

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1877-UM 1882, UM 1884-UM 1886, UM 1888-UM 1890**

In the Matters of

BOTTLENOSE SOLAR, LLC;  
VALHALLA SOLAR, LLC;  
WHIPSNAKE SOLAR, LLC;  
SKYWARD SOLAR, LLC;  
LEATHERBACK SOLAR, LLC; PIKA  
SOLAR, LLC; COTTONTAIL SOLAR,  
LLC; OSPREY SOLAR, LLC; WAPITI  
SOLAR, LLC; BIGHORN SOLAR,  
LLC; MINKE SOLAR, LLC; HARRIER  
SOLAR, LLC,

Complainants,

v.

PORTLAND GENERAL ELECTRIC  
COMPANY,

Defendant.

COMPLAINANTS' CROSS-  
MOTION FOR SUMMARY  
JUDGMENT

ORAL ARGUMENT REQUESTED

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## I. INTRODUCTION

Bottlenose Solar, LLC, Valhalla Solar, LLC, Whipsnake Solar, LLC, Skyward Solar, LLC, Leatherback Solar, LLC, Pika Solar, LLC, Cottontail Solar, LLC, Osprey Solar, LLC, Wapiti Solar, LLC, Bighorn Solar, LLC, Minke Solar, LLC, and Harrier Solar, LLC (collectively “Complainants”) submit this Cross-Motion for Summary Judgment in opposition to Portland General Electric Company’s (“PGE”) Motion for Summary Judgment.<sup>1</sup> The Oregon Public Utility Commission (the “Commission” or “OPUC”) should deny PGE’s motion, and instead grant summary judgment to the Complainants.

These complaints are a quintessential example of the need and purpose for the concept of legally enforceable obligations (“LEO”) under the Public Utility Regulatory Policies Act (“PURPA”). Federal and state law allow a qualifying facility (“QF”) to determine the date upon which the QF commits itself to sell its energy and capacity to the utility and to “lock in” the then-current avoided cost rates. At its core, a QF has the power to determine the date for which avoided costs are calculated by simply tendering an agreement that obligates it to provide power. Neither a utility nor a state commission can impose restrictions or processes that have the practical effect of delaying the contract negotiation process so that a later and lower avoided cost is applicable.

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<sup>1</sup> In order to reduce the amount of pleadings and volume of documents the Commission needs to review in this proceeding, this Cross-Motion for Summary Judgment is substantially the same as the Complainants’ Response to PGE’s Motion for Summary Judgment filed on March 9, 2018. The differences are: 1) the title of the document has been changed; 2) an additional paragraph at the end of the introduction regarding alternative relief regarding eligibility for the post-June 1 and pre-September 18, 2017 rates; 3) revised dates in the background section; 4) a formal motion in Section IV; and 5) a revised conclusion.

The Complainants passed key steps that the Federal Energy Regulatory Commission (“FERC”) and the OPUC have determined are relevant and minimally sufficient to form a LEO. They all had undertaken the contracting process, and negotiations progressed beyond initial contact by a QF. In most instances, negotiations had passed almost six months before avoided cost rates were reduced by the OPUC, effective on June 1, 2017. The Complainants executed standard contracts that included key terms and conditions, including a scheduled commercial on-line date, information regarding their minimum and maximum annual deliveries, and obligating themselves to provide power or be subject to penalty for failing to deliver energy on the scheduled commercial on-line date. The Complainants requested that PGE process its application in a timely manner so that they would be eligible for the then current avoided cost rates. The Complainants all would have processed their applications more quickly had they been aware that PGE would request an early avoided cost rate effective date or if PGE had met with them to discuss their applications. PGE would also have the Commission ignore its delays, unreasonable requests for information, refusals to communicate or meet, and surprise regulatory filings.

PGE’s position is simple: that the requirements in its Schedule 201 are all that is required to establish a LEO and that Complainants have not followed them so they are not entitled to a LEO. As explained further below, not only have Complainants followed PGE’s Schedule 201 requirements, but that any rigid interpretation of those requirements would be invalid under the FERC and the Commission’s standards.

However, PGE’s arguments are simply irrelevant. The Schedule 201 contract negotiation process may not operate as a rigid series of obstacles and hurdles that the utility can use to prevent a QF from forming a LEO. Schedule 201 was instead designed to facilitate negotiations

and prevent a utility from (rather than using it as an excuse for) unreasonably delaying the process. PGE's role should be limited to an administrative function of processing the PPA request and verifying that the QF has provided sufficient information to qualify for a contract. Schedule 201 and its administrative process cannot be used to limit the methods through which a LEO may be created so that a later and lower avoided cost rate becomes effective. For example, FERC's and the Commission's policies cannot be read to mean that whether a QF can establish a LEO turns on whether a utility tariff provides the utility with 10 business days rather than 15 business days to provide the QF with a draft PPA. In the end, PGE cannot be allowed to hide behind the Schedule 201 process to run out the clock and prevent QF from forming a LEO before an impending rate decrease.

Finally, while the Complainants are eligible for the pre-June 1, 2017 rates, the Complainants at a minimum are entitled to the post-June 1 and pre-September 18, 2017 rates. PGE disagrees, but should not be allowed to use the delays associated with a protracted legal dispute to force the Complainants to be eligible to be paid the avoided cost rates in effect at the time their dispute is resolved by the Commission. The Complainants intend to file amended complaints explicitly requesting this alternative relief.

## **II. BACKGROUND**

Complainants filed their complaints between August 7, 2017 and August 14, 2017, and PGE filed its answers between October 11, 2017 and October 18, 2017. These cases are being handled jointly, but they have not been formally consolidated. PGE filed a Motion for Summary Judgment on January 24, 2018. On March 20, 2018, Administrative Law Judge ("ALJ") Allan Arlow held a prehearing conference and set April 6, 2018 as the first date by which

Complainants could file a Cross-Motion for Summary Judgment to PGE’s Motion. This is that Cross-Motion for Summary Judgment.

### III. FACTS

Each of the projects at issue in these cases are QFs under PURPA, and each of the PPAs at issue are Standard offer PPAs. Based on information known at this time, Complainants first contacted PGE regarding the QF projects at issue in these cases and committed to sell power under the then-current rates on the following dates:

**TABLE A**

<b>Project</b>	<b>Date of First Contact<sup>2</sup></b>
Valhalla	4/20/2017
Skyward	4/20/2017
Cottontail	3/22/2017
Osprey	3/22/2017
Wapiti	3/22/2017
Bighorn	12/8/2016
Minke	12/8/2016
Harrier	12/8/2016
Bottlenose	12/8/2016
Whipsnake	12/8/2016
Leatherback	12/8/2016
Pika	12/8/2016

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<sup>2</sup> For Valhalla see Docket No. UM 1878, Complaint and Answer at ¶ 9; for Skyward see Docket No. UM 1880, Complaint and Answer at ¶ 9; for Cottontail see Docket No. UM 1884, Complaint and Answer at ¶ 9; for Osprey see Docket No. UM 1885, Complaint and Answer at ¶ 9; for Wapiti see Docket No. UM 1886, Complaint and Answer at ¶ 9; for Bighorn, Minke, and Harrier see Declaration of James Ortega in Support of Response to Motion for Summary Judgment (hereafter “Declaration of James Ortega”); and for Bottlenose, Whipsnake, Leatherback, and Pika see Declaration of Chris Norqual in Support of Response to Motion for Summary Judgment (hereafter “Declaration of Chris Norqual”).

Complainants each made unequivocal commitments to sell power to PGE on all the following dates:

**TABLE B**

<b>Project</b>	<b>Date(s) of Commitment</b>
Valhalla <sup>3</sup>	4/20/17, 5/23/17, 5/26/17, 5/31/17, 8/2/17
Skyward <sup>4</sup>	4/20/17, 5/23/17, 5/26/17, 5/31/17, 8/2/17
Cottontail <sup>5</sup>	5/23/17, 5/31/17, 8/2/17
Osprey <sup>6</sup>	5/23/17, 5/31/17, 8/2/17
Wapiti <sup>7</sup>	5/23/17, 5/31/17, 8/2/17
Bighorn <sup>8</sup>	12/8/16, 5/23/17, 5/31/17, 8/11/17
Minke <sup>9</sup>	12/8/16, 5/23/17, 5/31/17, 8/11/17
Harrier <sup>10</sup>	12/8/16, 5/23/17, 5/31/17, 8/11/17
Bottlenose <sup>11</sup>	12/8/16, 4/27/17, 5/23/17, 5/24/17, 5/30/17, 5/31/17, 8/2/17
Whipsnake <sup>12</sup>	12/8/16, 4/27/17, 5/23/17, 5/24/17, 5/30/17, 5/31/17, 8/2/17
Leatherback <sup>13</sup>	12/8/16, 4/27/17, 5/23/17, 5/24/17, 5/30/17, 5/31/17, 8/2/17
Pika <sup>14</sup>	12/8/16, 4/27/17, 5/23/17, 5/24/17, 5/30/17, 5/31/17, 8/2/17

<sup>3</sup> Valhalla Solar v. PGE, Docket No. UM 1878, Complaint at ¶¶ 9, 66; Declaration of Chris Norqual at Attachments A, G, and I.

<sup>4</sup> Skyward Solar v. PGE, Docket No. UM 1880, Complaint at ¶¶ 9, 60; Declaration of Chris Norqual at Attachments B, G, and I.

<sup>5</sup> Cottontail Solar v. PGE, Docket No. UM 1884, Complaint at ¶¶ 9, 55.

<sup>6</sup> Osprey Solar v. PGE, Docket No. UM 1885, Complaint at ¶¶ 9, 54.

<sup>7</sup> Wapiti Solar v. PGE, Docket No. UM 1886, Complaint at ¶¶ 9, 55.

<sup>8</sup> Bighorn Solar v. PGE, Docket No. UM 1888, Complaint at ¶ 51; Declaration of James Ortega at Attachments A.

<sup>9</sup> Minke Solar v. PGE, Docket No. UM 1889, Complaint at ¶ 51; Declaration of James Ortega at Attachment B.

<sup>10</sup> Harrier Solar v. PGE, Docket No. UM 1890, Complaint at ¶ 51; Declaration of James Ortega at Attachment C.

<sup>11</sup> Bottlenose Solar v. PGE, Docket No. UM 1877, Complaint at ¶¶ 22, 77; Declaration of Chris Norqual at Attachments C, H and J.

<sup>12</sup> Whipsnake Solar v. PGE, Docket No. UM 1879, Complaint at ¶¶ 22, 77; Declaration of Chris Norqual at Attachments D, H, and J.

<sup>13</sup> Leatherback Solar v. PGE, Docket No. UM 1881, Complaint at ¶¶ 22, 77; Declaration of Chris Norqual at Attachments E, H, and J.

<sup>14</sup> Pika Solar v. PGE, Docket No. UM 1882, Complaint at ¶¶ 22, 77; Declaration of Chris Norqual at Attachments F, H, and J.

The material terms of the PPAs were finalized when each Complainant indicated that it agreed to the draft PPA and requested an executable PPA, even if there were some minor changes requested.<sup>15</sup> The draft contracts that Complainants agreed to and executed in these cases all include the material terms that the Commission looks for: a scheduled commercial on-line

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<sup>15</sup> Bottlenose Solar v. PGE, Docket No. UM 1877, Complaint at ¶ 40 (“On May 23, 2017, Bottlenose Solar requested execution copies of the draft PPA with four changes ... [that] Bottlenose Solar believed ... would not constitute substantive changes to PGE’s draft PPA.”); Valhalla Solar v. PGE, Docket No. UM 1878, Complaint at ¶ 27 (On May 23, 2017, Valhalla Solar requested “execution copies of the draft PPA with five changes ... [that] Valhalla Solar believed ... would not constitute substantive changes to PGE’s draft PPA.”); Whipsnake Solar v. PGE, Docket No. UM 1879, Complaint at ¶ 40 (“On May 23, 2017, Whipsnake Solar requested execution copies of the draft PPA with four changes ... [that] Whipsnake Solar believed ... would not constitute substantive changes to PGE’s draft PPA.”); Skyward Solar v. PGE, Docket No. UM 1880, Complaint at ¶ 27 (On May 23, 2017, Skyward Solar requested “execution copies of the draft PPA with five changes ... [that] Skyward Solar believed ... would not constitute substantive changes to PGE’s draft PPA.”); Leatherback Solar v. PGE, Docket No. UM 1881, Complaint at ¶ 40 (“On May 23, 2017, Leatherback Solar requested execution copies of the draft PPA with four changes ... [that] Leatherback Solar believed ... would not constitute substantive changes to PGE’s draft PPA.”); Pika Solar v. PGE, Docket No. UM 1882, Complaint at ¶ 40 (“On May 23, 2017, Pika Solar requested execution copies of the draft PPA with four changes ... [that] Pika Solar believed ... would not constitute substantive changes to PGE’s draft PPA.”); Cottontail Solar v. PGE, Docket No. UM 1884, Complaint at ¶ 31 (“On May 23, 2017, Cottontail Solar requested execution copies of the May 16 draft with two minor edits ... [and] indicated that its intention for revising the change requests was to avoid any substantive updates and proceed with executable PPAs the same week.”); Osprey Solar v. PGE, Docket No. UM 1885, Complaint at ¶ 30 (“On May 23, 2017, Osprey Solar requested execution copies of the May 16 draft with two minor edits ... [and] indicated that its intention for revising the change requests was to avoid any substantive updates and proceed with executable PPAs the same week.”); Wapiti Solar v. PGE, Docket No. UM 1886, Complaint at ¶ 31 (“On May 23, 2017, Wapiti Solar requested execution copies of the May 16 draft with two minor edits ... [and] indicated that its intention for revising the change requests was to avoid any substantive updates and proceed with executable PPAs the same week.”); Bighorn Solar v. PGE, Docket No. UM 1888, Complaint at ¶ 31 (“On May 23, 2017, Bighorn Solar requested an executable PPA.”); Minke Solar v. PGE, Docket No. UM 1889, Complaint at ¶ 31 (“On May 23, 2017, Minke Solar requested an executable PPA.”); Harrier Solar v. PGE, Docket No. UM 1890, Complaint at ¶ 31 (“On May 23, 2017, Harrier Solar requested an executable PPA.”).



date and the QF's minimum and maximum annual deliveries. Any proposed differing or new terms sent by Complainants were immaterial and did not qualify Complainants unequivocal commitment to sell their output to PGE.<sup>16</sup>

Complainants expected PGE to process their PPA requests more expeditiously and without making regulatory filings designed to prevent them from executing contracts. One project developer, Cypress Creek Renewables, that has been involved in whole or in in part in some of these cases previously negotiated PPAs with PGE that took only 27 business days from initial contact to PGE providing an executable Standard PPA.<sup>17</sup>

PGE also made filings seeking early or expedited consideration while in negotiation with Complainants and without informing Complainants of its intent to do so (even though PGE was well aware that Complainants' projects would be materially affected by those requests and the Complainants had requested that PGE process their applications expeditiously to be eligible for the then current rates). PGE filed its annual avoided cost update on May 1, 2017 and sought an effective date of May 17, 2017 for the new avoided cost prices.<sup>18</sup> PGE planned to request an early effective date well in advance of May 1.<sup>19</sup> PGE did not inform any of the Complainants

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<sup>16</sup> See e.g., Bottlenose Solar v. PGE, Docket No. UM 1877, Complaint at Attachment A (Bottlenose Solar's partially executed PPA).

<sup>17</sup> See Motion to Supplement Complainants' Motion to Compel at 4 (Feb. 9, 2018) (initial contact was on December 15, 2015 and PPAs were executed on January 25, 2016).

<sup>18</sup> PGE Application to Update Schedule 201 Qualifying Facility Information, Docket No. UM 1728, Order No. 17-177 (May 19, 2017).

<sup>19</sup> In response to Complainants request to identify when PGE decided to request an effective date of May 17, 2017, PGE stated that it "does not recall" when it decided to make the request. Attachment A (PGE Response to Complainants Data Request 13). It is not credible that no one at PGE can recollect this important date, and PGE failed to provide even an estimate of when it made this decision.

that it intended to seek that May 17, 2017 effective date.<sup>20</sup> PGE’s avoided cost update eventually went into effect on June 1, 2017.<sup>21</sup> PGE’s past annual avoided cost updates went into effect in late June,<sup>22</sup> and the independent power producer development community expected a similar late June effective date.<sup>23</sup> PGE also filed its Application to Lower the Standard Price and Standard Contract Eligibility Cap for Solar Qualifying Facilities on June 30, 2017 and requested interim relief on an expedited basis<sup>24</sup> without providing advance notice to anyone. In totality, these actions demonstrate an intentional effort to use surprise regulatory filings to prevent as many QFs as possible from being able to obtain executable PPAs.

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<sup>20</sup> Bottlenose Solar v. PGE, Docket No. UM 1877, Complaint and Answer at ¶ 26; (“PGE admits that it provided no advance notice to Complainant that it would request an effective date of May 17, 2017 for its May 1 filing”); Valhalla Solar v. PGE, Docket No. UM 1878, Complaint and Answer at ¶ 17; Whipsnake Solar v. PGE, Docket No. UM 1879, Complaint and Answer at ¶ 26; Skyward Solar v. PGE, Docket No. UM 1880, Complaint and Answer at ¶ 17; Leatherback Solar v. PGE, Docket No. UM 1881, Complaint and Answer at ¶ 26; Pika Solar v. PGE, Docket No. UM 1882, Complaint and Answer at ¶ 26; Cottontail Solar v. PGE, Docket No. UM 1884, Complaint and Answer at ¶ 20; Osprey Solar v. PGE, Docket No. UM 1885, Complaint and Answer at ¶ 19; Wapiti Solar v. PGE, Docket No. UM 1886, Complaint and Answer at ¶ 20; Bighorn Solar v. PGE, Docket No. UM 1888, Complaint and Answer at ¶ 21; Minke Solar v. PGE, Docket No. UM 1889, Complaint and Answer at ¶ 21; Harrier Solar v. PGE, Docket No. UM 1890, Complaint and Answer at ¶ 21.

<sup>21</sup> PGE Application to Update Schedule 201 Qualifying Facility Information, Docket No. UM 1728, Order No. 17-177 (May 19, 2017).

<sup>22</sup> PGE’s prior annual updates went into effect on June 23, 2015 even though PGE requested an earlier effective date of June 1, 2015 and on June 22, 2016 even though the Commission hearing on the matter took place on June 7, 2016. PGE Application to Update Schedule 201 Qualifying Facility Information, Docket No. UM 1728, Order No. 15-206 (June 23, 2015), PGE Application to Update Schedule 201 Qualifying Facility Information, Docket No. UM 1728, Order No. 16-220 (June 8, 2016).

<sup>23</sup> PGE Application to Update Schedule 201 Qualifying Facility Information, Docket No. UM 1728, Renewable Energy Coalition Comments (May 15, 2017).

<sup>24</sup> PGE Application to Lower the Standard Price and Standard Contract Eligibility Cap for Solar Qualifying Facilities, Docket No. UM 1854 (June 30, 2017); Docket No. UM 1854, PGE Motion for Interim Relief (June 30, 2017).

PGE delayed the contracting process in all of the following ways in some or all of the projects at issue in these complaints:

- PGE’s request for additional information was late;
- PGE’s written request for additional information was unclear, included unreasonable information, ignored information already provided, and required a meeting between the parties to clarify PGE’s request;
- PGE refused to timely meet with Complainants or answer emailed requests for information and questions;
- PGE did not inform Complainants that PGE would seek a May 17, 2017 effective date for its avoided cost update knowing that had Complainants known that fact, they would have provided PGE with the requested additional information on a more expedited basis;
- PGE’s first draft Standard PPA was late; and
- PGE impermissibly subjected Complainants to a “final draft” Standard PPA contracting phase that is not required.

In all cases, PGE’s above actions delayed and obstructed progress towards an executable contract under the totality of the circumstances. In any case, all Complainants clearly established LEOs prior to June 1, 2017 and are entitled to PPAs at the pre-June 1, 2017 Schedule 201 rates.<sup>25</sup>

#### **IV. MOTION**

Complainants hereby move the Commission for an order granting summary judgment in favor of Complainants finding that each Complainant:

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<sup>25</sup> See Attachment B for a fuller picture regarding PGE’s specific delays.

1. Formed a legally enforceable obligation under the terms and conditions of PGE's Standard PPA in effect prior to June 1, 2017 and at PGE's Schedule 201 avoided cost rates in effect prior to June 1, 2017; or
2. In the alternative and at a minimum, formed a legally enforceable obligation under the terms and conditions of PGE's Standard PPA in effect between June 1, 2017 and September 18, 2017 and at PGE's Schedule 201 avoided cost rates in effect between June 1, 2017 and September 18, 2017.

## V. LEGAL STANDARD

The Commission should grant a motion for summary judgment if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law.<sup>26</sup> No genuine issue as to a material fact exists if, based on the record and viewed in a manner most favorable to the non-moving party, no objectively reasonable person could return a verdict for the non-moving party on the matter that is the subject matter of the motion for summary judgment.<sup>27</sup> PGE is not entitled to summary judgment, and the Commission should instead grant summary judgment to the Complainants.

## VI. ARGUMENT

### A. **Complainants Formed LEOs Prior to June 1, 2017 Because They Unequivocally Committed Themselves to Sell Power Prior to PGE's June 1 Rate Change**

Complainants formed LEOs prior to June 1, 2017 because they unequivocally committed to sell power to PGE prior to that date. Under both the state and federal PURPA statutes, a QF's commitment to sell power is the ultimate deciding factor for when a LEO is formed. The

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<sup>26</sup> ORCP 47C.

<sup>27</sup> Id.

primary and most fundamental purpose of a LEO is to prevent a utility from delaying the signing of a contract, so that a later and lower avoided cost rate is applicable. Any Commission or utility process that ultimately keeps a QF from reasonably committing itself to sell its net output to a utility with the practical result of preventing a QF from obtaining an earlier and higher avoided cost price is invalid. Thus, there is no prescribed administrative contracting process that can operate to block a LEO, regardless of how many stages or hurdles a QF must overcome or whether PGE inappropriately delayed.

The Commission should reject PGE's efforts to deprive Complainants of the avoided cost rate in effect when Complainants committed to sell to PGE through surprise regulatory filings, a failure to communicate and refusal to work with Complainants, repeated delays, and insistence on a formalistic process.

**1. Oregon and Federal PURPA Law Allow the QF to Form a Legally Enforceable Obligation Prior to Contract Execution to Obtain an Earlier and Higher Avoided Cost Rate**

The Commission's resolution of the issues in this proceeding must be based on both the plain language as well as the intent and purpose of the law. In Oregon, the Oregon Legislative Assembly stated its PURPA goals to "[i]ncrease the marketability of electric energy produced by [QFs], . . . and [c]reate a settled and uniform institutional climate for [QFs]."<sup>28</sup> In implementing those goals, the Commission approved standard PPAs, a process for entering into those standard PPAs, published avoided costs, a process for updating those published avoided costs,<sup>29</sup> and a

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<sup>28</sup> ORS 758.515.

<sup>29</sup> See Re Investigation Related to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129.

standard for forming a LEO based on a case-by-case analysis.<sup>30</sup> These process were intended to facilitate the contract formation process and provide protection to QFs—not provide utilities with the ability to delay the formation of a LEO.

The LEO concept is intended to give the QF control over when the utility becomes obligated to purchase the QF’s output.<sup>31</sup> The utility’s obligation to purchase QF power is “created by statutes, regulations and administrative rules” and may be triggered by the QF’s “self-imposed obligation to deliver energy.”<sup>32</sup> Both federal and state statutes, regulations and administrative rules govern the utility’s obligation to purchase power.<sup>33</sup> Under PURPA, state regulatory agencies are required to implement the rules adopted by FERC.<sup>34</sup>

In Snow Mountain, the Oregon Court of Appeals provided an excellent summary of the intent and purpose of LEOs. The Court explained that:

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<sup>30</sup> See Re Commission Investigation into QF Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 27.

<sup>31</sup> Grouse Creek Wind Park, LLC, 142 FERC ¶ 61,187 at P.36 (2013); Re Commission Investigation into QF Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 23 (May 13, 2016) (noting that the purpose of a LEO is to “[prevent] a utility from circumventing PURPA requirements by refusing to execute a contract”).

<sup>32</sup> Snow Mountain Pine Co. v. Mauldin, 734 P.2d 1366, 1370-72, 84 Or. Ct. App. 590 (1987). Note that the court’s finding in Snow Mountain was based on a prior definition of “time the obligation is incurred” as “the date on which a binding obligation first exists between a qualifying facility and a utility to deliver capacity or firm energy.” OAR 860-29-0010(26) (1981). This was subsequently changed to its current version defining “[t]ime the obligation to purchase the energy capacity or energy and capacity is incurred” as the earlier of the date the contract was executed or “[t]he date agreed to, in writing, by the qualifying facility and the electric utility as the date the obligation is incurred.” OAR 860-29-0010(29) (2001). The Commission has since modified its reading of the current version of that definition in Order No. 16-174 to allow a LEO to be formed earlier than contract execution because the current rule “may conflict with FERC precedent suggesting a LEO is broader.” Docket No. UM 1610, Order No. 16-174 at 23 (citing Cedar Creek Wind, LLC, 137 FERC ¶ 61,006).

<sup>33</sup> See Snow Mountain, 734 P.2d at 1370.

<sup>34</sup> PURPA § 210; 16 USC § 824a-3.

To 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. The FERC commentary to 18 CFR § 292.304(d)(2) suggests that a utility cannot ‘merely by refusing to enter into a contract,’ deprive a qualifying facility of its right to commit to sell power in the future at prices which are determined at the time the qualifying facility makes its decision to provide power:

‘[18 CFR § 292.304(d)(2)] permits a qualifying facility to enter into a contract or other legally enforceable obligation to provide energy or capacity over a specified term. Use of the term ‘legally enforceable obligation’ is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.’ 45 Fed Reg 12224 (1980).

We conclude that a qualifying facility has the power to determine the date for which ‘avoided costs’ are to be calculated by tendering an agreement that obligates it to provide power. Snow Mountain obligated itself to provide power on July 6, 1983, and that is when CP became obligated to purchase power.<sup>35</sup>

FERC’s rules provide that each QF shall have the option to provide energy or capacity pursuant to a contract or other LEO over a specified term at avoided costs that are either calculated at the time of delivery or at the time the obligation is incurred.<sup>36</sup> Oregon law also specifically contemplates that a QF has the right to a price based on the “projected avoided costs calculated at the time the legal obligation to purchase the energy or energy and capacity is incurred.”<sup>37</sup> FERC’s intention in adopting its rules was explicit: “[u]se of the term ‘legally enforceable obligation’ is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.”<sup>38</sup>

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<sup>35</sup> Snow Mountain, 734 P.2d at 1370.

<sup>36</sup> 18 CFR 292.304(d).

<sup>37</sup> ORS 758.525(2)(b).

<sup>38</sup> 45 Fed. Reg. 12214, 12224 (Feb. 25, 1980).

States have the initial power to determine the specific parameters of when a LEO is formed;<sup>39</sup> however, any state requirement that is inconsistent with federal law and regulations is invalid.<sup>40</sup> For example, a state rule or policy requiring, per se, that a PPA be executed by one or both parties in order to form a LEO is invalid because it is inconsistent with PURPA and FERC's regulations.<sup>41</sup> In a series of cases in Idaho, FERC found that it was inconsistent with PURPA and FERC's regulations for the Idaho commission to require that a PPA be executed by one or both parties in order to form a LEO prior to a regulatory change.<sup>42</sup> All of those cases were affected by a December 14, 2010 change in the eligibility requirements for published avoided costs that the Idaho commission determined made each QF ineligible for those published avoided costs.<sup>43</sup> In Cedar Creek,<sup>44</sup> Rainbow Ranch,<sup>45</sup> and Murphy Flat,<sup>46</sup> the QF executed the PPA prior to that December 14 eligibility change but the utility executed it on or after that date. In Grouse Creek, neither the QF nor the utility executed the PPA prior to December 14; however, the Grouse Creek QF provided final site-specific information by December 9, signed the agreement on December 20, and the utility signed on December 28.<sup>47</sup> The Idaho commission rejected the

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<sup>39</sup> West Penn Power Co., 71 FERC ¶ 61,153 at 61,495 (1995).

<sup>40</sup> See Cedar Creek Wind, LLC, 137 FERC ¶ 61,006 at P.35 (2011).

<sup>41</sup> See id.; see also Grouse Creek, LLC, 142 FERC ¶ 61,187 at PP. 37-38 (2013).

<sup>42</sup> See Cedar Creek, 137 FERC ¶ 61,006 at P.30, Rainbow Ranch Wind, LLC, 139 FERC ¶ 61,077 at P.23 (2012), Murphy Flat Power, LLC, 141 FERC ¶ 61,145 at P.25 (2012), and Grouse Creek, 142 FERC ¶ 61,187 at P.36.

<sup>43</sup> See Grouse Creek, 142 FERC ¶ 61,187 at PP.2-4 & 7-9.

<sup>44</sup> Cedar Creek, 137 FERC ¶ 61,006 at P.8.

<sup>45</sup> Rainbow Ranch, 139 FERC ¶ 61,077 at P.11.

<sup>46</sup> Murphy Flat, 141 FERC ¶ 61,145 at P.6.

<sup>47</sup> Grouse Creek, 142 FERC ¶ 61,187 at PP.6 & 14.



executed PPAs in each of these cases because they were either not executed by one or both parties prior to the eligibility rule change.<sup>48</sup> FERC found that in all four instances the QFs:

had engaged in formal negotiations to enter into power purchase agreements with electric utilities during November and December 2010, and all four QF petitioners had unequivocally committed themselves to sell to the utilities prior to the new rules concerning eligibility for published avoided cost rates went into effect, i.e., before December 14, 2010.<sup>49</sup>

FERC reasoned that, because the purpose of a LEO was to prevent utilities from refusing to sign contracts or delaying signing until a lower rate was in effect, the Idaho commission's requirement that the contract be executed to form a LEO was inconsistent with PURPA and FERC's regulations implementing PURPA.<sup>50</sup> Therefore, a state commission rule requiring contract execution to form a LEO is invalid as a matter of law. Instead, where a contract has not been executed prior to a rule change, a LEO can at a minimum still be created where negotiations took place, the material terms were finalized, and the QF unequivocally committed to sell to the utility prior to the rule change.

Further, a state rule that requires, per se, that certain procedural steps be completed prior to LEO formation is also invalid as inconsistent with PURPA and FERC regulations.<sup>51</sup> This is especially true when those steps are under the control of or provide discretion to the utility regarding when a contract is entered into. FERC found that it was inconsistent with PURPA and FERC's regulations for the Montana commission to require that an interconnection agreement be tendered to the utility in order to form a LEO prior to a regulatory change.<sup>52</sup> In FLS Energy, the

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<sup>48</sup> See id. at PP.6-9.

<sup>49</sup> Id. at P.37.

<sup>50</sup> Id. at P.36.

<sup>51</sup> See FLS Energy, Inc., 157 FERC ¶ 61,211 at P.23 (2016).

<sup>52</sup> Id.

QF tendered its executed PPA to the utility prior to a June 16, 2016 change in the eligibility requirements for standard rates but had not tendered its interconnection agreement because the utility had not provided an executable copy of the interconnection agreement.<sup>53</sup> FERC reasoned that, because “the establishment of a [LEO] turns on the QF’s commitment, and *not* the utility’s actions,”<sup>54</sup> the Montana commission’s requirement that an interconnection agreement be tendered was inconsistent with PURPA and FERC’s regulations.<sup>55</sup> This would inappropriately allow a utility to “control whether and when a [LEO] exists—e.g. by delaying the facilities study or by delaying the tendering by the utility to the QF of an executable interconnection agreement.”<sup>56</sup> Therefore, a state commission rule requiring certain procedural steps that are within the utility’s control and over which the utility has the power to delay, is invalid as a matter of law. Instead, where those procedural steps have not been completed prior to a rule change, a LEO can still be created by looking at the facts and circumstances of the case.

**2. The Complainants Formed Legally Enforceable Obligations under FERC’s Rules and Policies by Unequivocally Committing Themselves Prior to the Avoided Cost Rate Change**

Under FERC’s rules, the main deciding factor in determining when a LEO is created is the QF’s unequivocal commitment to sell to the utility.<sup>57</sup> Whether such a commitment has been made may involve an analysis of other factors, including the length of time the parties have been negotiating, whether and when a contract was executed, whether there was an upcoming

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<sup>53</sup> Id. at PP.3-4.

<sup>54</sup> Id. at P.24.

<sup>55</sup> Id. at PP.23-26.

<sup>56</sup> Id. at P.23.

<sup>57</sup> See Grouse Creek, 142 FERC ¶ 61,187 at P.36.

regulatory change, and whether the material terms of the contract were finalized prior to that regulatory change.<sup>58</sup>

In this case, Complainants, formed LEOs prior to June 1, 2017 at the then-current standard contract terms and the then-current Schedule 201 rates. The Complainants unequivocally committed themselves on multiple occasions prior to the June 1, 2017 rate change as detailed in Table B above. The parties had been negotiating for 2 to 6 months prior to that rate change. While PGE never provided an executable contract before that rate change, the material terms of the PPAs were finalized. Therefore, under FERC's rules, because the Complainants unequivocally committed and that commitment is supported by other the factors, the Complainants formed LEOs prior to June 1, 2017. No further analysis is necessary.

**3. Complainants Formed Legally Enforceable Obligations under Oregon's Rules and Policies by Engaging in Substantial Negotiations and Unequivocally Committing Themselves Prior to the Avoided Cost Rate Change**

Oregon follows PURPA and FERC's LEO ruling by not requiring that a contract be executed or that a QF comply with other rigid procedural requirements in order to form a LEO.<sup>59</sup> Rather, the Commission requires, at a minimum, that the QF and utility have undertaken the contracting process, negotiations have progressed beyond initial contact by a QF, and then the Commission performs a case-by-case analysis.<sup>60</sup> One factor that the Commission considers is whether the QF executed a PPA that includes key material terms such as a scheduled commercial

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<sup>58</sup> See id. at PP.36-38.

<sup>59</sup> Re Commission Investigation into QF Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 27 (May 13, 2016).

<sup>60</sup> Id.

on-line date and the QF's minimum and maximum annual deliveries.<sup>61</sup> All of these requirements have been met.

Specifically, under the Commission's policies, a LEO is created when a QF signs an executable contract that includes a scheduled commercial on-line date and information regarding the QF's minimum and maximum annual deliveries.<sup>62</sup> A LEO may also be created even when the utility has not provided an executable PPA. In the administrative proceeding in which the Commission adopted its current LEO policy (UM 1610), PGE argued that a LEO should occur when the utility provides the final executable draft contract because "[t]he terms of a QF agreement prior to the utility providing a final draft are not sufficiently known and clear for the QF to make such a commitment."<sup>63</sup> The Commission rejected this approach and instead adopted a LEO policy that was based on Staff's recommendation. Staff noted 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. In these circumstances, the QF should have the ability to establish a LEO *even though the utility has not provided it with a final draft executable standard contract.*<sup>64</sup>

The Commission also acknowledged that "problems may delay or obstruct progress towards a final draft of executable contract, such as failure by a utility to provide a QF with required information or documents on a timely basis."<sup>65</sup> Therefore, even where no executed contract has

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<sup>61</sup> See id.

<sup>62</sup> Re Commission Investigation into QF Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 27 (May 13, 2016).

<sup>63</sup> Re Commission Investigation into QF Contracting and Pricing, Docket No. UM 1610, PGE/500, McFarlane-Morton/12 (May 22, 2015).

<sup>64</sup> Re Commission Investigation into QF Contracting and Pricing, Docket No. UM 1610, Staff/500, Andrus/41 (May 22, 2015) (emphasis added).

<sup>65</sup> Re Commission Investigation into QF Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 27 (May 13, 2016).

been provided, the QF could form a LEO, if the terms of the agreement are sufficiently known and clear, and the QF commits itself to those terms. The Commission decides on a case-by-case basis when a LEO is formed,<sup>66</sup> but any decision that does not allow the QF to create a LEO through its unequivocal commitment would violate FERC's rules and precedent.

As discussed above, any policy that requires more than FERC's minimum requirements is invalid. This was illustrated with the Idaho cases requiring contract execution to form a LEO and the Montana case requiring the interim procedural step of a completed interconnection agreement to form a LEO. Both state requirements were found to be more restrictive than FERC's requirements and therefore invalid. Therefore, even if the Oregon Commission's LEO rule were read to require contract execution or a strict adherence some procedural mechanism, it would be invalid.

Further, in Oregon, the Commission adopted standard contracts to make it easier for a QF to get an executable PPA.<sup>67</sup> Because the terms of these contracts are standardized, there are fewer terms that PGE can require a QF to negotiate and, therefore, a LEO in Oregon can be formed more quickly than in other states. Therefore, in Oregon it is not necessary for the utility to take all of its allowed time to respond to QF requests because the utility is generally just filling-in the blanks of the standard form with the QF-specific information.

PGE takes the rigid position that to form a LEO a QF must jump through a series of arbitrary steps and obstacles, including three 15 business day procedural steps (draft, final, and

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<sup>66</sup>

Id.

<sup>67</sup>

Re Investigation Related to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129, Order No. 05-584 at 16 (“Standard contracts are designed to eliminate negotiations and to thereby remove transaction costs”).

executable PPA stages) and that the QF must execute an executable PPA provided by the utility.<sup>68</sup> In light of the above FERC decisions in Idaho and Montana and Oregon's rules and policies, PGE's rigid interpretation is invalid. PGE's view would result in a timeline far longer than FERC has concluded is allowed and would sanction a state- or utility-determined process that effectively prevents a QF from forming a LEO for weeks after there are no disputed material terms and conditions. This is particularly inappropriate when the QF is attempting to finalize their PPA in the shadow of an impending rate decrease (and even more so when that rate decrease has been proposed and made effective on a short notice and in a departure from standard practice).

The Commission, in its case-by-case analysis, does not simply look at when the QF signed an executable contract or whether each contracting step was strictly adhered to. Rather, as it is relevant to this case, the Commission should consider the totality of the circumstances including: 1) the length of time the parties had been engaged in negotiations; 2) the reasonable expectations of the parties regarding how long it takes to execute an agreement including whether the parties are negotiating a standard or negotiated PPA, and the history of the negotiations between the parties (including on past PPAs); 3) whether and when the material terms of the PPA are finalized; 4) whether there was an impending regulatory change that may give the utility an incentive to delay or that would warrant shortening any due dates; 5) the reasonable expectations of the parties regarding when a regulatory change will take effect including the utility's and the Commission's past procedural practices with respect to such

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<sup>68</sup> PGE's Motion for Summary Judgment at 18.

regulatory changes; and 6) whether and when the QF unequivocally committed itself to sell to the utility.

In these cases, Complainants formed LEOs prior to June 1, 2017 because, under the totality of the circumstances and consistent with both the federal and Oregon LEO standards, each Complainant properly obligated itself to sell power to PGE at a time when PGE refused to provide executable PPAs.

First, Complainants engaged in substantial negotiations prior to the June 1, 2017 avoided cost rate change. Each Complainant initiated contact with PGE no later than March and April of 2017. Most Complainants initiated negotiations as early as December 2016. Each Complainant had the goal of executing a PPA prior to the effective date of PGE's next annual avoided cost filing. Negotiations were ongoing up until and following PGE's June 1, 2017 avoided cost rate change. Therefore, Complainants negotiated with PGE for between 40 days and 6 months prior to that rate change. In the Idaho cases discussed above, the parties only negotiated for about 43 days (November to December 13, not counting any weekends or holidays), and FERC still found that that length of time would weigh in favor of finding that a LEO had been created prior to the rule change.

Second, the Parties had a reasonable expectation that they could execute a Standard PPA in less than two months. Since these are Standard PPAs and (despite PGE's actions to require negotiation of numerous elements) there should not be any terms that need to be negotiated, it is reasonable to expect that a PPA can be executed in less than a two-month time period. The only terms that are really at issue are the Complainants' site-specific provisions which are all provided up front or are clarified by PGE prior to providing a first draft.

Further, one of the developers previously executed Standard PPAs with PGE in only 27 business days or in about a month and a half. PGE's Schedule 201 and the Commission's orders outline a process where a draft Standard PPA is provided within 15 business days after submission of project information and once a QF agrees to that draft, an executable will be provided within another 15 business days.<sup>69</sup> This gives the QF a reasonable expectation that, under normal circumstances, a Standard PPA can be executed in about 30 business days if the QF quickly turns it around. Therefore, even under this rigid schedule, it is still reasonable for a QF to expect the process to take less than 2 months.

Third, the material terms of the PPAs were finalized when each Complainant indicated that it agreed to the draft PPA and requested an executable PPA, even if there were some minor changes requested. Other states have allowed QFs to commit to then current prices to form a LEO and continue to negotiate material terms.<sup>70</sup> Minor changes are not material, and the Complainants believed that their requested changes were acceptable to PGE. The most that is required to form a LEO is that the material terms be included. PGE has even agreed in other circumstances that a LEO can be formed regarding the eligibility to prices, even when the utility has not agreed to any of the material terms and conditions.<sup>71</sup>

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<sup>69</sup> Portland General Electric Company, Schedule 201, 201-2; Re Commission Investigation into QF Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 24 (May 13, 2016).

<sup>70</sup> E.g., Re Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Thayn Hydro, L.L.C., Docket No. 16-035-04, Order at 12-15 (July 29, 2016).

<sup>71</sup> Re Blue Marmots v. PGE, Docket Nos. UM 1829-1833 (consolidated), PGE's Response Testimony at PGE/100, Greene-Moore/14-15 (distinguishing between a fully executed contracts, which lock in all terms and conditions, from a LEO, which locks in the "right to avoided cost rate in place at the time the LEO arises").



The draft contracts that Complainants agreed to and executed in these cases all include the material terms that the Commission looks for: a scheduled commercial on-line date and the QF's minimum and maximum annual deliveries. Any differing or new terms sent by Complainants are immaterial, and PGE does not rely upon any changes to argue that LEOs have not been formed.

Fourth, PGE's annual avoided cost update filing was upcoming, and PGE had an incentive to delay negotiations. Conversely, the upcoming rate reduction provides a justification for the Commission to require PGE not to use its entire "allotted time," but to process each PPA with a good faith intention to provide the QF with an executable PPA. PGE had exclusive knowledge regarding whether that filing would increase or decrease the avoided cost rate. Complainants merely knew that the then-current rates worked for their projects and wanted to execute PPAs at those rates. Because PGE knew that its update would lower the rate, PGE had an incentive to delay negotiations as much as possible and to get an effective date that is as early as possible. PGE was also incentivized not to inform Complainants that it was seeking an earlier effective date because PGE was actively negotiating with them and Complainants would have processed PGE's requests more expeditiously had they been aware of this fact.

The scenario in this case is no different than the Idaho and Montana cases discussed above. In all cases, there was a pending regulatory change that favored the utility and the utility attempted to implement a rigid formalistic process to bar the QF from unequivocally committing to sell its net output at the pre-existing avoided cost rate. Therefore, like the Idaho and Montana rules, any interpretation of Oregon's LEO standard that allows PGE to use its rigid step-by-step process to bar the creation of a LEO is also invalid under PURPA and FERC's regulations.

Fifth, Complainants had a reasonable expectation based on past Commission practice that PGE's new avoided costs would not go into effect until the date of the last public meeting in June. It was reasonable to expect that the avoided costs would go into effect until late-June because the Commission's past practices for the prior (and only) two annual avoided cost update filings was to make the rates effective at that time even when PGE and other utilities requested an earlier effective date.

Prior to 2017, the Commission repeatedly rejected utility efforts to change avoided cost rates earlier than the end of June, and the Commission approved Staff's recommendations stating that the established process was for a late June price change. In the first annual update for PacifiCorp, Staff explained that: "Future Pacific Power avoided cost updates will be filed under Docket No. UM 1729, and Staff will present the filings at a public meeting preceding the 60th day from the filing date."<sup>72</sup> When Idaho Power's rates dropped by over 40% and Idaho Power asked for an early rate reduction, the Commission concluded that its regular process should be followed and ordered a late June update.<sup>73</sup> Similarly, when PGE claimed in 2016 that it had roughly 68 requests for contracts of a total of 326 MWs in the "queue," the Commission still allowed the rates to become effective the day after the last public meeting in June.<sup>74</sup> Thus, in approving PGE's requested avoided cost rate reduction in May of 2017 to be effective June 1, 2017, the Commission made a significant departure from past policy and practice; the adverse

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<sup>72</sup> Re PacifiCorp Application to Update Schedule 37 Qualifying Facility Information, Docket No. UM 1729, Order No. 15-205, Appendix A at 4. (May 19, 2017).

<sup>73</sup> Re Idaho Power Company Application to Update Schedule 85 Qualifying Facility Information, Docket No. UM 1730, Order No. 16-219, Appendix A at 3 (June 8, 2016).

<sup>74</sup> June 7, 2016 Public Meeting at 1:36 (PGE's Brett Sims reported the number of QFs in the queue as nearing 326 MWs).

impact of that decision of QFs should not be exacerbated by an unreasonable restrictive test for LEO formation.

The Oregon Legislative Assembly has stated its policy goal to create a settled and uniform institutional climate for QFs; it is therefore reasonable for Complainants to have expected that the annual avoided cost update process would continue in the same manner as it had in prior years and go into effect on the date of the last public meeting in June. This expectation of a late-June effective date combined with the Complainants' expectation that a contract could be finalized in about 2 months, means that by starting the process in March or April, as some Complainants did, a QF could finalize it under the then-current rates before they were expected to change 2-3 months later.

Last and most important, Complainants repeatedly and unequivocally committed to sell to PGE before PGE's June 1, 2017 avoided cost change and continued to make that commitment after June 1, 2017 under the previously effective avoided cost rates. Among other things, the Complainants executed PPAs based on terms and provisions that they believed were or should be acceptable to PGE.

Therefore, in these cases, Complainants formed LEOs prior to June 1, 2017 because the totality of the circumstances indicate that each Complainant negotiated with PGE prior to its June 1, 2017 avoided cost rate change, agreed to the material terms of the draft Standard PPA, and unequivocally committed itself to selling power to PGE. Further, the Complainants are entitled to the avoided cost rates in effect prior to June 1, 2017 because Complainants had a reasonable expectation that the new rates would not go into effect until late June, and while they were actively negotiating with PGE, PGE did not inform them of its desire to request an earlier effective date.

**B. Complainants Formed LEOs at the Pre-June 1, 2017 Rates Even Under PGE’s Rigid LEO Standard**

Even if the Commission follows PGE’s rigid LEO standard, Complainants still formed LEOs and are entitled to the pre-June 1, 2017 Schedule 201 rates because they were entitled to executable contracts prior to that date and/or because PGE engaged in bad faith tactics to harm Complainants’ bargaining position.

Under PGE’s own Schedule 201 and the Commission’s orders, PGE must provide a draft Standard PPA within 15 business days after the QF submits its project information and must provide an executable version of the draft Standard PPA within 15 business days after the QF indicates that it agrees to the terms of the draft Standard PPA.<sup>75</sup> These are maximum times, and there is no reason why PGE should not provide earlier drafts, especially when there is a pending rate decrease. There is an additional “final draft” Standard PPA stage if the if the QF requests that a final draft be prepared or if the QF needs to provide clarifying information.<sup>76</sup> The language regarding this final draft Standard PPA is written in the permissive and not in the mandatory; thus, it is not a required step in the contracting process but merely an option available to the QF. Therefore, as a matter of law, the “final draft” phase is not required and once a QF agrees to the terms of a draft contract, PGE is required to forward an executable version within 15 business days.

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<sup>75</sup> Portland General Electric Company, Schedule 201, 201-2; Re Commission Investigation into QF Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 24 (May 13, 2016).

<sup>76</sup> Id. (“Seller *may* request in writing that the Company prepare a final draft Standard PPA. . . In connection with such request, the QF must provide the Company with any additional or clarified project information that the Company reasonably determines to be necessary for the preparation of a final draft Standard PPA”) (emphasis added).

Additionally, a utility is required to respond in good faith to all QF proposals.<sup>77</sup> Aside from the utility's mandatory PURPA obligations, there is also an implied covenant of good faith and fair dealing in any Oregon contract.<sup>78</sup> That duty "is to be applied in a manner that will effectuate the reasonable contractual expectations of the parties."<sup>79</sup>

In these cases, PGE engaged in numerous actions that delayed the negotiations, and without these delays Complainants would have been due executable PPAs earlier than PGE provided them. Regardless of the specific delays or obstructions, the overall context must also be kept in mind. PGE previously negotiated QF contracts in a different manner allowing QFs to execute PPAs with less difficulty, but recently and due to a significant increase in the number of contract requests, PGE adopted more strict and difficult process with the intent and purpose of preventing QFs from being able to obtain a contract. In addition, as relevant to this case, PGE's actions were specifically intended to ensure that as many QFs as possible, including the Complainants, would be unable to execute PPAs prior to the date of an avoided cost rate decrease.

First, PGE's request for additional information was late for seven of the projects. Complainants Cottontail, Osprey, Wapiti, Bottlenose, Whipsnake, Leatherback, and Pika all provided their initial request on March 22, 2017, with four of them (Bottlenose, Whipsnake, Leatherback, and Pika) initially contacting PGE back in December 2016. PGE responded to these seven projects on April 13, 2017 with a request for additional or clarifying information.

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<sup>77</sup> See International Paper Co. v. PacifiCorp, dba Pacific Power, Docket No. UM 1449, Order No. 09-439 at 6-7 (Nov. 4, 2009).

<sup>78</sup> See Uptown Heights Assocs. v. Seafirst Corp., 891 P.2d 639, 645, 320 Or. 638 (1995); see also ORS 71.3040 ("Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement").

<sup>79</sup> Uptown Heights, 891 P.2d at 645.

PGE's draft was due within 15 business days, which fell on April 12, 2017, therefore, PGE's response was one day late. While this delay, standing alone, may not seem like a major issue, it combined with the rest of PGE's actions to cause significant and cascading delays for Complainants.

Second, for those same seven projects, PGE's request for additional information was unclear or unreasonable. Complainants met with PGE on April 18, 2017 to understand certain changes requested by PGE. PGE has an obligation to provide clear instructions regarding the changes or additional information it requested, and by not doing so PGE delayed the contracting by an additional four business days. PGE's delays and unclear requests are especially concerning for the projects that initially contacted PGE in December 2016 and PGE had plenty of time to give Complainants clarity regarding its information requirements prior to Complainants formal initial information submission on March 22, 2017. These four business days combined with the rest of PGE's actions caused significant delays in the contracting process.

Complainants had requested to meet earlier to discuss some of PGE's information requirements even before PGE requested additional information.<sup>80</sup> PGE's refusal to meet with and communicate with the Complainants led to unnecessary delays. For example, PGE recently began requesting that QFs install expensive metering for participation in the Western Energy Imbalance Market ("EIM"). At least some of the Complainants inquired regarding these requirements given the small size of their projects (less than 3 MW). PSE and PacifiCorp also participate in the EIM, but only require facilities 5 MW and above (PSE) or 3 MW and above to

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<sup>80</sup> E.g., Bottlenose Solar v. PGE, Docket No. UM 1877, Complaint at ¶ 19.

install metering. PGE never explained the reason for the requirements to the Complainants during negotiations or discovery and left Complainants guessing as to whether removal of this requirement would be considered a substantive change request by PGE.<sup>81</sup>

A particularly egregious PGE request was PGE's April 13, 2017 letter where, after waiting 15 business days, PGE stated that certain Complainants needed to fill-in information into a form rather than referencing certain attached documents.<sup>82</sup> At this time, the Complainants had already asked (and been refused) to schedule a meeting, to have their contract processed quickly, and whether PGE needed any additional information.<sup>83</sup> Complainants Bottlenose, Whipsnake, Leatherback, and Pika requested to meet with PGE on March 29, 2017 (10 business days prior PGE's 15-business day deadline) so that they could discuss whether any additional or clarified information was needed and resubmit if necessary. Rather than responding in good faith and scheduling a meeting at a reasonable date, PGE simply refused the request to meet. PGE held fast to its rigid 15-business day schedule and did not provide any response until April 13, 2017 (one day late) and did not meet until April 18. If PGE had agreed to meet at some time before its 15-business day deadline, these Complainants could have re-submitted their information earlier. It is reasonable to assume that these Complainants could have resolved any issues and re-submitted their information around 5 business days earlier. Therefore, PGE's refusal to meet with these Complainants resulted in an additional 5 business days of delay.

Complainants Bighorn, Minke, and Harrier also asked for an in-person meeting with PGE on March 29, 2017, to better understand PGE's QF process, but PGE effectively ignored them

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<sup>81</sup> See Attachment C (PGE Response to Complainants Data Requests 4, 5 and 11).

<sup>82</sup> E.g., Bottlenose Solar v. PGE, Docket No. UM 1877, Complaint at ¶¶ 15-16.

<sup>83</sup> E.g., Bottlenose Solar v. PGE, Docket No. UM 1877, Complaint at ¶¶ 15-17.

until April 25, 2017.<sup>84</sup> PGE staff informed Complainants that they were unavailable on March 29, 2017. Complainants repeated their request on April 10, 2017, and PGE was not available then either. Complainants tried again to connect on April 17, and PGE was not even available for “a quick call today or tomorrow.” Complainants tried again on April 20, but that day did not work for PGE. Complainants followed up on April 24, and were able to find time on April 25—when they were finally able to connect with PGE staff. Unfortunately, after a brief phone discussion, PGE requested additional information from Complainants Bighorn, Minke, and Harrier that same day. After submitting the information requested, along with what Complainants believed to be non-substantive change requests on May 23, 2017, Complainants again requested a meeting with PGE to discuss the status of their applications. PGE was unavailable. Complainants reached out again on May 30, 2017 requesting a status update, because PGE had not been responsive.

By making itself completely unavailable, PGE was able to delay processing of these PPA applications throughout April and May, which was a critically important time for QFs trying to establish contracts with PGE. It is reasonable to assume that if PGE had agreed to meet earlier, these Complainants could have resolved any issues and re-submitted their information *at a minimum* around 6 business days earlier. Therefore, PGE’s refusal to meet with these Complainants resulted in at least an additional 6 business days of delay, which would result in a LEO before June 1, 2017.

Third, PGE acted in bad faith by not informing Complainants that it would seek a May 17, 2017 effective date in its annual avoided cost update. Complainants and PGE had been

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<sup>84</sup> Declaration of James Ortega at Attachment E.



actively negotiating these PPAs at the time PGE was preparing its annual avoided cost update filing. PGE was aware that Complainants were seeking to execute PPAs at the current avoided cost rates. Had PGE informed Complainants of its intent to seek an effective date prior to the date of the last public meeting in June. Complainants would have provided complete information earlier, or processed PGE's requests for additional information more quickly. PGE's bad faith negotiation tactics resulted in 4 and 7 business days delay for each of the projects as detailed in full in Attachment B, with additional delays resulting from Complainants requesting changes when they otherwise would not. Complainants did not respond to PGE's first draft Standard PPA as quickly as they would have done, had they known that PGE was seeking an early effective date, and Complainants would not have requested any changes to their draft PPAs.<sup>85</sup> These delays combined with PGE's other actions caused significant delays.

Fourth, PGE delayed by providing the draft Standard PPA late for four of the projects. Complainants Bottlenose, Whipsnake, Leatherback, and Pika all provided PGE's requested additional information on April 27, 2017 and PGE responded on May 23, 2017 with a draft Standard PPA. PGE's draft was due within 15 business days, which fell on May 18, 2017, therefore, PGE's response was 3 business days late. While this delay, standing alone, may not seem like a major issue, combined with the rest of PGE's actions it caused significant delays for Complainants.

Last, PGE improperly delayed progress toward an executable contract by requiring that a "Final Draft" PPA be provided in between the draft and executable PPA stages. As discussed

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<sup>85</sup> PGE appears to adjust the executable PPA due dates for part of these delays related to Complainants requested changes in its Exhibit A. This is discussed in more detail below.

above, the final draft stage is permissive and, if needed, it is only used where material terms are being changed in the contract. If the QF has not requested any changes or the changes that have been requested are not material, then this final draft stage is not required as matter of law. Here, PGE assumes, arguendo, in its Motion for Summary Judgment that if the final draft stage is not required every project in this case would have been entitled to an executable PPA by June 14, 2017 whether they requested changes or not.<sup>86</sup> The Commission recognizes that problems may delay or obstruct progress towards an executable contract, such as failure by a utility to provide a QF with required information or documents on a timely basis.

Therefore, it is appropriate to adjust the June 14 date by which an executable PPA was due by the cumulative number of business days that PGE delayed and find that Complainant formed LEOs on those dates. PGE, in its Motion for Summary Judgment adjusts the June 14 executable PPA due date by the number of business days of delay that would have been avoided had PGE had informed Complainants of its request for an early effective date and Complainants had responded immediately with no requested changes. PGE's adjustment resulted in each Complainant being due an executable PPA sometime between June 7, 2017 and June 14, 2017,<sup>87</sup> conveniently right after the avoided cost rate change.

In Table C, Complainants adjust these dates further for the clearly defined cumulative delays discussed above. This results in Complainants being entitled to executable PPAs between before June 1, 2017. Therefore, because PGE's actions delayed and obstructed progress towards an executable contract, the Commission should find that Complainants formed LEOs as of the

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<sup>86</sup> See PGE's Motion for Summary Judgment at Exhibit A.

<sup>87</sup> See PGE's Motion for Summary Judgment at Exhibit A.

dates detailed in Table C if the Commission agrees that PGE’s rigid interpretation of the LEO standard controls.

**TABLE C**

<b>Project Name</b>	<b>PGE’s “Earliest” Executable PPA Due Date if No Changes Requested</b>	<b>Total Number of Business Days of Delay Caused by PGE’s Actions<sup>88</sup></b>	<b>Date LEO Formed Under PGE’s Rigid Interpretation of the LEO Rule</b>
Valhalla	June 7, 2017	0	same
Skyward	June 7, 2017	0	same
Cottontail	June 7, 2017	10	May 24, 2017
Osprey	June 7, 2017	10	May 24, 2017
Wapiti	June 7, 2017	10	May 24, 2017
Bighorn	June 9, 2017	10	May 26, 2017
Minke	June 9, 2017	10	May 26, 2017
Harrier	June 9, 2017	10	May 26, 2017
Bottlenose	June 14, 2017	19	May 17, 2017
Whipsnake	June 14, 2017	19	May 17, 2017
Leatherback	June 14, 2017	19	May 17, 2017
Pika	June 14, 2017	19	May 17, 2017

Additionally, as discussed above, even if some Complainants were not entitled to executable PPAs prior to June 1, 2017, they were still entitled to a LEO prior to that date under the totality of the circumstances. A QF’s commitment to sell power is the ultimate deciding factor for when a LEO is formed, and each Complainant committed prior to June 1, 2017.

Further, Complainants are entitled to LEOs at the avoided costs in effect prior to June 1 because PGE’s bad faith tactics harmed Complainants’ bargaining positions. Each of the Complainants had a reasonable expectation that the avoided cost rate would not go into effect until late June and that PGE would inform them of its intent to seek an earlier date.

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<sup>88</sup> These delays do not account for the fact that all of the Complainants would have provided more complete information starting the clock for PGE’s responses earlier, if they had known that PGE intended to file an early avoided cost rate change.

Complainants had a reasonable right to expect that PGE would inform them of its intent, especially where the parties had been negotiating for months prior, and PGE was aware that Complainants wished to finalize contracts prior to a rate change. Even where, under PGE's rigid approach to establishing a LEO, the Complainants would not have been due an executable contract prior to June 1, the Complainants are still entitled to the pre-June 1 Schedule 201 rates.

**C. Complainants, at a Minimum, Formed LEOs after June 1, 2017 but Before September 18, 2017**

If the Commission finds that Complainants have not formed LEOs prior to June 1, 2017, then the Complainants have at a minimum, formed LEOs after June 1, 2017 but before PGE's next avoided cost rate change on September 18, 2017. PGE notes that under its rigid contracting schedule, Complainants would have been entitled to a revised draft contract on June 14, 2017 and if Complainants accepted those revised drafts, they would have been due an executable PPA on July 6, 2017.<sup>89</sup> Therefore, a LEO was formed by at least that date. Even if the process dragged out longer than that, surely the executable PPA would have been provided prior to September 18, 2017, more than two months after that date.

PGE never provided executable contracts because the dispute around the applicable prices obstructed progress towards those executable PPAs. The Complainants also stopped negotiations with PGE because of a belief that they were entitled to the pre-June 1, 2017 rates. However, setting the price term aside, the terms of the PPAs in this case were known and clear, and there is no dispute regarding any of the terms and conditions by September 18, 2017. The Complainants unequivocally committed themselves on multiple occasions as detailed in Table B

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<sup>89</sup> PGE's Motion for Summary Judgment at 12-13.

above including before and after the June 1, 2017 rate change. If the Complainants had known on June 1, 2017 that they would not be entitled to the pre-June 1, 2017 rates, then it is difficult to imagine that PGE could have delayed the process past September 18, 2017, even if it used its best efforts and creatively sought to avoid finalizing contracts.

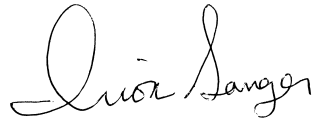
Therefore, even if the Commission finds that one or all of the Complainants did not form a LEO prior to June 1, 2017, all of the Complainants at a minimum formed LEOs prior to September 18, 2017.

## **VII. CONCLUSION**

For the reasons explained above, the Complainants established LEOs prior to June 1, 2017 and are entitled to the pre-June 1, 2017 rates. In response to Complainants assertion that they are entitled to pre-June 1, 2017 rates, PGE disagreed and PGE takes the position that Complainants were only entitled to the post-June 1 rates. PGE cannot now assert that Complainants are not entitled to the post-June 1, pre-September 18, 2017 rates. Therefore, if the Commission determines that the Complainants are not entitled to the pre-June 1, 2017 rates, then the Commission should at least determine that they are entitled to the pre-September 18, 2017 rates.

Dated this 6th day of April 2018.

Respectfully submitted,

A handwritten signature in cursive script that reads "Irion Sanger".

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Irion A. Sanger  
Marie Barlow  
Sanger Law, PC  
1117 SE 53rd Avenue  
Portland, OR 97215  
Telephone: 503-756-7533  
Fax: 503-334-2235  
irion@sanger-law.com

Of Attorneys for Complainants

# **Attachment A**

**to Complainants'**

**Cross-Motion for Summary Judgment**

January 16, 2018

TO: Irion Sanger  
Sanger Law, P.C.  
Bottlenose Solar, LLC

FROM: Patrick Hager  
Manager, Regulatory Affairs

**PORTLAND GENERAL ELECTRIC  
UM 1877  
PGE Response to Sanger Law's Data Request No. 013  
Dated December 29, 2017**

**Request:**

**Please refer to PGE's May 1, 2017 application to update standard avoided cost prices effective May 17, 2017. Please explain:**

- a. When did PGE decide to make this filing?**
- b. When did PGE decide to request an effective date of May 17, 2017?**
- c. Who was involved in each of those decisions?**
- d. When did PGE begin preparing and evaluating the statistics presented (e.g., that PGE has 45 requests in the queue for a total of 531.2 MW of capacity) in the application?**

**Please provide both a narrative explanation and supporting communications.**

**Response:**

PGE objects to the request on the grounds that it seeks information that is irrelevant, unduly burdensome and calls for speculation. Without waiving its objections, PGE responds as follows:

- a. Consistent with Commission Order 14-058, the filing is required to be submitted by May 1 of every year. PGE does not have the discretion not to make the filing.
- b. PGE does not recall the exact date it decided to request an effective date of May 17, 2017.
- c. PGE employees from Legal, Rates and Regulatory Affairs, and Power Operations.
- d. In approximately May 2017.



# **Attachment B**

**to Complainants'**

**Cross-Motion for Summary Judgment**

ATTACHMENT B

Project Name	PGE’s “Earliest” Executable PPA Due Date if No Changes Requested <sup>i</sup>	Number of Business Days of Delay Caused by PGE					Total Number of Business Days of Delay Caused by PGE’s Actions	Date LEO Formed Under PGE’s Rigid Interpretation of the LEO Rule
		Late to Request Additional Information <sup>ii</sup>	Failure to Meet <sup>iii</sup>	Unclear Request for Additional Information <sup>iv</sup>	Failure to Notify QF of Request for Early Avoided Cost Effective Date <sup>v</sup>	Late to Provide Draft Standard PPA <sup>vi</sup>		
Valhalla	June 7, 2017	n/a	n/a	n/a	0	0	0	Same
Skyward	June 7, 2017	n/a	n/a	n/a	0	0	0	Same
Cottontail	June 7, 2017	1	n/a	3	6	0	10	May 24, 2017
Osprey	June 7, 2017	1	n/a	3	6	0	10	May 24, 2017
Wapiti	June 7, 2017	1	n/a	3	6	0	10	May 24, 2017
Bighorn	June 9, 2017	0	6	0	4	0	10	May 26, 2017
Minke	June 9, 2017	0	6	0	4	0	10	May 26, 2017
Harrier	June 9, 2017	0	6	0	4	0	10	May 26, 2017
Bottlenose	June 14, 2017	1	5	3	7	3	19	May 17, 2017
Whipsnake	June 14, 2017	1	5	3	7	3	19	May 17, 2017
Leatherback	June 14, 2017	1	5	3	7	3	19	May 17, 2017
Pika	June 14, 2017	1	5	3	7	3	19	May 17, 2017

Even though some of these dates are past June 1, 2017, as explained in the Response, these Complainants are still entitled to LEOs at the rates in effect before June 1, 2017 under the totality of the circumstances.

<sup>i</sup> PGE’s Motion for Summary Judgment at Exhibit A.

<sup>ii</sup> PGE’s Motion for Summary Judgment at Exhibit A. PGE indicates that the initial submissions for Cottontail, Osprey and Wapiti were sent after 5:00 PM Eastern Time, but does not indicate that they were received by PGE before 5:00 PM Pacific Time. See *id.*

<sup>iii</sup> For Bighorn, Minke, and Harrier see Declaration of James Ortega at Attachment E; Bottlenose Solar v. PGE, Docket No. UM 1877, Complaint and Answer at ¶¶ 15-16; Whipsnake Solar v. PGE, Docket No. UM 1879, Complaint and Answer at ¶¶ 15-16; Leatherback Solar v. PGE, Docket No. UM 1881, Complaint and Answer at ¶¶ 15-16; Pika Solar v. PGE, Docket No. UM 1882, Complaint and Answer at ¶¶ 15-16.

<sup>iv</sup> PGE requested additional information from Bottlenose, Whipsnake, Leatherback, Pika, Cottontail, Osprey and Wapiti on April 13, 2017, which culminated in an in-person meeting with the parties on April 18, 2017. If PGE’s initial written request had been clear, or PGE had been able to clarify its request over the phone, then these three business days of delay could have been avoided. See e.g., Bottlenose Solar v. PGE, Docket No. UM 1877, Complaint at ¶¶ 20-21 (“Bottlenose Solar met with PGE to understand certain changes PGE requested Bottlenose Solar make to the format of its application.”); see also Bottlenose Solar v. PGE, Docket No. UM 1877, Answer at ¶¶ 20-21 (admitting the same).

<sup>v</sup> PGE requested additional information from all of the projects, but for Valhalla and Skyard. Had these QFs known that PGE intended to request a May 17, 2017 effective date for its avoided cost update they would have responded right away rather than waiting to respond until April 26, 2017 (for Cottontail, Osprey, and Wapiti—resulting in six wasted business days), April 27, 2017 (for Bottlenose, Whipsnake, Leatherback, and Pika—resulting in seven wasted business days), and May 1, 2017 (for Bighorn, Minke, and Harrier—resulting in four wasted business days). See e.g., Cottontail Solar v. PGE, Docket No. UM 1884, Complaint at ¶¶ 15-22 (“Cottontail Solar would have proceeded through its PPA negotiations more quickly ... if it had been aware that PGE intended to request a May 17, 2017 effective date for its May 1 Update.”); Cottontail Solar v. PGE, Docket No. UM 1884, Answer at ¶¶ 15-22 (“PGE admits that it did not provide Complainant with any notice in advance of its May 1, 2017 filing and that it would seek approval of the May 1 filing at the May 16, 2017 Public Meeting.”); Bighorn Solar v. PGE, Docket No. UM 1888, Complaint and Answer at ¶¶ 18-22; Bottlenose Solar v. PGE, Docket No. UM 1877, Complaint and Answer at ¶¶ 18-27.

<sup>vi</sup> PGE’s Motion for Summary Judgment at Exhibit A.

# **Attachment C**

**to Complainants'**

**Cross-Motion for Summary Judgment**

December 5, 2017

TO: Irion Sanger  
Sanger Law, P.C.  
Chris Norqual  
Cyprus Creek Renewables

FROM: Patrick Hager  
Manager, Regulatory Affairs

**PORTLAND GENERAL ELECTRIC  
UM 1877-UM 1882, UM 1844-UM 1886, UM 1888-UM 1890  
PGE Response to Sanger Law's Data Request No. 004  
Dated November 21, 2017**

**Request:**

**Please explain when PGE began requiring all Standard PPAs include testing the communication system for offsite monitoring and all requirements of the Western Energy Imbalance Market. Please provide all supporting documents and the grounds of such a requirement.**

**Response:**

PGE objects to this request on the grounds that it is overly broad, unduly burdensome and seeks legal conclusions. Notwithstanding and without waiving the foregoing objections, PGE responds as follows:

Exhibit C of the Standard PPAs requires that start-up testing include testing the communication system for offsite monitoring and all requirements of the Western Energy Imbalance Market (EIM). The requirement pertaining to offsite monitoring was added in approximately July 2015 on the grounds that it may be used to calculate MAP (Mechanical Available Percentage) as defined in section 1.17 of the standard contract.

PGE began obtaining information regarding all requirement pertaining to the Western in approximately May 2017 to ensure that PGE and the QF continue to comply with the requirements of the EIM should the QF become subject to such requirements.

December 5, 2017

TO: Irion Sanger  
Sanger Law, P.C.  
Chris Norqual  
Cyprus Creek Renewables

FROM: Patrick Hager  
Manager, Regulatory Affairs

**PORTLAND GENERAL ELECTRIC  
UM 1877-UM 1882, UM 1844-UM 1886, UM 1888-UM 1890  
PGE Response to Sanger Law's Data Request No. 005  
Dated November 21, 2017**

**Request:**

**Please identify all utilities participating in the Western Energy Imbalance Market, or planning to participate by the end of 2020, and confirm whether they require QFs to include testing the communication system for offsite monitoring and all requirements for the Western Energy Imbalance Market. If applicable, please explain what nameplate capacity size of qualifying facility and/or resource type that must include testing the communication system for offsite monitoring and all requirements of the Western Energy Imbalance Market.**

**Response:**

PGE objects to this request on the grounds that it is unduly burdensome and overly broad and that responding to the request would require PGE to develop information or prepare a study for another party. Notwithstanding and without waiving the foregoing objections, PGE responds as follows:

Western EIM Participants:

- PacifiCorp – entered 2014
- NV Energy – entered 2015
- Puget Sound – entered 2016
- Arizona Public Service – entered 2016
- Portland General Electric – entered 2017

Utilities planning to participate in Western EIM:

- Idaho Power Company – entry 2018
- Powerex – entry 2018
- Seattle City Light – entry 2019

- Los Angeles Department of Power & Water – entry 2019
- Balancing Authority of Northern California/SMUD – entry 2019
- Salt River Project – entry 2020

While PGE lacks the information on the other utilities' QF contracts, all utilities that participate in the Western EIM must conform to the applicable rules and requirements established by the Western EIM Market Operator, the California Independent System Operator (CAISO).

January 2, 2018

TO: Irion Sanger  
Sanger Law, P.C.

FROM: Patrick Hager  
Manager, Regulatory Affairs

**PORTLAND GENERAL ELECTRIC  
UM 1877-UM 1882, UM 1844-UM 1886, UM 1888-UM 1890  
PGE Response to Sanger Law's Data Request No. 011  
Dated December 19, 2017**

**Request:**

**Please refer to PGE's Response to Complainants Data Request No. 4, which requested that PGE provide the grounds for the Western Energy Imbalance Market requirements. PGE's data response is non-responsive and does not identify or list any Western Energy Imbalance requirements. Please identify all Western Energy Imbalance Market requirements for testing the communication system for offsite monitoring, and why those requirements support PGE's new Exhibit C.**

**Response:**

PGE objects to this request on the grounds that it is overly broad, unduly burdensome and seeks legal conclusions. Notwithstanding and without waiving the foregoing objections, PGE responds as follows:

Line 7 of Exhibit C states "Testing the communication system for offsite monitoring and all requirements of the Western Energy Imbalance Market." As explained in PGE response to Complainants Data Request No 004, testing the communication system for offsite monitoring is separate and distinct from the requirements of the EIM. There are no "Western Energy Imbalance Market requirements for testing the communication system for offsite monitoring."

# **Declaration of Chris Norqual**



**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**UM 1877-UM 1882, UM 1884-UM 1886, UM 1888-UM 1890**

In the Matters of

BOTTLENOSE SOLAR, LLC;  
VALHALLA SOLAR, LLC;  
WHIPSNAKE SOLAR, LLC;  
SKYWARD SOLAR, LLC;  
LEATHERBACK SOLAR, LLC; PIKA  
SOLAR, LLC; COTTONTAIL SOLAR,  
LLC; OSPREY SOLAR, LLC; WAPITI  
SOLAR, LLC; BIGHORN SOLAR,  
LLC; MINKE SOLAR, LLC; HARRIER  
SOLAR, LLC,

Complainants,

v.

PORTLAND GENERAL ELECTRIC  
COMPANY,

Defendant.

DECLARATION OF CHRIS  
NORQUAL IN SUPPORT OF  
COMPLAINANTS' RESPONSE TO  
PGE'S MOTION FOR SUMMARY  
JUDGMENT

I, Chris Norqual, declare:

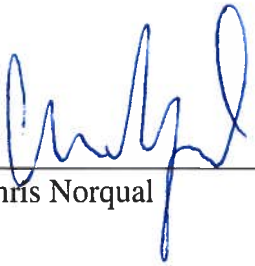
1. I am the Vice President, Utilities, of Cypress Creek Renewables.
2. On the dates the below letters were sent, Cypress Creek Renewables was developer of the Valhalla Solar, Skyward Solar, Bottlenose Solar, Whipsnake Solar, Leatherback Solar, and Pika Solar projects.
3. I make this declaration in support of Complainants' Response to PGE's Motion for Summary Judgment. If called as a witness, I could testify to all matters referred to here.

4. Attached to this declaration are true and correct copies of the following:

Attachment No.	Document
A	Letter dated April 18, 2017 from Valhalla Solar, LLC to Bruce True of Portland General Electric Company Re: Valhalla Solar, LLC; Power Purchase Agreement
B	Letter dated April 18, 2017 from Skyward Solar, LLC to Bruce True of Portland General Electric Company Re: Skyward Solar, LLC; Power Purchase Agreement
C	Letter dated December 8, 2016 from Bottlenose Solar, LLC to Bruce True of Portland General Electric Company Re: Bottlenose Solar, LLC; Power Purchase Agreement
D	Letter dated December 8, 2016 from Whipsnake Solar, LLC to Bruce True of Portland General Electric Company Re: Whipsnake Solar, LLC; Power Purchase Agreement
E	Letter dated December 8, 2016 from Leatherback Solar, LLC to Bruce True of Portland General Electric Company Re: Leatherback Solar, LLC; Power Purchase Agreement
F	Letter dated December 8, 2016 from Pika Solar, LLC to Bruce True of Portland General Electric Company Re: Pika Solar, LLC; Power Purchase Agreement
G	Email dated May 23, 2016 from Chris Norqual to Angeline Chong of Portland General Electric Company Re: Skyward /Valhalla PPA notes
H	Email dated May 24, 2016 f Chris Norqual to Angeline Chong of Portland General Electric Company Re: Whipsnake/ Pika/Leatherback/ Bottlenose – PPA Execution Copy Request
I	Email dated May 26, 2016 from Chris Norqual to Angeline Chong of Portland General Electric Company Re: Skyward /Valhalla PPA notes
J	Email dated May 30, 2016 from Chris Norqual to Angeline Chong of Portland General Electric Company Re: Got your message

I hereby declare that the above statement is true to the best of my knowledge and belief,  
and that I understand it is made for use as evidence and is subject to penalty for perjury under the  
laws of the State of Oregon

Dated this 8<sup>th</sup> day of March 2018.



Chris Norqual

# **Attachment A**

**Valhalla Solar, LLC**

April 18, 2017

Bruce True  
Portland General Electric Company  
P.O. Box 4404  
Portland, OR 97208

RE: Valhalla Solar, LLC; Power Purchase Commitment

Dear Mr. True,

I am writing to confirm the establishment of a legally enforceable obligation for Portland General Electric Company to purchase the generation from Valhalla Solar, LLC pursuant to the standard rate and contract terms established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016, approved by the Oregon Commission.

As you are no doubt aware, in accordance with regulations issued by the Federal Energy Regulatory Commission ("FERC") pursuant to its authority under PURPA, a "qualifying facility" ("QF") may, at its option, "provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." 18 CFR 292.304(d). As you are also aware, FERC has recently stated that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non contractual, but binding, legally enforceable obligations." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at 32 (2011) (emphasis added).

Through FERC self-certification, a formal PPA request, completion of a draft PPA, as well as other communications with the utility, Valhalla Solar, LLC has established a legally enforceable obligation for Portland General Electric Company's purchase of the generation from this facility pursuant to the standard avoided cost rate established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016.

Thank you for your attention to this matter. Please feel free to contact me at [utility@ccrenew.com](mailto:utility@ccrenew.com) with any questions.

Sincerely,

**Valhalla Solar, LLC**

By: 

\_\_\_\_\_  
Name: Jerome O'Brien  
Title: Authorized Person

# **Attachment B**

**Skyward Solar, LLC**

April 18, 2017

Bruce True  
Portland General Electric Company  
P.O. Box 4404  
Portland, OR 97208

RE: Skyward Solar, LLC; Power Purchase Commitment

Dear Mr. True,

I am writing to confirm the establishment of a legally enforceable obligation for Portland General Electric Company to purchase the generation from Skyward Solar, LLC pursuant to the standard rate and contract terms established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016, approved by the Oregon Commission.

As you are no doubt aware, in accordance with regulations issued by the Federal Energy Regulatory Commission ("FERC") pursuant to its authority under PURPA, a "qualifying facility" ("QF") may, at its option, "provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." 18 CFR 292.304(d). As you are also aware, FERC has recently stated that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non contractual, but binding, legally enforceable obligations." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at 32 (2011) (emphasis added).

Through FERC self-certification, a formal PPA request, completion of a draft PPA, as well as other communications with the utility, Skyward Solar, LLC has established a legally enforceable obligation for Portland General Electric Company's purchase of the generation from this facility pursuant to the standard avoided cost rate established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016.

Thank you for your attention to this matter. Please feel free to contact me at [utility@ccrenew.com](mailto:utility@ccrenew.com) with any questions.

Sincerely,

**Skyward Solar, LLC**

By: 

Name: Jerome O'Brien  
Title: Authorized Person

# Attachment C



**Bottlenose Solar, LLC**

December 8, 2016

Bruce True  
Portland General Electric Company  
P.O. Box 4404  
Portland, OR 97208

RE: Bottlenose Solar, LLC; Power Purchase Commitment

Dear Mr. True,

I am writing to confirm the establishment of a legally enforceable obligation for Portland General Electric Company to purchase the generation from Bottlenose Solar, LLC pursuant to the standard rate and contract terms established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016, approved by the Oregon Commission.

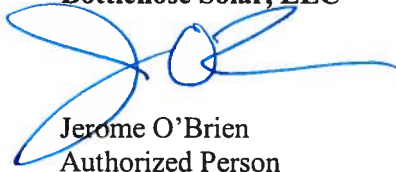
As you are no doubt aware, in accordance with regulations issued by the Federal Energy Regulatory Commission ("FERC") pursuant to its authority under PURPA, a "qualifying facility" ("QF") may, at its option, "provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." 18 CFR 292.304(d). As you are also aware, FERC has recently stated that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non contractual, but binding, legally enforceable obligations." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at 32 (2011) (emphasis added).

Through FERC self-certification, a formal PPA request, completion of a draft PPA, as well as other communications with the utility, Bottlenose Solar, LLC has established a legally enforceable obligation for Portland General Electric Company's purchase of the generation from this facility pursuant to the standard avoided cost rate established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016.

Thank you for your attention to this matter. Please feel free to contact me at [utility@ccrenew.com](mailto:utility@ccrenew.com) with any questions.

Sincerely,

**Bottlenose Solar, LLC**



Jerome O'Brien  
Authorized Person

# Attachment D

**Whipsnake Solar, LLC**

December 8, 2016

Bruce True  
Portland General Electric Company  
P.O. Box 4404  
Portland, OR 97208

RE: Whipsnake Solar, LLC; Power Purchase Commitment

Dear Mr. True,

I am writing to confirm the establishment of a legally enforceable obligation for Portland General Electric Company to purchase the generation from Whipsnake Solar, LLC pursuant to the standard rate and contract terms established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016, approved by the Oregon Commission.

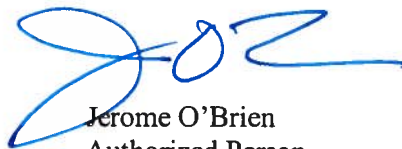
As you are no doubt aware, in accordance with regulations issued by the Federal Energy Regulatory Commission ("FERC") pursuant to its authority under PURPA, a "qualifying facility" ("QF") may, at its option, "provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." 18 CFR 292.304(d). As you are also aware, FERC has recently stated that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non contractual, but binding, legally enforceable obligations." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at 32 (2011) (emphasis added).

Through FERC self-certification, a formal PPA request, completion of a draft PPA, as well as other communications with the utility, Whipsnake Solar, LLC has established a legally enforceable obligation for Portland General Electric Company's purchase of the generation from this facility pursuant to the standard avoided cost rate established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016.

Thank you for your attention to this matter. Please feel free to contact me at [utility@ccrenew.com](mailto:utility@ccrenew.com) with any questions.

Sincerely,

**Whipsnake Solar, LLC**



Jerome O'Brien  
Authorized Person

# **Attachment E**

**Leatherback Solar, LLC**

December 8, 2016

Bruce True  
Portland General Electric Company  
P.O. Box 4404  
Portland, OR 97208

RE: Leatherback Solar, LLC; Power Purchase Commitment

Dear Mr. True,

I am writing to confirm the establishment of a legally enforceable obligation for Portland General Electric Company to purchase the generation from Leatherback Solar, LLC pursuant to the standard rate and contract terms established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016, approved by the Oregon Commission.

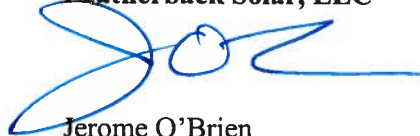
As you are no doubt aware, in accordance with regulations issued by the Federal Energy Regulatory Commission ("FERC") pursuant to its authority under PURPA, a "qualifying facility" ("QF") may, at its option, "provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." 18 CFR 292.304(d). As you are also aware, FERC has recently stated that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non contractual, but binding, legally enforceable obligations." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at 32 (2011) (emphasis added).

Through FERC self-certification, a formal PPA request, completion of a draft PPA, as well as other communications with the utility, Leatherback Solar, LLC has established a legally enforceable obligation for Portland General Electric Company's purchase of the generation from this facility pursuant to the standard avoided cost rate established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016.

Thank you for your attention to this matter. Please feel free to contact me at [utility@ccrenew.com](mailto:utility@ccrenew.com) with any questions.

Sincerely,

**Leatherback Solar, LLC**



Jerome O'Brien  
Authorized Person

# **Attachment F**

**Pika Solar, LLC**

December 8, 2016

Bruce True  
Portland General Electric Company  
P.O. Box 4404  
Portland, OR 97208

RE: Pika Solar, LLC; Power Purchase Commitment

Dear Mr. True,

I am writing to confirm the establishment of a legally enforceable obligation for Portland General Electric Company to purchase the generation from Pika Solar, LLC pursuant to the standard rate and contract terms established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016, approved by the Oregon Commission.

As you are no doubt aware, in accordance with regulations issued by the Federal Energy Regulatory Commission ("FERC") pursuant to its authority under PURPA, a "qualifying facility" ("QF") may, at its option, "provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." 18 CFR 292.304(d). As you are also aware, FERC has recently stated that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non contractual, but binding, legally enforceable obligations." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at 32 (2011) (emphasis added).

Through FERC self-certification, a formal PPA request, completion of a draft PPA, as well as other communications with the utility, Pika Solar, LLC has established a legally enforceable obligation for Portland General Electric Company's purchase of the generation from this facility pursuant to the standard avoided cost rate established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016.

Thank you for your attention to this matter. Please feel free to contact me at [utility@ccrenew.com](mailto:utility@ccrenew.com) with any questions.

Sincerely,

**Pika Solar, LLC**



Jerome O'Brien  
Authorized Person

# **Attachment G**



---

**From:** Chris Norqual [<mailto:norqual@ccrenew.com>]

**Sent:** Tuesday, May 23, 2017 3:35 PM

**To:** Angeline Chong <[Angeline.Chong@pgn.com](mailto:Angeline.Chong@pgn.com)>

**Cc:** John McQueeney <[john.mcqueeney@ccrenew.com](mailto:john.mcqueeney@ccrenew.com)>; Garrett Hollingsworth <[hollingsworth@ccrenew.com](mailto:hollingsworth@ccrenew.com)>; Danny Obeler <[obeler@ccrenew.com](mailto:obeler@ccrenew.com)>; Andrew Berrier <[aberrier@pgrenewables.com](mailto:aberrier@pgrenewables.com)>; David Bunge <[bunge@ccrenew.com](mailto:bunge@ccrenew.com)>

**Subject:** Skyward / Valhalla PPA notes

**Importance:** High

Hi Angeline,

Thank you very much for your call and time this morning. For your review, here are the few notes and requests we discussed. Again, our priority is to receive Execution Copies of the PPAs as soon as possible this week since we intend to sell the power from our six applied-for projects to PGE under the currently available Schedule 201. This includes Skyward and Valhalla, as well as Pika, Leatherback, Whipsnake, and Bottlenose, which you noted will have drafts available today.

1. Valhalla is missing this note in the top margin on all pages: Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement Form Effective August 12, 2016. We are OK with this, as long as PGE is
2. Skyward, Exhibit B – for consistency, please remove/exclude expected dates
3. All Projects, Exhibit C – Please remove point #7
4. All Projects -- Section 4.5 -- We suggest returning to the prior language from the previously signed SP Solar 2, LLC PPA:
  - a. During the Renewable Resource Deficiency Period, Seller shall provide and PGE shall acquire the RPS Attributes for the Contract Years as specified in the Schedule and Seller shall retain ownership of all other Environmental Attributes (if any). During the Renewable Resource Sufficiency Period, and any period within the Term of this Agreement after completion of the first fifteen (15) years after the Commercial Operation Date, Seller shall retain all Environmental Attributes in accordance with the Schedule. The Contract Price includes full payment for the Net Output and any RPS Attributes transferred to PGE under this Agreement. With respect to Environmental Attributes not transferred to PGE under this Agreement ("Seller-Retained Environmental Attributes") Seller may report under §1605(b) of the Energy Policy Act of

1992 or under any applicable program as belonging to Seller any of the Seller-Retained Environmental Attributes, and PGE shall not report under such program that such Seller-Retained Environmental Attributes belong to it. With respect to RPS Attributes transferred to PGE under this Agreement ("Transferred RECs"), PGE may report under §1605(b) of the Energy Policy Act of 1992 or under any applicable program as belonging to it any of the Transferred RECs, and Seller shall not report under such program that such Transferred RECs belong to it.

5. All Projects -- Section 9.2 -- We suggest returning to the prior language from the previously signed SP Solar 2, LLC PPA:
  - a. In the event of a default hereunder, except as otherwise provided in this Agreement, the non-defaulting party may immediately terminate this Agreement at its sole discretion by delivering written notice to the other Party. In addition, the non-defaulting party may pursue any and all legal or equitable remedies provided by law or pursuant to this Agreement including damages related to the need to procure replacement power. A termination hereunder shall be effective upon the date of delivery of notice, as provided in Section 20. The rights provided in this Section 9 are cumulative such that the exercise of one or more rights shall not constitute a waiver of any other rights. Provided; however, PGE may not terminate this Agreement for Seller's failure to meet the Guarantee of Mechanical Availability established in Section 3.1.10.
  - b. 9.1.6 and 9.3 – were not included in the previous PPA. We suggest removing both to be consistent

By way of introduction, I have copied Andrew Berrier from Pine Gate, since I believe he is also interested in pursuing execution copies for his three projects, with similar comments. I'll let him respond directly to you.

Please don't hesitate to call if you have any questions or needs.

**Chris Norqual**

Cypress Creek Renewables

3250 Ocean Park Blvd, Suite 355 | Santa Monica, California 90405

(o) 213-347-9377 (c) 310-746-7067 | [norqual@ccrenew.com](mailto:norqual@ccrenew.com)



# **Attachment H**

**From:** Chris Norqual norqual@ccrenew.com  
**Subject:** Whipsnake/Pika/Leatherback/Bottlenose - PPA Execution Copy Request  
**Date:** May 24, 2017 at 6:17 PM  
**To:** Angeline Chong Angeline.Chong@pgn.com  
**Cc:** Garrett Hollingsworth hollingsworth@ccrenew.com, Danny Obeler obeler@ccrenew.com, Bruce True Bruce.True@pgn.com



Hi Angeline,

Thanks for sending these four copies yesterday. I request to proceed with PPA execution copies, without substantive updates, as soon as possible for all four projects. There are two minor edits I'd like to please request in each copy:

- Remove point #7 from Exhibit C: "Testing the communication system for offsite monitoring and all requirements of the Western Energy Imbalance Market"
- Update the expected dates in Sections 2.2.1 and 2.2.2 to: 5/1/2020

Since the projects intend to sell all output to PGE per the currently available Schedule 201, I respectfully ask that you please provide the execution copies this week.

Thank you,

**Chris Norqual**

Cypress Creek Renewables

3250 Ocean Park Blvd, Suite 355 | Santa Monica, California 90405

(o) 213-347-9377 (c) 310-746-7067 | [norqual@ccrenew.com](mailto:norqual@ccrenew.com)



Draft PPA and  
Sched...017.pdf



Draft PPA and  
Sched...017.pdf



Draft PPA  
Leathe...017.pdf



Draft PPA and  
Sched...017.pdf

# **Attachment I**

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**From:** Chris Norqual  
**Sent:** Friday, May 26, 2017 9:46 AM  
**To:** Angeline Chong; 'John.Morton@pgn.com'  
**Cc:** 'Andrew Berrier'; Danny Obeler; Garrett Hollingsworth; David Bunge  
**Subject:** RE: Skyward / Valhalla PPA notes

**Importance:** High

Hi Angeline and John,

Thank you for your acknowledgements of receiving our comments. We know how busy you are, so our goal is to make this as simple as possible for you to prepare drafts for our signature. Angeline, as discussed on the phone, we appreciate you working to send these to us before May 31<sup>st</sup> and I am available at any time if you have any questions.

We have previously asked for only these two very minor edits to four projects' drafts:

- 1) Remove point #7 from Exhibit C: "Testing the communication system for offsite monitoring and all requirements of the Western Energy Imbalance Market"
- 2) Update the expected dates in Sections 2.2.1 and 2.2.2 to: 5/1/2020

I'd like to revise our request for Skyward and Valhalla to match the other four exactly. We are requesting this to make the updates as simple as possible for you. Therefore, please send execution copies with the two minor updates above for these **six** projects:

- Skyward Solar, LLC
- Valhalla Solar, LLC
- Whipsnake Solar, LLC
- Bottlenose Solar, LLC
- Pika Solar, LLC
- Leatherback Solar, LLC

I will be in Portland late afternoon on Tuesday 5/30 and Wednesday 5/31 morning. Would it be possible to please meet up for 30 minutes?

Thank you,  
Chris  
310-746-7067

---

# **Attachment J**

**From:** Chris Norqual norqual@ccrenew.com

**Subject:** RE: Got your message

**Date:** May 30, 2017 at 2:24 PM

**To:** Angeline Chong Angeline.Chong@pgn.com

**Cc:** Ryin Khandoker Ryin.Khandoker@pgn.com, Brett Greene Brett.Greene@pgn.com, John Morton John.Morton@pgn.com, David Bunge bunge@ccrenew.com, Andrew Berrier aberrier@pgrenewables.com, Steve Levitas steve.levitas@ccrenew.com, Edward Johnson jGroenewold@pgrenewables.com, Bruce True Bruce.True@pgn.com

CN

Hi Angeline,

I appreciate your response. My clear question is: if you do not send us official execution copies until June, do you still intend to honor the currently available Schedule 201 rates that were offered in the drafts that we just approved? These are the same rates that were available when, and since, we submitted Legally Enforceable Obligation notices and requests for PPAs in March 2017. We intend to sign the contracts ASAP and sell all the output from all the projects to PGE.

We've only asked for two minor corrections in the final drafts. However, we want to understand if this is causing any delay in providing us the final copies today or tomorrow. We have worked in good faith to provide all the information you've requested over the past two plus months. I'm happy to talk about whatever will make it easiest for you to provide the execution copies.

If you see any possibility at all of the currently available Schedule 201 NOT being available in our execution copies, then I urgently request that we please meet to discuss. I'm meeting with Jason Zappe in your office at 930am tomorrow and would be available before or after. I'm also available by phone this afternoon. Please let me know.

Thank you,  
Chris Norqual  
310-746-7067

---

**From:** Angeline Chong [mailto:Angeline.Chong@pgn.com]

**Sent:** Tuesday, May 30, 2017 1:43 PM

**To:** Chris Norqual <norqual@ccrenew.com>

**Cc:** Ryin Khandoker <Ryin.Khandoker@pgn.com>; Brett Greene <Brett.Greene@pgn.com>; John Morton <John.Morton@pgn.com>

**Subject:** Got your message

I received your May 26, 2017 email and your May 30, 2017 voicemail. I am unable to meet with you today. PGE intends to proceed under the process and timeline discussed in John Morton's May 25, 2017 email. Thanks.

Angeline D. Chong |  
Portland General Electric |  
121 SW Salmon St. 3WTC0306 | Portland, Oregon 97204 |  
W: 503-464-7343 | F: 503-464-2605 |  
E: [angeline.chong@pgn.com](mailto:angeline.chong@pgn.com)



# **Declaration of James Ortega**

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**UM 1877-UM 1882, UM 1884-UM 1886, UM 1888-UM 1890**

In the Matters of

BOTTLENOSE SOLAR, LLC;  
VALHALLA SOLAR, LLC;  
WHIPSNAKE SOLAR, LLC;  
SKYWARD SOLAR, LLC;  
LEATHERBACK SOLAR, LLC; PIKA  
SOLAR, LLC; COTTONTAIL SOLAR,  
LLC; OSPREY SOLAR, LLC; WAPITI  
SOLAR, LLC; BIGHORN SOLAR,  
LLC; MINKE SOLAR, LLC; HARRIER  
SOLAR, LLC,

Complainants,

v.

PORTLAND GENERAL ELECTRIC  
COMPANY,

Defendant.

DECLARATION OF JAMES  
ORTEGA IN SUPPORT OF  
COMPLAINANTS' RESPONSE TO  
PGE'S MOTION FOR SUMMARY  
JUDGMENT

I, James Ortega, declare:

1. I am Senior Counsel for Pinegate Renewables, LLC.
2. On the dates the below letters were sent, Pinegate Renewables, LLC was developer of the Bighorn Solar, Minke Solar, and Harrier Solar projects.
3. I make this declaration in support of Complainants' Response to PGE's Motion for Summary Judgment. If called as a witness, I could testify to all matters referred to here.

DECLARATION OF JAMES ORTEGA IN SUPPORT OF COMPLAINANTS'  
RESPONSE TO PGE'S MOTION FOR SUMMARY JUDGMENT

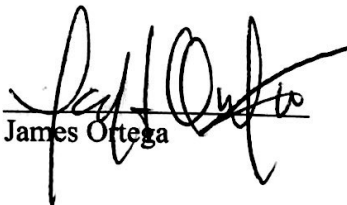
Page 1 of 2

4. Attached to this declaration are true and correct copies of the following:

Attachment No.	Document
A	Letter dated December 8, 2016 from Bighorn Solar, LLC to Bruce True of Portland General Electric Company Re: Bighorn Solar, LLC; Power Purchase Agreement
B	Letter dated December 8, 2016 from Minke Solar, LLC to Bruce True of Portland General Electric Company Re: Minke Solar, LLC; Power Purchase Agreement
C	Letter dated December 8, 2016 from Harrier Solar, LLC to Bruce True of Portland General Electric Company Re: Harrier Solar, LLC; Power Purchase Agreement
D	Email thread beginning on March 22, 2017 and ending on April 25, 2017 between Angeline Chong of Portland General Electric Company, Jason Groenewold, et al. Re: New Position/Contact
E	Email thread dated May 23, 2017 between Angeline Chong of Portland General Electric Company and Jason Groenewold Re: chance to connect?

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence and is subject to penalty for perjury under the laws of the State of Oregon

Dated this 9th day of March 2018.

  
James Ortega

# **Attachment A**

**Bighorn Solar, LLC**

December 8, 2016

Bruce True  
Portland General Electric Company  
P.O. Box 4404  
Portland, OR 97208

RE: Bighorn Solar, LLC; Power Purchase Commitment

Dear Mr. True,

I am writing to confirm the establishment of a legally enforceable obligation for Portland General Electric Company to purchase the generation from Bighorn Solar, LLC pursuant to the standard rate and contract terms established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016, approved by the Oregon Commission.

As you are no doubt aware, in accordance with regulations issued by the Federal Energy Regulatory Commission ("FERC") pursuant to its authority under PURPA, a "qualifying facility" ("QF") may, at its option, "provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." 18 CFR 292.304(d). As you are also aware, FERC has recently stated that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non contractual, but binding, legally enforceable obligations." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at 32 (2011) (emphasis added).

Through FERC self-certification, a formal PPA request, completion of a draft PPA, as well as other communications with the utility, Bighorn Solar, LLC has established a legally enforceable obligation for Portland General Electric Company's purchase of the generation from this facility pursuant to the standard avoided cost rate established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016.

Thank you for your attention to this matter. Please feel free to contact me at [jluster@pgrenewables.com](mailto:jluster@pgrenewables.com) with any questions.

Sincerely,

**Bighorn Solar, LLC**



James Luster  
Managing Director

# **Attachment B**

**Minke Solar, LLC**

December 8, 2016

Bruce True  
Portland General Electric Company  
P.O. Box 4404  
Portland, OR 97208

RE: Minke Solar, LLC; Power Purchase Commitment

Dear Mr. True,

I am writing to confirm the establishment of a legally enforceable obligation for Portland General Electric Company to purchase the generation from Minke Solar, LLC pursuant to the standard rate and contract terms established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016, approved by the Oregon Commission.

As you are no doubt aware, in accordance with regulations issued by the Federal Energy Regulatory Commission ("FERC") pursuant to its authority under PURPA, a "qualifying facility" ("QF") may, at its option, "provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." 18 CFR 292.304(d). As you are also aware, FERC has recently stated that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non contractual, but binding, legally enforceable obligations." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at 32 (2011) (emphasis added).

Through FERC self-certification, a formal PPA request, completion of a draft PPA, as well as other communications with the utility, Minke Solar, LLC has established a legally enforceable obligation for Portland General Electric Company's purchase of the generation from this facility pursuant to the standard avoided cost rate established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016.

Thank you for your attention to this matter. Please feel free to contact me at [jluster@pgreenewables.com](mailto:jluster@pgreenewables.com) with any questions.

Sincerely,

**Minke Solar, LLC**



James Luster  
Managing Director

# Attachment C



**Harrier Solar, LLC**

December 8, 2016

Bruce True  
Portland General Electric Company  
P.O. Box 4404  
Portland, OR 97208

RE: Harrier Solar, LLC; Power Purchase Commitment

Dear Mr. True,

I am writing to confirm the establishment of a legally enforceable obligation for Portland General Electric Company to purchase the generation from Harrier Solar, LLC pursuant to the standard rate and contract terms established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016, approved by the Oregon Commission.

As you are no doubt aware, in accordance with regulations issued by the Federal Energy Regulatory Commission ("FERC") pursuant to its authority under PURPA, a "qualifying facility" ("QF") may, at its option, "provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." 18 CFR 292.304(d). As you are also aware, FERC has recently stated that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non contractual, but binding, legally enforceable obligations." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at 32 (2011) (emphasis added).

Through FERC self-certification, a formal PPA request, completion of a draft PPA, as well as other communications with the utility, Harrier Solar, LLC has established a legally enforceable obligation for Portland General Electric Company's purchase of the generation from this facility pursuant to the standard avoided cost rate established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016.

Thank you for your attention to this matter. Please feel free to contact me at [jluster@pgrenewables.com](mailto:jluster@pgrenewables.com) with any questions.

Sincerely,

**Harrier Solar, LLC**



James Luster  
Managing Director

# **Attachment D**

**From:** Angeline Chong <Angeline.Chong@pgn.com>  
**Subject:** Re: New Position/Contact  
**Date:** April 25, 2017 at 6:56 AM  
**To:** Jason Groenewold <jGroenewold@pgrenewables.com>



I am going to be tied up at meetings until around 11:30 mt time. I will try and call you after the meeting. My cell is 503-207-3289.  
Thanks.

---

**From:** Jason Groenewold <jGroenewold@pgrenewables.com>  
**Date:** April 24, 2017 at 9:30:38 PM MDT  
**To:** Angeline Chong <Angeline.Chong@pgn.com>  
**Subject:** Re: New Position/Contact

\*\*\*Please take care when opening links, attachments or responding to this email as it originated outside of PGE.\*\*\*

Thanks. I look forward to speaking to you then. I'm at 704-575-3351.

Can you send me a good number to reach you in case I miss the call?

Thanks,  
Jason

---

**From:** Angeline Chong <Angeline.Chong@pgn.com>  
**Sent:** Tuesday, April 25, 2017 1:45:55 AM  
**To:** Jason Groenewold  
**Subject:** RE: New Position/Contact

Let's try and shoot for the noon time period. I'll try and call you.

---

**From:** Jason Groenewold <jGroenewold@pgrenewables.com>  
**Date:** April 24, 2017 at 9:01:05 AM MDT  
**To:** Angeline Chong <Angeline.Chong@pgn.com>  
**Subject:** RE: New Position/Contact

\*\*\*Please take care when opening links, attachments or responding to this email as it originated outside of PGE.\*\*\*

Thanks. Could we talk in one of these windows:

- 9:30-10:00 AM PT
- 12:00-1:30 pm PT
- After 3:00 pm PT?

Thanks,  
Jason

---

**From:** Angeline Chong [mailto:Angeline.Chong@pgn.com]  
**Sent:** Monday, April 24, 2017 10:57 AM  
**To:** Jason Groenewold <jGroenewold@pgrenewables.com>

**Subject:** RE: New Position/Contact

Jason – I am traveling for work today and Tuesday, so unfortunately I will not be able to connect with you in person. I am happy to chat with you in between meetings. If you are flexible, I can call you sometime on Tuesday. Just let me know whether that works for you. Thanks.

---

**From:** Jason Groenewold [<mailto:jGroenewold@pgrenewables.com>]

**Sent:** Monday, April 24, 2017 4:55 AM

**To:** Angeline Chong

**Subject:** RE: New Position/Contact

\*\*\*Please take care when opening links, attachments or responding to this email as it originated outside of PGE.\*\*\*

Hi Angeline,

I am going to be in Portland on Tuesday for a meeting with the T&D teams at 1:30 pm PT. Do you have time to meet in the morning or after that meeting? It would be nice to catch up and have a chance to formally meet.

Thanks,  
Jason

---

**From:** Jason Groenewold

**Sent:** Thursday, April 20, 2017 7:30 PM

**To:** Angeline Chong <[Angeline.Chong@pgn.com](mailto:Angeline.Chong@pgn.com)>

**Subject:** Re: New Position/Contact

Tomorrow is fine. Thanks.

On Apr 20, 2017, at 6:05 PM, Angeline Chong <[Angeline.Chong@pgn.com](mailto:Angeline.Chong@pgn.com)> wrote:

Jason – I am unable to make 3:15. Can we shoot for later today or tomorrow? I will call you. Thanks.

---

**From:** Jason Groenewold [<mailto:jGroenewold@pgrenewables.com>]

**Sent:** Thursday, April 20, 2017 12:29 PM

**To:** Angeline Chong

**Subject:** RE: New Position/Contact

\*\*\*Please take care when opening links, attachments or responding to this email as it originated outside of PGE.\*\*\*

I will be in an appointment until 3:00 or so. Could we try for 3:15?

Thanks,  
Jason

---

**From:** Angeline Chong [<mailto:Angeline.Chong@pgn.com>]  
**Sent:** Thursday, April 20, 2017 3:05 PM  
**To:** Jason Groenewold <[jGroenewold@pgrenewables.com](mailto:jGroenewold@pgrenewables.com)>  
**Subject:** RE: New Position/Contact

Do you have some flexibility today? Likely later today, around 2-3pm. I will call you.

---

**From:** Jason Groenewold [<mailto:jGroenewold@pgrenewables.com>]  
**Sent:** Thursday, April 20, 2017 11:50 AM  
**To:** Angeline Chong  
**Subject:** RE: New Position/Contact

\*\*\*Please take care when opening links, attachments or responding to this email as it originated outside of PGE.\*\*\*

Hi Angeline,

Does it still work to connect today?

Thanks,  
Jason

**Jason Groenewold**

(704) 457-7004 (w)  
(704) 575-3351 (c)

---

**From:** Jason Groenewold  
**Sent:** Tuesday, April 18, 2017 11:46 AM  
**To:** 'Angeline Chong' <[Angeline.Chong@pgn.com](mailto:Angeline.Chong@pgn.com)>  
**Subject:** RE: New Position/Contact

Hi Angeline,

Thanks for the note. Thursday afternoon after 1:00 pm PT works for me. Is there a good time for you?

Hope you're feeling better,  
Jason

---

**From:** Angeline Chong [<mailto:Angeline.Chong@pgn.com>]  
**Sent:** Tuesday, April 18, 2017 11:25 AM  
**To:** Jason Groenewold <[jGroenewold@pgrenewables.com](mailto:jGroenewold@pgrenewables.com)>

**From:** Jason Groenewold <[jgroenewold@pgrenewables.com](mailto:jgroenewold@pgrenewables.com)>

**Subject:** RE: New Position/Contact

Hi Jason – Thanks for your note. I was out sick yesterday and am catching up. Is it possible for us to chat on Thursday? I am pretty tied up today and tomorrow. I appreciate your patience. Thanks.

---

**From:** Jason Groenewold [<mailto:jGroenewold@pgrenewables.com>]

**Sent:** Monday, April 17, 2017 2:33 PM

**To:** Angeline Chong

**Subject:** RE: New Position/Contact

**\*\*\*Please take care when opening links, attachments or responding to this email as it originated outside of PGE.\*\*\***

Hi Angeline,

Can you send me your contact information (mine attached and pasted below)? Also, do you have time for a quick call today or tomorrow?

Thanks,  
Jason

**<image001.jpg>Jason Groenewold**  
Vice President, Development

**Pine Gate Renewables, LLC**  
(704) 457-7004 (w)  
(704) 575-3351 (c)

1111 Hawthorne Lane, Suite 201  
Charlotte, NC 28205  
[jgroenewold@pgrenewables.com](mailto:jgroenewold@pgrenewables.com)

**<image002.png>**

---

**From:** Jason Groenewold

**Sent:** Monday, April 10, 2017 6:15 PM

**To:** Angeline Chong <[Angeline.Chong@pgn.com](mailto:Angeline.Chong@pgn.com)>

**Subject:** Re: New Position/Contact

Sounds good.

On a somewhat related note, I would like to talk with you about a few terms in the PPA. Do you have time later this week for a call?

Best,

Jason

On Apr 10, 2017, at 4:31 PM, Angeline Chong <[Angeline.Chong@pgn.com](mailto:Angeline.Chong@pgn.com)> wrote:

I am sorry Jason but I am out of the office. Perhaps the next time you are in town. Have a good visit and I will catch you the next time. Best.

AC

---

**From:** Jason Groenewold <[jGroenewold@pgrenewables.com](mailto:jGroenewold@pgrenewables.com)>  
**Date:** April 10, 2017 at 11:33:57 AM MST  
**To:** Angeline Chong <[Angeline.Chong@pgn.com](mailto:Angeline.Chong@pgn.com)>, 'Chris Norqual' <[norqual@ccrenew.com](mailto:norqual@ccrenew.com)>  
**Subject:** RE: New Position/Contact

\*\*\*Please take care when opening links, attachments or responding to this email as it originated outside of PGE.\*\*\*

Hi Angeline,

I will be in Portland tomorrow for a meeting with the interconnection group at PGE. Would you have time for getting together? Say 30 mins or so?

Jason

**Jason Groenewold**  
Vice President, Development

**Pine Gate Renewables, LLC**  
(704) 457-7004 (w)  
(704) 575-3351 (c)

1111 Hawthorne Lane, Suite 201  
Charlotte, NC 28205  
[jgroenewold@pgrenewables.com](mailto:jgroenewold@pgrenewables.com)

<[image003.png](#)>

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**From:** Angeline Chong [<mailto:Angeline.Chong@pgn.com>]  
**Sent:** Thursday, March 30, 2017 11:53 AM

**To:** 'Chris Norqual' <[norqual@ccrenew.com](mailto:norqual@ccrenew.com)>  
**Cc:** Jason Groenewold <[jGroenewold@pgrenewables.com](mailto:jGroenewold@pgrenewables.com)>  
**Subject:** RE: New Position/Contact

Hi Chris – thanks for the note. Unfortunately I am on PTO that day. I would love to meet with you and Jason the next time you are in Portland. Safe travels.

AC

---

**From:** Chris Norqual [<mailto:norqual@ccrenew.com>]  
**Sent:** Wednesday, March 29, 2017 4:06 PM  
**To:** Angeline Chong  
**Cc:** Jason Groenewold  
**Subject:** RE: New Position/Contact

\*\*\*Please take care when opening links, attachments or responding to this email as it originated outside of PGE.\*\*\*

Hi Angeline,

Jason Groenewold of Pinegate and I are meeting with Jason Zappe on Tuesday afternoon at 3pm about interconnection for our 9 projects that already have signed PPAs. It would be great to meet you in person and introduce ourselves. We met with Shawn Davis during the past couple visits. Would you have any availability later in the morning or early afternoon next Tuesday, April 4<sup>th</sup>?

Thanks,  
Chris Norqual  
310-746-7067

---

**From:** Chris Norqual  
**Sent:** Wednesday, March 22, 2017 3:10 PM  
**To:** Angeline Chong <[Angeline.Chong@pgn.com](mailto:Angeline.Chong@pgn.com)>  
**Cc:** 'Shawn Davis' <[Shawn.Davis@pgn.com](mailto:Shawn.Davis@pgn.com)>  
**Subject:** RE: New Position/Contact

Great to meet you Angeline and look forward to working with you. We'll be sure to reach out the next time we visit, which should be early April.

Best,  
Chris

---

**From:** Shawn Davis [<mailto:Shawn.Davis@pgn.com>]  
**Sent:** Wednesday, March 22, 2017 2:20 PM



**To:** Chris Norqual <[norqual@ccrenew.com](mailto:norqual@ccrenew.com)>  
**Cc:** Angeline Chong <[Angeline.Chong@pgn.com](mailto:Angeline.Chong@pgn.com)>  
**Subject:** RE: New Position/Contact

Chris,

Definitely think you should drop in and see Angeline. I think you will be in good hands.

**Shawn P Davis** |  
Portland General Electric |  
121 SW Salmon St. 3WTC0306 | Portland, Oregon 97204 |  
W: 503-464-7013 | F: 503-464-7608 |  
E: [shawn.davis@pgn.com](mailto:shawn.davis@pgn.com)

---

**From:** Chris Norqual [<mailto:norqual@ccrenew.com>]  
**Sent:** Wednesday, March 22, 2017 1:54 PM  
**To:** Shawn Davis  
**Cc:** Jason Groenewold  
**Subject:** New Position/Contact

\*\*\*Please take care when opening links, attachments or responding to this email as it originated outside of PGE.\*\*\*

Hi Shawn,

Just checking in as Bruce True mentioned you've moved out of the PPA contracting role? I know you wore about 5 too many hats previously, so I hope the move is for the better! Is Angeline ([Angeline.chong@pgn.com](mailto:Angeline.chong@pgn.com)) our best contact going forward and would you suggest we meet her on our next trip to Portland in a couple weeks?

Thanks for your help.

Chris

**Chris Norqual**  
Vice President - Utilities  
Cypress Creek Renewables  
3250 Ocean Park Blvd, Suite 355 | Santa Monica, California 90405  
(o) 213-347-9377 (c) 310-746-7067 | [norqual@ccrenew.com](mailto:norqual@ccrenew.com)  
<image004.png>

# **Attachment E**

**From:** Angeline Chong [Angeline.Chong@pgn.com](mailto:Angeline.Chong@pgn.com)  
**Subject:** RE: chance to connect?  
**Date:** May 23, 2017 at 11:46 AM  
**To:** Jason Groenewold [jGroenewold@pgrenewables.com](mailto:jGroenewold@pgrenewables.com)



Jason – I got your VM and email. Unfortunately I unable to meet you for lunch or coffee. I am tied up in meetings. I am also down with the flu and really should not be at work but I am. I certainly don't want to pass whatever I have to you.

Perhaps another time when you are in town.

AC

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**From:** Jason Groenewold [<mailto:jGroenewold@pgrenewables.com>]  
**Sent:** Tuesday, May 23, 2017 11:28 AM  
**To:** Angeline Chong  
**Subject:** chance to connect?

\*\*\*Please take care when opening links, attachments or responding to this email as it originated outside of PGE.\*\*\*

Hi Angeline,

Any chance you are free for lunch today prior to 1:15 pm? Or coffee/tea after 2:30? Happen to be in town and thought I would try to reach out and formally meet, even if for 15-30 mins.

Best,  
Jason

**From:** Angeline Chong [Angeline.Chong@pgn.com](mailto:Angeline.Chong@pgn.com)  
**Subject:** RE: chance to connect?  
**Date:** May 23, 2017 at 11:46 AM  
**To:** Jason Groenewold [jGroenewold@pgrenewables.com](mailto:jGroenewold@pgrenewables.com)



Jason – I got your VM and email. Unfortunately I unable to meet you for lunch or coffee. I am tied up in meetings. I am also down with the flu and really should not be at work but I am. I certainly don't want to pass whatever I have to you.

Perhaps another time when you are in town.

AC

---

**From:** Jason Groenewold [<mailto:jGroenewold@pgrenewables.com>]  
**Sent:** Tuesday, May 23, 2017 11:28 AM  
**To:** Angeline Chong  
**Subject:** chance to connect?

\*\*\*Please take care when opening links, attachments or responding to this email as it originated outside of PGE.\*\*\*

Hi Angeline,

Any chance you are free for lunch today prior to 1:15 pm? Or coffee/tea after 2:30? Happen to be in town and thought I would try to reach out and formally meet, even if for 15-30 mins.

Best,  
Jason