordingly, "granting this petition to intervene to allow the NewSun Solar Projects' participation in proceedings on clarification and rehearing would be a mere formality in recognition of the fact that the order could be construed to have already made the NewSun Solar Projects parties to this proceeding." *Id.*

PGE fails to respond to this argument, *see PGE's Objection* at 15-16, and thereby effectively concedes that where a final order by the Commission is specifically directed at a non-party, basic logic and due process dictate that the affected non-party becomes a party to the order with the right to apply for reconsideration or rehearing. That right is consistent with the undisputed right elsewhere in the statutory scheme for such affected non-parties to challenge the order on judicial review. *See* ORS 183.480(1).

The text of ORS 756.561 supports the NewSun Solar Projects' right to ask for rehearing or reconsideration of the Order. In full, it provides:

> (1) 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 service of such order. The commission may grant such a rehearing or reconsideration if sufficient reason therefor is made to appear.
>
> (2) No such application shall excuse *any party against whom an order has been made* by the commission from complying therewith, nor operate in any manner to stay or postpone the enforcement thereof without the special order of the commission. * * * *

ORS 756.561 (emph. added). The dispute here concerns the intended meaning of the phrase "any party thereto" in subsection (1). PGE argues that "any party thereto" means any party to *the proceeding*. But the better reading is that "any party thereto" also includes any party to *the order*, such as the persons identified in subsection (2) as "*any party against whom an order has been made*." *Id.* (emph. added). Put simply, if an order can be made against a person that was not previously a party to the proceeding (as PGE argues in this case), then such person is *a party to the order* and thus allowed to file an application for rehearing or reconsideration of the order.[1]

It would be incongruent and lead to an absurd result to apply the statutes to allow an affected non-party to challenge the order on judicial review, *see* ORS 183.480(1), without providing that same affected non-party the opportunity to first alert the Commission itself to the problem through an application for reconsideration or rehearing. The Oregon courts give effect to all provisions of a statutory scheme and interpret statutes to avoid an absurd result. *See* ORS 174.010 (in construing statutes, "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all"); *Peters v. McKay*, 195 Or. 412, 440, 238 P.2d 225, 237 (1951) ("This court has frequently held that a statutory construction which would lead to unreasonable or absurd results should be avoided."). PGE's interpretation of ORS 756.561 fails to do so. In contrast, the NewSun Solar Projects' construction allows for more efficient correction of Commission orders and reduction of litigation for all parties.

[1] Another reasonable interpretation is that the Commission cannot issue an order against a non-party to the proceeding, and the Order here has no legal effect as to previously effective contract forms because no counter parties to those contracts were made parties to this proceeding. But that is not PGE's argument.

In addition, PGE confirms the existence of the precise harm that caused the NewSun Solar Projects' to petition to intervene. PGE's interpretation of the Order is that the Order is an affirmative ruling on the meaning of the NewSun Solar Projects' contracts or at least the previously effective standard contract form underlying them. *See PGE's Objection* at 7-8 & 13 (arguing the Order already addressed the 2015 Standard Renewable Contract Form in PGE's favor). In effect, therefore, PGE argues that the NewSun Solar Projects are "part[ies] against whom the order has been made," who may not ignore the Order under ORS 756.561(2). It is without merit for PGE to also simultaneously argue that the NewSun Solar Projects are not also "parties thereto" under ORS 756.561(1), who may file an application for reconsideration or rehearing of the Order under the statute.

PGE itself argued in this proceeding that counter parties to PGE's previously effective standard contracts would become "indispensable parties" in a proceeding to interpret such executed contracts. *PGE's Comments on Declaratory Ruling Option* at 4 (filed Jan. 5, 2017). To elaborate on PGE's argument, Oregon law generally requires that a person be joined in an action as a necessary party if that person "claims an interest relating to the subject of the action and is so situated that the disposition in that person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest," among other reasons. ORCP 29A. The necessary party is an indispensable party, requiring dismissal of the action, if such party cannot be joined and, among other factors, judgment cannot be modified so as not to impact that parties' interests. ORCP 29B; *see also Waxwing Cedar Prods. v. C & W Lumber Co*., 44 Or. App. 167, 170-71, 605 P.2d 719 (1980) (holding that "trial court should have acted on its own

motion" to join party to assignment agreement in action to determine meaning of "necessarily interrelated" sale agreement); *Herald Pub. Co. v. Klamath News Pub. Co*., 116 Or. 62, 68-69, 240 P. 244 (1925) (Belt, J., concurring) (collecting cases).

Thus, PGE raised a valid concern – that is, *if* the Complainants sought a binding interpretation of the previously effective contract forms, the Commission would need to consider whether the action had to be dismissed or the relief at issue modified so as not to affect non-parties who had executed those contract forms. Of course, in response to PGE's arguments, the Complainants emphatically clarified that their complaint did not seek an interpretation of any of PGE's previously effective contract forms – negating the need for the Commission to even determine if there were additional necessary or indispensable parties, which it never did. The Complainants' claims and arguments are not the source of the ambiguity that implicated NewSun Solar Projects' interest. Instead, it is the *Order*, and PGE's sweeping interpretation of it, that created ambiguity and that implicated the NewSun Solar Projects' interest.

In short, whatever the Commission's intent was when it wrote the Order, it is now obvious that the Order should be clarified and that the NewSun Solar Projects have properly brought the issue to the Commission's attention in good faith instead of proceeding directly to a petition for judicial review, as PGE appears to assert is the only option available in the statutes.

B. The Commission Has Authority to Grant Intervention

PGE is incorrect to suggest that the Commission lacks statutory authority to grant intervention to the NewSun Solar Projects. To the contrary, the statute requires that intervention be granted under the circumstances here, absent a complete clarification of the Order that

disclaims any interpretation of the 2015 Standard Renewable Form Contract.

PGE relies on ORS 756.525(1), which merely states the Commission "*may* permit any person to become a party who might, on the institution of the proceeding, have been such a party, if application therefor is made before the final taking of evidence in the proceeding." (emph. added). But this use of the word "may" is not a statutory bar of the Commission's authority to grant intervention under other circumstances. Subsection (2) of that section provides: "The commission shall determine the interest of the applicant in the proceeding and *shall* grant the application, subject to appropriate conditions, if the commission determines that such appearance and participation will not unreasonably broaden the issues or burden the record, and *otherwise may deny the application*." ORS 756.525(2) (emph. added). Read together, these subsections of the statute provide the Commission with the mandatory obligation to grant intervention in certain circumstances and state the Commission "may deny the application" if those circumstances are not met, presuming there is some non-arbitrary basis to deny intervention. *Id.* But the statute contains no mandatory directive divesting the Commission's authority to grant a petition to intervene, especially under the circumstances here.

Additionally, as noted elsewhere in this reply and in the joint petition to intervene, the NewSun Solar Projects' "appearance and participation will not unreasonably broaden the issues or burden the record" beyond the issues first implicated by the Order itself and subsequently implicated by the clarification and rehearing filings by the original parties. ORS 756.525(2). Thus, under ORS 756.525(2), the Commission "shall" grant petition to intervene under the circumstances here.

Furthermore, PGE's collective arguments do not fit within the statutory scheme. On the one hand, PGE asserts that the Order construes the NewSun Solar Projects' contracts or at least the contract form from which they arose. But on the other hand PGE provides no basis to conclude the Commission has completed the "taking of evidence" regarding those contracts, as contemplated in ORS 756.525. Prior to issuance of the Order, the record did not even contain the 2015 Standard Renewable Contract Form (approved by Order No. 15-289) or the version of Schedule 201 in effect at the time that contract form was available. PGE submitted a limited amount of its previously effective contract forms into the record, but it did not submit the renewable contract forms in effect between the issuance of Order No. 14-435 on December 16, 2014, and the issuance of Order No. 16-377 on October 11, 2016. *See PGE's Motion for Summary Judgment* (filed April 24, 2017) (including six attachments that do not include the 2015 Standard Renewable Contract Form or any agreement with the same terms as that form). Complainants did not submit the 2015 Standard Renewable Contract Form into the record either. As discussed in the NewSun Solar Projects' application for rehearing and reconsideration, the 2015 Standard Renewable Contract Form was highly distinguishable from the contract forms PGE addressed in its briefing in this proceeding. *See NewSun Solar Projects' Motion for Clarification and Application for Rehearing* at 18-29 (filed Sept. 8, 2017).

If PGE truly sought a binding interpretation of the 2015 Standard Renewable Contract Form, it should have at least placed that form in the record. An agency's decisions must be based upon the record compiled in the proceeding. *See* ORS 756.558(2) (stating the Commission "shall prepare and enter findings of fact and conclusions of law *upon evidence received*" (emph.

added)). It is hard to understand how the Commission's Order could interpret a contract that is not even contained in the record when Oregon law requires the Commission to limit its considerations to evidence in the record. Thus, to the extent the Order construes the 2015 Standard Renewable Contract Form or the NewSun Solar Projects' executed versions of it (as PGE asserts), the record was incomplete until those documents were supplemented into the record through the NewSun Solar Projects' petition to intervene and motion for clarification and application for rehearing or reconsideration.

PGE cannot have it both ways. If this proceeding was in fact a proceeding to adjudicate the meaning of the 2015 Standard Renewable Contract Form, the "taking of evidence" on the 2015 Standard Renewable Contract Form was not complete until the time of the filing of the joint petition to intervene when that form was placed in the record. Thus, the joint petition cannot be untimely under ORS 756.525 if this is in fact now a proceeding to address the 2015 Standard Renewable Contract Form.

PGE also relies upon Order No. 08-016, where the Commission denied a petition to intervene after the final order, but that order is distinguishable from the circumstances here. First, PGE fails to acknowledge that Order No. 08-016 actually *clarified* the meaning of the order challenged by the late intervenor in a manner that effectively mooted the objections voiced by the request to intervene late for reconsideration of the order. *See* Order No. 08-016 at 5. Thus, that case has no applicability here unless the Commission actually clarifies the Order in a manner that nullifies the NewSun Solar Projects' interest in the proceeding – that is, by clarifying the Order did *not* interpret either the 2015 Standard Renewable Contract Form or any

of the NewSun Solar Projects' executed contracts.

Moreover, in Order No. 08-016, the late interveners were directly encouraged to intervene in the proceeding by a letter from the Administrative Law Judge to their counsel. *Id.* at 2-3. In contrast here, the NewSun Solar Projects had no similar notice that the Order would address their contracts because the original parties' filings expressly requested the Commission not provide a legal interpretation of the fully executed agreements or any previously effective contract forms. PGE points to the Commission's pro forma "Notice of Expedited Prehearing Conference" issued in the docket on December 20, 2016, as the basis for PGE's assertion that the Commission "encouraged" the NewSun Solar Projects to intervene. *See PGE's Objection* at 4 & n.12. This assertion is far off the mark. The Commission's pro forma notice issued generally to its docket sheet for the case stated as follows:

> The purpose of the prehearing conference will be to identify parties and establish a procedural schedule. The Commission strongly encourages any person wanting to participate as a party in these proceedings to file a petition to intervene before the prehearing conference. *See* OAR 860-001-0300. Petitions to intervene received before the prehearing conference may be ruled upon during the conference. A form petition to intervene can be found online at: http://www.puc.state.or.us/Pages/admin_hearings/Petition_to_Intervene_Form.aspx

That is highly distinguishable from a letter sent by the ALJ in Order No. 08-016 directly to counsel for the late intervenor specifically inviting their participation.

The NewSun Solar Projects agree they had actual notice of the proceeding. But as noted above, any reasonable person following this proceeding would have concluded that Complainants did not request any determination of the meaning of any previously available standard contract forms or executed agreements. Intervening and actively participating in

Commission complaint proceedings is not without cost, and doing so when the claims in the complaint do not directly affect one's interests is a waste of everyone's resources. Indeed, doing so would undermine the Complainants' own obvious efforts to narrowly frame their prospectively pled claims to streamline the processing of their complaint without engaging in a more costly and protracted proceeding that would have resulted if every QF that has ever executed a standard contract with PGE had intervened.

In addition, there is no statutory basis for the Commission to entertain a complaint against PGE for violations of law or policy contained in its previously effective contract forms – once the contract form is superseded by a next version of the contract form, any violation would cease and be moot. Not surprisingly, therefore, none of the claims in the complaint sought a declaratory judgment on previously effective contract forms, as noted above. The issue of the meaning of previously effective forms was not put before the Commission by Complainants, who instead expressly disavowed any assertion of such claim repeatedly and forcefully. The previously effective contract forms are not even all contained in the record.

Therefore, the NewSun Solar Projects have not "laid in the weeds" while Complainants litigated the meaning of the NewSun Solar Projects' contracts by proxy, as PGE asserts. *See PGE's Objection* at 7. They decided not to intervene in a complaint proceeding where the Complainants expressly requested that the Commission not address the meaning of NewSun Solar Projects' executed agreements or the form contract underlying those agreements. The equities are in fact exactly the opposite of PGE's assertions. Denial of an intervention seeking to limit PGE's ability to use the Order as weapon against the NewSun Solar Projects would be an

abuse of process and the rights of the NewSun Solar Projects.

In any event, even if PGE were correct that ORS 756.525 mandates denial of intervention, the NewSun Solar Projects would still have the right to seek rehearing or reconsideration under ORS 756.561 for the reasons explained in the previous section. As noted above, under PGE's construction of the Order, the NewSun Solar Projects are already parties to whom the Order is directed. Thus, the Commission would still have to address the NewSun Solar Projects' motion for clarification and application for rehearing or reconsideration. PGE's opposition to intervention is a meaningless procedural objection.

C. Granting the NewSun Solar Projects' Intervention Would Not Broaden the Issues

PGE next incorrectly asserts that granting intervention to the NewSun Solar Projects would broaden the issues in this proceeding. *See PGE's Objection* at 11-12. As explained previously, it is the Order that unreasonably broadened the issues beyond what the Complainants asked the Commission to address, at least as PGE construes the Order.

PGE argues this was a proceeding to render sweeping interpretations of all of PGE's prior standard contract forms, asserting "[i]t is clear that the complaint sought a ruling on whether PGE's current and prior standard contract forms provided for fixed prices for 15 contract years from contract execution or from commercial operation." *See PGE's Objection* at 14. That assertion is incorrect. It contradicts numerous prior filings in this proceeding, quoted above in detail. *See NewSun Solar Projects' Motion for Clarification and Application for Rehearing* at 4-7 (filed Sept. 8, 2017) (detailing PGE's prior filings); *Complainants' Motion for Clarification and Application for Rehearing or Reconsideration* at 5-6 (filed Sept. 11, 2017) (same). It also

contradicts the fact that those previously available contract forms are not even all contained in the record.

Additionally, given that Complainants clarified that their complaint sought no such interpretation of previously effective contract forms or any executed contracts, the only way PGE could have brought those issues into the case would have been to file its own claims against the counter parties to all of those prior contracts, including the NewSun Solar Projects. *See* ORCP 29 (joinder of persons needed for just adjudication). PGE brought no such counter claims, cross claims, or interpleader claims against the NewSun Solar Projects. The reality is that the Order included ambiguities which PGE now admits it wants to exploit and that therefore vastly broadened the scope of this proceeding beyond what either the Complainants or PGE could have asked for without filing additional claims and naming additional parties. The intervention of the NewSun Solar Projects will not broaden the issues any further than the Order already did.

PGE cannot obtain the result it seeks for the additional reason that the Complainants filed a motion for clarification and rehearing or reconsideration that raises the same substantive issues as the one filed by the NewSun Solar Projects. *See PGE's Objection* at 16-17 (acknowledging this fact). Therefore, intervention of the NewSun Solar Projects could not possibly broaden the issues beyond the issues contained in the filings by the original parties to this proceeding. Instead, it would simply allow the NewSun Solar Projects to protect their interests which are now implicated by PGE's interpretation of the Order.

D. PGE Concedes the Need for Clarification

Incredibly, PGE's objection appears to agree that the Order should be clarified.

Specifically, PGE acknowledges "it is possible that parties to a specific executed contract have inserted language in the exhibits or in the blank spaces of the form contract that provides for fixed prices for 15 years measured from commercial operation" and further acknowledges this is in fact the case for the OneEnergy contract. *PGE's Objection* at 13. However, it is undisputed the Order contains no such limiting language. Acknowledging this problem, PGE tries to recast the appropriate clarification as a much more limited clarification than would be necessary to fully correct the Order. PGE's objection requests that clarification be limited to a new order that still states the Commission intended to interpret all prior contract *forms*, but did not interpret any executed versions of the previously effective forms. *See id.* at 17-18.

First of all, PGE's request for clarification in its objection to intervention is procedurally improper. PGE did not itself seek clarification within the 60-day deadline to file for clarification or rehearing, and therefore it cannot re-write and narrow the requests for clarification and rehearing that were timely filed, as it attempts to do in its objection.

In any case, however, PGE's untimely request for clarification is telling. Clarification is obviously necessary, as PGE appears to agree, but PGE's proposed clarification order would still contain errors of law if it were to rule that the 2015 Standard Renewable Contract Form "provides for 15 years of fixed prices measured from contract execution," as PGE now requests. *See id.* at 17. The NewSun Solar Projects demonstrated why such a conclusion would be wrong as a matter of law in their timely application for rehearing or reconsideration, arguments which the Complainants incorporated into their own timely rehearing filing. *See NewSun Solar Projects' Motion for Clarification and Application for Rehearing* at 15-32 (filed Sept. 8, 2017).

Moreover, PGE's clarification requires the Commission to rule that it affirmatively adjudicated the meaning of standard contract forms that were not even contained the record, which the Order cannot lawfully do. The Commission should not grant PGE's more limited clarification because it would be an incomplete clarification that would leave errors in the Order.

In sum, PGE's apparent concession is important because it demonstrates the Order is in fact flawed and contains ambiguities that should concern all interested parties, including the Commission. As such, PGE's own request for clarification only further supports the NewSun Solar Projects' interest in the proceedings to obtain correction of the Order.

IV. CONCLUSION

The Commission should grant the joint petition to intervene of the NewSun Solar Projects.

Dated October 2, 2017.

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