BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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

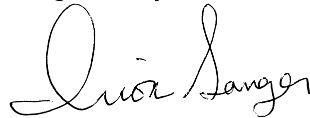
In the Matters of BOTTLENOSE SOLAR, LLC; VALHALLA SOLAR, LLC; WHIPSNAKE SOLAR, LLC; SKYWARD SOLAR, LLC; LEATHERBACK SOLAR, LLC; PIKA SOLAR, LLC; COTTONTAIL SOLAR, LLC; OSPREY SOLAR, LLC; WAPITI SOLAR, LLC; BIGHORN SOLAR, LLC; MINKE SOLAR, LLC; HARRIER SOLAR, LLC, Complainants, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	REPLY IN SUPPORT OF COMPLAINANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Complainants file this Reply in support of their Cross-Motion for Summary Judgment and in response to PGE's Response in Opposition to Complainants Cross-Motion for Summary Judgment. The Oregon Public Utility Commission ("OPUC" or "Commission") should grant Complainants' Cross-Motion for Summary Judgment because under the facts and circumstances of these cases, legally enforceable obligations ("LEOs") were formed prior to June 1, 2017, or alternatively after June 1, 2017, as of the time of the Complainants filed their complaints. In its response, PGE incorporates by reference its Reply in support of its Motion for Summary Judgment, to which Complainants responded to in their Sur-Response in support of

Complainants' Response to PGE's Motion for Summary Judgment. The Complainants' Sur-Response completely responds to PGE. As to not further burden the record with duplicative pleadings, the Complainants are simply incorporating by reference their Sur-Response herein, which is attached as Attachment A.

Dated this 30th day of April 2018.

Respectfully submitted,



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Attachment A

Complainants' Sur-Response in support of Complainants' Response to PGE's Motion for Summary Judgment

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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I. INTRODUCTION

Pursuant to the Prehearing Conference Report and Ruling issued on March 20, 2018 by Administrative Law Judge ("ALJ") Allan Arlow, Complainants submit this Sur-Response in support of their Response to Portland General Electric Company's ("PGE's") Motion for Summary Judgment. The Oregon Public Utility Commission ("OPUC" or "Commission") should deny PGE's Motion for Summary Judgment because PGE is not entitled to judgment as a matter of law. Under the facts and circumstances of these cases, legally enforceable obligations

("LEOs") were formed prior to June 1, 2017, or alternatively after June 1, 2017, as of the time of the Complainants filed their complaints.

II. FACTS

Complainants formally requested standard power purchase agreements ("PPAs") from PGE between March 22 and April 26, 2017, but some of the Complainants had contacted PGE as early as December 2016. PGE provided draft PPAs to all Complainants between May 15 and May 23, 2017. PGE should have provided draft PPAs to all of the Complainants, except Skyward and Valhalla, at earlier dates because PGE delayed progress towards providing the PPA. PGE filed for an avoided cost rate decrease on May 1, 2017, but did not inform the Complainants. Complainants learned that PGE's new and lower avoided cost rate would go into effect on June 1, 2017, and on May 31, 2017 each of the Complainants indicated to PGE the terms that they agreed to at the pre-June 1, 2017 rates. Complainants executed the PPAs on May 31, 2017. PGE responded after the new and lower rate went into effect that Complainants were only eligible for the new lower post-June 1, 2017 rate. Believing that they formed LEOs prior to June 1, Complainants did not agree to the post-June 1, 2017 rates and between August 7, 2017 and August 14, 2017 they each filed their Complaints in these matters.

PGE's avoided cost rate decreased again on September 18, 2017. Complainants could have executed PPAs at the rates in effect between June 1 and September 18, 2017, but they did not because they believed they were entitled to the pre-June 1 rates and because these Complaints were filed and pending.

III. ARGUMENT

The Commission's LEO standard requires that in the event of a dispute, a qualifying facility ("QF") should file a complaint so that the Commission may determine on a case-by-case

basis when a LEO was formed for the purpose of establishing an avoided cost price.[1] The most important criterion to form a LEO is not when PGE elects to provide a version of a contract or whether a QF has jumped through a sufficient number of hoops, but whether the QF has unequivocally committed itself to sell its net output to the utility. A QF's right to a LEO cannot be denied by a rigid or formulistic process that allows a utility to sit on an executable PPA until after avoided cost rates change.

A. PGE Was on Notice and Appeared to Concede that Complainants' at the Very Least Formed LEOs After June 1, 2017 at the Time of Filing their Complaints

The point of the Commission's standard is to determine the date a LEO was formed and therefore establish the avoided cost rate and any disputed terms and conditions that apply. The date a LEO was formed is most relevant where there is an avoided cost rate change (or other regulatory change). In fact, if there was no rate change, then there would likely be no reason for PGE to delay, there would be no dispute, and it would be abundantly clear which rate applies. Therefore, in this case, PGE was on notice that upon execution of the contracts and in no event any later than the filing of the complaints, the Complainants' sought to have the Commission determine which rate applies: either the pre-June 1, 2017 rate or the post-June 1, 2017 rate. While it is not required that a contract be partially executed or that a complaint be filed prior to a regulatory change to form a LEO, surely a LEO is formed and the relevant rates established, at the very least, at the time of filing a Complaint or signing a contract that includes key terms and conditions, including penalties for failure to deliver. Even in Idaho, which has developed a number of onerous and unlawful LEO tests over the years, the most onerous test the Idaho Public

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[1] Re Commission Investigation into QF Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 27 (May 13, 2016).

Utilities Commission ("IPUC") has ever used for determining grandfather eligibility is the pre-filed complaint test. This test requires, prior to the effective date of the rate change, the QF must have obtained an executed contract, or have filed a meritorious complaint at the Commission alleging it is entitled to a contract.[2]

Notably, FERC rejected the IPUC's rule that required the QF to file and fully litigate a "*meritorious* complaint" against the utility at the commission to create a LEO, reasoning that the filing of the complaint itself was clear evidence of intent by the QF of intent to obligate itself.[3] Instead, FERC ruled that the LEO is created when the QF commits to sell its power. Ultimately, FERC brought an enforcement action in federal court against the Idaho Public Utilities Commission in the Grouse Creek matter, and the state was forced to agree in a stipulation "that a legally enforceable obligation may be incurred prior to the formal memorialization of a contract to writing."[4] Likewise, in Virginia Electric and Power Co., FERC found that several QFs created

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[2] A.W. Brown Co., Inc. v. Idaho Power Co., 121 Idaho 812, 816-18 (1992). Notably, the IPUC has not applied this test consistently and has also found formation of a LEO before a formal complaint was filed. See Earth Power Resources, Inc. v. Washington Water Power Company, IPUC Case No. WWP-E-96-6, Order No. 27231 (1997) (finding utility delayed negotiations and therefore QF was entitled to grandfathered rate); Re Approval of a Firm Energy Sales Agreement with Yellowstone Power Co., IPUC Case No. IPC-E-10-22, Order No. 32104, at 12 (2010) (approving of grandfathered rates despite "the apparent lack of any *written* documentation . . . evidencing that the terms of a power purchase agreement were materially complete [before the rate change]" in part because QF had "familiarity with PURPA projects and the standard terms of Idaho Power's power purchase agreements").

[3] Grouse Creek Wind Park LLC, 142 FERC ¶ 61,187 at PP 11, 39 (March 15, 2013) (noting, "even though Petitioners filed a complaint to establish a legally enforceable obligation before the Idaho Commission in November 2010, the Idaho Commission found that irrelevant due to the contract negotiated and executed after the December 14, 2010 deadline.").

[4] See FERC v. Idaho PUC, Case No. 1:13-cv-141, Memorandum of Agreement Between FERC and the Idaho PUC (D. Id., Dec. 24, 2013) (copy available at: https://www.ferc.gov/legal/mou/mou-idaho-12-2013.pdf)

LEOs by obtaining state certificates of public convenience and necessity and expressing commitment to sell under the applicable state tariff *in letters* sent on October 28, 2014, even though the QFs did not even file their state commission complaint against the utility until over a month later on December 30, 2014.[5]

Although it may seem out of the ordinary for a party to form a binding contract by filing a complaint against its contracting counter party, this is admittedly and necessarily a unique contracting situation. In the words of one court finding a LEO had arisen: "We are not, after all, dealing with completely free enterprise. We are, rather, dealing with the twilight world of regulated monopolies."[6] Thus, even in Idaho, a QF can form a LEO by attempting to negotiate, providing the utility with the necessary project information, and filing a complaint after the utility refuses to process the request timely and in good faith. Certainly, in the context of Oregon's much more reasonable rule, the filing of the complaint that commits the QFs to sell to the utility constitutes the necessary unequivocal commitment to sell to the utility.

Furthermore, the QF does not even need to necessarily know the rates that are the lawful rates in order to lock in it right to those rates, as Oregon's own seminal LEO case demonstrates. In Snow Mountain Pine, an Oregon utility insisted that the LEO could be created "*only* when the utility and a qualifying facility execute a written contract for the purchase of power *or* when the commissioner issues an order determining the contract terms for the parties in a case brought before him . . . ."[7] According to the utility, "an obligation is not incurred by a qualifying

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[5] 151 FERC ¶ 61,038, PP 9-10, 27 (2015).

[6] Pub. Service Co. of Oklahoma v. State ex rel. Oklahoma Corp. Comm'n., 115 P.3d 861, 873 (Okla. 2005) (internal quotation omitted).

[7] 84 Or App 590 at 598 (emphasis added).

facility's unilateral presentation of a contract, the terms of which have not been agreed upon."[8] The Oregon Public Utility Commissioner's order endorsed this view and determined that rates would be calculated as of the date of the Commission's final order resolving the QF's complaint and not the earlier date on which the QF tendered an agreement to the utility.[9] The Oregon Court of Appeals reversed the Commissioner, holding that the QF created a LEO "by tendering an agreement that obligates it to provide power" – thus rejecting the view that the QF cannot create a LEO until the state commission actually calculates the disputed rates.[10]

The court reasoned that "the obligation to purchase power is imposed by law on a utility; it is not voluntarily assumed."[11] "[A] qualifying facility's self-imposed obligation *to deliver energy* triggers a utility's obligation *to purchase energy*."[12] Accordingly, "[t]he date on which the qualifying facility obligates itself to deliver energy fixes the date on which the 'avoided costs' are determined[,]" and "the fact that the price is not agreed upon when the qualifying facility obligates itself to provide power does not change the date on which the obligation is incurred or affect the date used for determining the price."[13] "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."[14] The court found FERC's preamble to its LEO rule particularly relevant,

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8 Id.

9 Id.

10 Id. at 600.

11 Id. at 599.

12 Id.

13 Id.

14 Id. at 599-600. Oregon has a separate mini-PURPA statute specifically directing the state's regulatory commission to encourage QF development. See ORS 758.505 to 758.555.

stating FERC "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*."[15] Thus, the utility cannot delay creation of the LEO by forcing the QF to file a complaint and limiting the QF to the rates applicable several months or years *after* the complaint is resolved.

Indeed, in Snow Mountain Pine, a LEO had existed as of the QF's tender of a proposed agreement on July 6, 1983, *even though that proposed agreement contained the incorrect rates and the final rate was still unknown at the time of the appellate court's decision years later in 1987*. The court directed the Commissioner to recalculate the avoided costs as of the date the QF tendered the agreement, not the date of the Commissioner's final order establishing rates.[16] Thus, even if the complaint itself does not specifically identify the rates that are applicable, the Commission has an independent obligation to itself identify the correct rates. As applied here, the latest date that could possibly exist for the LEO was the date of the filing of the complaints.

PGE also proposes a rigid standard that in no circumstances can a LEO be formed unless a QF accepts "the revised draft contracts *without change* and ask PGE to produce executable contracts,"[17] and then the QF must actually execute that PPA provided by the utility.[18] This is simply an impossible standard when there are disputes, because it requires both the utility and QF to be in full agreement on all issues, which is essentially the same as requiring a fully executed contract. The point of having LEOs in the first place is because there is a dispute

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15 Id. at 600 (internal quotation omitted) (emphasis added).
16 Id. at 601.
17 PGE's Reply in Support of Its Motion for Summary Judgment at 34 (emphasis added).
18 PGE's Motion for Summary Judgment at 18.

between the QF and the utility, and the only reasons for a dispute are that the utility will not provide an executable PPA or the QF and the utility cannot agree to relevant terms and conditions. Both of which apply here.

The fundamental problem with PGE's standard is that if the QF believes that PGE delayed the process and that it formed a LEO at an earlier and higher rate, the QF will be hesitant to agree *without change* (even in prices) and sign an executable PPA containing the lower rates. PGE would have the QF first sign a PPA with the terms and conditions (including prices) that it disagrees with, and then file a complaint to obtain the terms and conditions (including prices) that it actually believes it is entitled to. The formation of a LEO cannot hinge upon following counterintuitive and previously undisclosed procedural hurdles.

PGE's view is contrary to the Commission's standard that a LEO may be formed earlier if PGE delayed or obstructed progress towards an executable PPA and that the Commission will determine on a case-by-case basis which rate applies. It is unreasonable for PGE to require that QFs agree to a later and lower avoided cost price and execute a PPA at that price when PGE delayed or obstructed progress. The QF should be able to agree to all other terms and conditions of the PPA and file a complaint with the Commission to establish what rate should apply, as the Complainants have done here. The QF should commit itself to the terms and conditions that it wants and not PGE's preferred terms and conditions to form a LEO.

PGE's approach makes even less sense when the dispute between the utility and the QF is about non-price terms and conditions. LEO cases often result when, as is the case here, a utility is using delay, informational advantages, and other obfuscation tactics to ensure that the QF is unable to execute a PPA before a rate change. Disputes, even those in which are entirely reasonable and not due to the fault of either party, can occur for a myriad of reasons such as

nameplate capacity, contract provisions, QF eligibility, transmission arrangements, etc.[19] In these circumstances, the QF should be able to commit itself to the relevant terms and conditions that it believes are warranted and seek Commission resolution without fear of losing the then applicable avoided cost rates. Otherwise, if a QF will not be entitled to the then-current rates in effect at the time the dispute becomes irreconcilable, then the QF will be forced to choose the contract terms it does not agree with simply to retain eligibility for the better rates.

The Commission has resolved QF disputes in the past consistent with the Complainants view of how a LEO is formed. If a utility and a QF have a dispute after the QF has committed to sell its net output, then the QF will be entitled to the rates in effect at the time of the commitment and not the rates in effect at the time the Commission resolves the dispute. For example, in a dispute between Kootenai Electric Cooperative, Inc. ("Kootenai") and Idaho Power Company, the Commission determined that Kootenai should receive "the rates that were in effect on the date that the complaint was filed."[20] In that case, Kootenai filed its complaint on January 2, 2012 and the case was not finally resolved until two years later on January 9, 2014, but the Commission directed the utility to provide a standard contract with avoided cost prices in effect on the date the complaint was filed.[21]

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19 PGE v. Covanta Marion, Inc., Docket No. UM 1887 (nameplate capacity dispute); Evergreen Biopower, LLC v. PGE, Docket No. UM 1844 (same); Re Application of Rocky Mountain Power for Approval of the PPA between PacifiCorp and Thayn Hydro, L.L.C., Public Service Commission of Utah Docket No 16-035-04 (dispute over insurance contract term); Re Farmers Irrigation District v. PacifiCorp, dba Pacific Power, OPUC Docket No. UM 1441 (dispute over QF eligibility); Re Swalley Irrigation District v. PacifiCorp, dba Pacific Power, OPUC Docket No. 1438 (dispute over rates).

20 Kootenai Electric Cooperative, Inc. v. Idaho Power Company, Docket No. UM 1572, Order No. 14-027 (Jan. 27, 2014).

21 Id.

Additionally, and as explained in further detail below, PGE appears to have conceded that Complainants formed LEOs after the June 1, 2017 avoided cost rate change (but before it changed again on September 18, 2017) and PGE cannot now change course.[22]

The Complainants in this case should not be penalized for filing a complaint. Under PGE's argument, if the Complainants lose their argument that they are not entitled to the Pre-June 1, 2017 rates, then they must go back to the drawing board and re-submit a PPA request at the rates in effect at the time that the complaint is dismissed. PGE's publicly stated position that QFs should be subject to such a penalty is illustrative of PGE's entire approach to PURPA.

B. Under the Facts and Circumstances of these Cases, LEOs Were Formed Prior to June 1, 2017, but at the Very Least, as of the Time the Complaints Were Filed

In these cases, the Complainants requested Standard PPAs, provided PGE with all the required information, and indicated their intent to finalize the contract before PGE's avoided cost rate change. They expected that PGE would act reasonably to accomplish this goal. They did not expect that PGE would use its 15-day contracting turnaround process as a rigid procedural bar to providing a contract or forming a LEO. Complainants when faced with PGE's rigidity, continued to unequivocally commit to sell their power to PGE and agreed to all material terms prior to June 1, 2017. Under these facts, PGE is not entitled to judgment as a matter of law.

FERC rulings are persuasive authority regarding what is permissible and what violates PURPA. The FERC cases cited explain that a state Commission violates when it conditions a

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[22] See PGE's Motion for Summary Judgment at 11 ("If each of the 12 Complainants had accepted all of the terms and conditions in their draft PPAs and requested executable PPAs on the day they received the draft PPAs from PGE, then the *earliest* each QF would have been entitled to an executable PPA would have been after the June 1 rate change"); Id. at 13 ("the *earliest* that each Complainant would have been entitled to an executable PPA would have been 15 business days later on July 6, 2017").

LEO on a QF either: 1) obtaining a fully executed a PPA; 2) executing an interconnection agreement; or 3) filing a complaint before the date of the alleged LEO.[23] What is common among the first two findings is that process requirements within the exclusive control of the utility cannot operate to bar a LEO. The third finding relates to the Grouse Creek case where neither party executed the PPA and PGE even notes that the federal district court case was "dismissed by stipulation of the parties after the Idaho PUC . . . acknowledged that a LEO may be incurred prior to the formal memorialization of a contract in writing."[24] Therefore, there is, at least, some persuasive authority indicating that a LEO may be formed without a formal writing, especially where there are process-related challenges that would delay LEO formation until after a regulatory change. FERC found it persuasive that a LEO was formed prior to a regulatory change where the QF and utility had engaged in negotiations for about a month and a half, the QF made an unequivocal commitment to sell power, and that the material terms had been finalized.[25] And the OPUC also notes that a utility may delay or obstruct progress resulting in a LEO being formed earlier, and as such adopted a case-by-case approach to LEO formation.[26]

In this case, PGE's process-related challenge is that a LEO cannot be formed unless the QF obtains and signs an executable PPA provided by the utility after agreeing to all terms (including the price). These facts are not identical to the facts of the above FERC cases. However, PGE's assertion that a LEO was not formed because PGE had not provided (and the

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23 See PGE's Reply in Support of Its Motion for Summary Judgment at 2-3, 14.

24 PGE's Reply in Support of Its Motion for Summary Judgment at 13 (citing FERC v. Idaho PUC, Case No. 1:13-cv-141, Memorandum of Agreement Between FERC and the Idaho PUC (Dec. 24, 2013) (copy available at: https://www.ferc.gov/legal/mou/mou-idaho-12-2013.pdf)).

25 Grouse Creek, LLC, 142 FERC ¶ 61,187 at P. 37 (2013).

26 Docket No. UM 1610, Order No. 16-174 at 27 (May 13, 2016).

Complainants thus had not executed) an *executable* PPA is akin to the utilities in those cases claiming that a LEO was not formed because the utility did not execute a PPA or complete the interconnection application process. Following the guidance FERC found persuasive, the Complainants here all had engaged in negotiations with PGE for around two months (not even counting the December 2016 correspondence PGE disputes), they all made unequivocal commitments to sell to PGE, and the material terms were finalized before June 1, 2017. As such, the Complainants all formed LEOs prior to the June 1, 2017 rate change.

Further, even under PGE's rigid contracting process, LEOs would have been formed for all Complainants except for Skyward and Valhalla prior to June 1, 2017 because PGE delayed and obstructed progress towards an executable PPA. Some of PGE's delays are straight-forward such as providing draft contracts three days past its 15-day deadline. A few days of delay here or there may not appear significant in isolation, but in the aggregate and in conjunction with PGE's other actions, PGE actions resulted in delays significant enough to push Complainants from a pre-June 1 contract to a post-June 1 contract.

PGE did not inform Complainants that it would seek or was seeking a May 17, 2017 or that PGE obtained a June 1, 2017 avoided cost effective date. It may be that it was not bad faith for PGE to seek an earlier effective date, but it was bad faith for PGE to continue negotiating with Complainants without informing them of that fact. Complainants clearly indicated their desire to finalize the contract before a rate change, and if Complainants had known this fact they would have moved more expeditiously and would not have requested any changes. Therefore, they would have been entitled to draft contracts earlier than the May 15 to 23 dates on which they were provided, and they would not have needed to endure any additional "draft" stages. Those delays, combined with the deadlines that PGE missed result in executable PPAs being due

to all Complainants (except Skyward and Valhalla) prior to June 1, 2017. As such, the dates detailed in Attachment B to Complainants' Response to PGE's Motion for Summary Judgment are the dates upon which LEOs were created.

Further, the Commission can pick and choose which of the delays it finds actually delayed progress towards an executable PPA, and adjust the date the LEO was formed accordingly. For example, if the Commission finds that PGE's failure to meet with Bottlenose Solar for a 5-business-day period does not qualify as a delay toward an executable PPA, then the Commission can find that the LEO was formed 5 business days later as of May 24, 2017 instead of May 17, 2017. Under this logic, even PGE concedes that, the earliest date Complainants would get an executable PPA ranges from June 7, 2017 to June 14, 2017 if the Commission finds that Complainants would not have requested any changes to their contract[27] or by July 6, 2017 if they had.[28] As such, each Complainant formed a LEO at least by those dates. If that is not enough, the Complainants went further, and between August 7, 2017 and August 14, 2017 they each filed their Complaints indicating their unequivocal commitments to sell to PGE under the terms and conditions of its standard PPA. To be clear, the Complainants disagree that PGE's approach is unreasonable or warranted, but only point out that even under PGE's logic some of the Complainants should have LEOs before June 1 and all should have LEOs well before rates dropped again in September 2017.

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[27] PGE's Motion for Summary Judgment at 11, Table E (if the Commission finds Complainants would not have requested any changes).

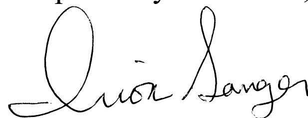
[28] Id. at 13 (if the Commission finds that Complainants would have requested changes, received a revised draft PPA on June 14, and then accepted those terms).

IV. CONCLUSION

In sum, the Complainants should not be penalized for bringing a Complaint to enforce their LEOs by being refused the post-June 1, 2017 avoided cost rates that were in effect at the time of filing their complaints. While the Complainants were not required to file a complaint in order to form a LEO, they at a minimum formed LEOs at the time they filed their complaints. Complainants all formed LEOs prior to June 1, 2017 because they negotiated with PGE for around two months prior, unequivocally committed to sell their power, and finalized the material terms of their PPAs. However, even under PGE's rigid contracting process, LEOs for the majority of the Complainants were formed before June 1, 2017 because PGE's bad faith negotiation tactics delayed and obstructed progress towards executable PPAs and without which, the Complainants would have been entitled to executable PPAs before June 1, 2017.

Dated this 20th day of April 2018.

Respectfully submitted,



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