BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	)	**DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES**

INTRODUCTION

Pursuant to OAR 860-001-0400, defendants Alfalfa Solar I LLC, Dayton Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, Riley Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, and Wasco Solar I LLC (collectively, the "NewSun Parties") respond as follows to the Complaint and Request for Dispute Resolution filed with the Public Utility Commission of Oregon (the "Commission") by Portland General Electric Company ("PGE"). As stated in PGE's Complaint and Request for Dispute Resolution, the NewSun Parties and PGE disagree about the proper interpretation of ten power purchase agreements executed during the period January through June 2016 (the "NewSun PPAs"). Specifically, the parties disagree as to whether the 15-year period during which PGE must pay fixed prices for power delivered by the NewSun Parties commences when the relevant NewSun Party begins commercial operation (the "Commercial Operation Date") or on the date the contract was executed.

PGE asserts that its standard form contracts on which the NewSun PPAs are based provide for 15 years of fixed prices from the date of execution of the applicable contract, which PGE's complaint claims is consistent with the Commission's policy set forth in Order No. 05-084. In Order No. 17-256, however, the Commission stated that "prices paid to a [qualifying facilities ("QF")] only are meaningful when a QF is operational delivering power to a utility"—a fact that is unchanged from the time of the Commission's original 2005 order—and that, therefore, Oregon investor-owned utilities ("IOUs") must offer "15 years of fixed prices that commence when the QF transmits power to the utility."[1] While, in an effort to justify its interpretation of the NewSun PPAs, PGE's complaint against the NewSun QFs alleges that this is a "newly articulated policy," the Commission recently clarified in Order No. 18-079 that its policy *always* has been that Oregon IOUs must offer QFs 15 years of fixed prices from the date the QF is operational and delivering power to a utility. The question now before the Commission is whether the NewSun Parties' interpretation of the contracts at issue in a manner consistent with long-standing Commission policy, industry convention, and implementation by other Oregon utilities, among other reasons, in absence of any explicitly contradictory language in the PPAs or the associated Schedule 201, should prevail, or whether PGE's position that the contracts mean something that they do not actually explicitly state and which is also in direct contradiction with long-standing Commission policy (which has been newly affirmed and clarified by the Commission since PGE's complaint against the NewSun Parties was filed) should prevail.

In 2005, the Commission determined that Oregon IOUs must offer and enter into standard form power purchase agreements containing fixed prices for 15 years to QFs such as the

[1] Docket No. UM 1805, Order No. 05-584 (Jul. 13, 2017).

NewSun Parties. PGE subsequently submitted, and the Commission approved, various standard form contracts, which could be completed and executed by a QF. Years later, in 2016, PGE began pointing to certain isolated provisions of certain versions of its blank standard contract forms and related Schedule 201, as well as out-of-context quotations from the Commission's Order No. 05-584, to suggest the Commission's policy was that PGE may only pay fixed prices for 15 years after the date a standard contract form is executed. This position was inconsistent with the readily-apparent intention of Order No. 05-584, as implemented by all other Oregon IOUs. In Docket Number UM 1805, the Commission ordered that all future PGE standard contracts must expressly state that the 15 years of fixed prices "commence when the QF transmits power."[2]

The Commission recently clarified that its decision in UM 1805 did not "constitute the adoption of a 'new policy.' Rather, . . . [the Commission's] decision was simply to affirm the policy with respect to the commencement date for the 15-year period of fixed prices."[3] The Commission further stated that its "policy, which had been reflected explicitly in standard contract forms for PacifiCorp and Idaho Power Company, had been, up until the filing of PGE's most recent standard contracts, neither a source of controversy nor litigation by either a QF or a utility."[4]

Prior to execution of the NewSun PPAs, PGE had asserted it interpreted its standard form contracts to require it to pay fixed prices only for 15 years from the date of contract execution. PGE was aware, however, that the NewSun Parties disagreed with PGE's interpretation and that

[2] *Id.*
[3] Docket No. UM 1805, Order No. 18-079 (Mar. 5, 2018).
[4] *Id.*

the NewSun Parties understood PGE's standard form contracts at issue here to require PGE to pay fixed prices for 15 years from the Commercial Operation Date.

The NewSun Parties' understanding of this issue was informed by: (1) the text and context of PGE's standard form contracts at issue, the provisions of which all make sense only if the fixed price period begins at commercial operation; (2) the NewSun Parties' reasonable understanding of the policy articulated in the Commission's Order No. 05-584, which Order No. 17-256 and Order No. 18-079 confirm was correct; (3) the common industry practice and understanding that a term of years of fixed prices in power purchase agreements ("PPAs") for new power generation facilities typically runs from the time the seller becomes operational and begins transmitting power to the buyer, not from the date—generally years earlier—on which the seller executes the agreement; (4) the fact that all other Oregon IOUs implemented Order No. 05-584 in a manner consistent with the NewSun Parties' understanding of the Commission's policy and the standard form PPAs; and (5) the fact that neither PGE's Commission-approved standard form contracts at issue nor the associated Schedule 201 tariff form expressly state that the 15-year fixed-price option begins on the date the contract is executed. The NewSun Parties' understanding of PGE's standard form contracts at issue was the most reasonable and consistent interpretation of the express language of those form contracts before the NewSun PPAs were executed, and it now is the most reasonable and consistent interpretation of the executed NewSun PPAs.

Indeed, if the NewSun PPAs were interpreted such that the 15-year fixed-price option begins on the date the contract is executed, the NewSun PPAs would contain inconsistent and contradictory terms regarding whether the applicable NewSun Party or PGE owns the Environmental Attributes of the facility in certain years of the contract. In contrast, if the fixed-

price option begins on the Commercial Operation Date, there is no inconsistency within the contract as to the ownership of each facility's Environmental Attributes in any year of the contract. The NewSun Parties therefore reasonably believed that PGE's purported interpretation of the standard form contracts at issue was a tactic to delay and discourage qualifying facilities from entering into power purchase agreements with PGE. Accordingly, the NewSun Parties reasonably elected to execute the NewSun PPAs confident that their interpretation of PGE's Commission-approved standard form contracts and tariff was correct, and that PGE's purported interpretation was not.

While the NewSun Parties continue to believe and assert that the Commission lacks original subject matter jurisdiction over this dispute, they acknowledge that the United States District Court for the District of Oregon has stayed the proceeding that the NewSun Parties initiated in that court pending resolution of this proceeding by the Commission. Importantly, the district court did so *only after* PGE agreed it would not oppose expedited treatment of this proceeding by the Commission. Without waiving their rights (i) to request the district court lift the stay of the district court proceeding if circumstances so warrant, and (ii) to appeal either the district court's order staying that proceeding or the Commission's order finding that the Commission has both original subject matter jurisdiction and primary jurisdiction over this dispute, the NewSun Parties are prepared to move forward in response to PGE's Complaint and Request for Dispute Resolution before this Commission on an expedited basis.

Accordingly, the NewSun Parties answer the allegations in PGE's Complaint and Request for Dispute Resolution as follows:[5]

[5] The Introduction to the NewSun Parties' Answer is intended as a general response to PGE's Introduction to its Complaint and Request for Dispute Resolution. The assertions contained in PGE's Introduction are not formal allegations and do not require a response. To the extent a

PARTIES

1. The NewSun Parties admit the allegations set forth in paragraphs 1 and 2.

JURISDICTION AND APPLICABLE LAW

2. In response to paragraph 3, the NewSun Parties admit the PPAs at issue were executed between the NewSun Parties and PGE and all are based on PGE's standard contract form titled "STANDARD RENEWABLE IN-SYSTEM VARIABLE POWER PURCHASE AGREEMENT" or PGE's standard contract form titled "STANDARD RENEWABLE OFF-SYSTEM VARIABLE POWER PURCHASE AGREEMENT," as approved by the Commission in Order No. 15-289. The NewSun Parties admit that, pursuant to the Commission's rules and orders implementing the Public Utility Regulatory Policies Act ("PURPA") and associated state law, PGE is required to offer QFs the opportunity to enter into PPAs based on PGE's standard PPA forms approved by the Commission. Except as expressly admitted herein, the NewSun Parties deny the allegations set forth in paragraph 3.

3. The allegations in paragraph 4 constitute legal conclusions to which no response is required. To the extent a response is required, the NewSun Parties admit the allegations in the second sentence set forth in paragraph 4 but deny the allegations in the first sentence set forth in paragraph 4.

4. The allegations in paragraph 5 constitute legal conclusions to which no response is required. To the extent a response is required, the NewSun Parties deny the allegations set forth in paragraph 5.

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response is required, the NewSun Parties deny any and all allegations in PGE's Introduction to the extent those allegations are not admitted in the NewSun Parties' introduction.

5. The allegations in paragraph 6 constitute legal conclusions to which no response is required.

6. The allegations in paragraph 7 constitute legal conclusions to which no response is required.

FACTUAL BACKGROUND

7. The allegations in paragraph 8 constitute legal conclusions to which no response is required. To the extent a response is required, the NewSun Parties admit that, in Order No. 05-584 in Docket No. UM 1129, the Commission required electric utilities to offer QFs standard contracts with 15 years of fixed prices. The NewSun Parties deny the allegations set forth in paragraph 8.

8. In response to paragraph 9, the NewSun Parties admit that, after the Commission issued Order No. 05-584, PGE filed revised tariffs and standard form contracts. The NewSun Parties admit the Commission resolved various compliance issues regarding those tariffs and contract forms in Order No. 06-538, issued in Docket No. UM 1129. The NewSun Parties are without sufficient knowledge to admit or deny whether anyone raised any confusion or ambiguity at that time about when the 15-year fixed-price period would begin under a fully executed version of PGE's standard form contracts. The allegation that the Commission approved standard form contracts in which the 15-year fixed-price period would begin on the date of execution is a legal conclusion to which no response is required. Except as expressly admitted herein, the NewSun Parties deny the allegations set forth in paragraph 9.

9. In response to paragraph 10, the NewSun Parties admit PGE filed a revised tariff and standard contract forms on or about January 23, 2007, and that the Commission approved those documents on February 27, 2007, in Order No. 07-065. The NewSun Parties admit that,

between May 13, 2005, and July 13, 2017, the Commission did not issue any order addressing PGE's standard contract length. Except as expressly admitted herein, the NewSun Parties deny the allegations set forth in paragraph 10.

10. The NewSun Parties deny the allegations set forth in paragraph 11.

11. In response to paragraph 12, the NewSun Parties admit that, in its April 29, 2016, response in opposition to a motion for clarification in Docket No. UM 1725, PGE contended that the fixed-price period in its standard form contracts and Schedule 201 is limited to the first 15 years following contract execution. The NewSun Parties admit PGE subsequently has made the same contention in other briefing with the Commission. Except as expressly admitted herein, the NewSun Parties deny the allegations set forth in paragraph 12.

12. In response to paragraph 13, the NewSun Parties admit the Commission recently addressed its policy regarding the 15-year fixed-price period in standard form contracts and ordered that all future PGE standard form contracts must expressly provide for 15 years of fixed prices commencing when the QF transmits power. Except as expressly admitted herein, the NewSun Parties deny the allegations set forth in paragraph 13.

13. In response to paragraph 14, the NewSun Parties deny that the Commission's recent statements about its policy regarding the 15-year fixed-price period in standard form contracts constitute a newly articulated policy. The NewSun Parties admit all other allegations set forth in paragraph 14.

14. The NewSun Parties admit the allegations set forth in paragraph 15.

15. The NewSun Parties admit the allegations set forth in paragraphs 16 and 17.

16. The NewSun Parties deny the allegations set forth in paragraph 18.

17. In response to paragraph 19, the NewSun Parties admit they commenced a declaratory judgment action in the United States District Court for the District of Oregon and asked the court to declare that the 15-year fixed-price period in the NewSun PPAs commences on the Commercial Operation Date. Except as expressly admitted herein, the NewSun Parties deny the allegations set forth in paragraph 19.

18. In response to paragraph 20, the NewSun Parties admit the difference in the amount PGE will pay for power delivered by the NewSun Parties likely will differ by millions of dollars depending on whether the 15-year fixed-price period in the NewSun PPAs is measured from the date of contract execution or the Commercial Operation Date. The NewSun Parties are without sufficient knowledge as to the truth or falsity of the alleged impact on PGE's customers and, therefore, deny the same. Except as expressly admitted herein, the NewSun Parties deny the allegations set forth in paragraph 20.

REQUEST FOR RELIEF

19. The NewSun Parties incorporate by reference their responses to paragraphs 1 through 20.

20. In response to paragraph 22, the NewSun Parties admit PGE and the NewSun Parties executed PPAs in 2016. The NewSun Parties admit those PPAs are based on PGE's standard PPA in effect at the time the parties entered into the PPAs and that the PPAs are enforceable. Except as expressly admitted herein, the NewSun Parties deny the allegations set forth in paragraph 22.

21. The NewSun Parties deny the allegations set forth in paragraph 23.

22. In response to paragraph 24, the NewSun Parties admit they knew when they executed the NewSun PPAs that PGE had asserted it interpreted its standard form contracts to

require it to pay fixed prices for 15 years from the date of contract execution. Likewise, PGE was aware before execution of the NewSun PPAs that the NewSun Parties disagreed with PGE's interpretation and that the NewSun Parties understood PGE's standard form contracts to require PGE to pay fixed prices for 15 years from the Commercial Operation Date. Except as expressly admitted herein, the NewSun Parties deny the allegations set forth in paragraph 24.

23. In response to paragraph 25, the NewSun Parties admit they contend the NewSun PPAs require PGE to pay fixed prices for 15 years from the Commercial Operation Date.

24. The allegations in paragraph 26 constitute legal argument to which no response is required. To the extent a response is required, the NewSun Parties admit PGE requests the Commission to find as stated in paragraph 26.

25. The allegations in paragraph 27 constitute legal argument to which no response is required. To the extent a response is required, the NewSun Parties admit PGE alternatively requests the Commission to find as stated in paragraph 27.

AFFIRMATIVE DEFENSES

As its further answer to PGE's Complaint and Request for Dispute Resolution, the NewSun Parties state the following as their affirmative defenses:

26. The Commission lacks subject matter jurisdiction over this dispute.

27. This proceeding is preempted by federal law.

28. The Oregon statutes and administrative rules under which the Commission is acting are preempted by federal law.

DATED this 6th day of June, 2018.

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