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David F. White
Associate General Counsel

August 10, 2018

Via Electronic Filing

Public Utility Commission of Oregon
Filing Center
201 High St SE, Suite 100
PO Box 1088
Salem OR 97308-1088

Re: **UM 1931 – Portland General Electric Company vs. Alfalfa Solar I LLC, et al.**

Attention Filing Center:

Enclosed for filing in Docket UM 1931 is Portland General Electric Company's Response to Intervenors' Joint Comments.

Thank you in advance for your assistance.

Sincerely,

David F. White
Associate General Counsel

DFW:jlm

Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, vs. 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, WASCO SOLAR I LLC, Defendants.	**PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE TO INTERVENORS' JOINT COMMENTS**

Pursuant to OAR 860-001-0420(5), Portland General Electric Company ("PGE") submits this response to the comments filed on August 3, 2018, by Intervenors Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition ("Intervenors").

I. RESPONSE

Discovery is routinely allowed in Commission proceedings involving qualifying facilities ("QFs"), including in advance of motions for summary judgment.[1] In this case, PGE has voluntarily narrowed the scope of its first set of data requests in an effort to make initial discovery as efficient as possible and in an effort to narrow the discovery dispute the Commission must resolve.

For the reasons discussed in PGE's July 27 motion to compel, PGE's August 10 reply in support of that motion, and in PGE's July 13 response to Defendants' motion for

[1] *See PGE's Reply in Support of PGE's Motion to Compel Discovery* at 1 (Aug. 10, 2018).

protective order staying discovery, PGE is entitled to conduct discovery and PGE's motion to compel should be granted. Below, PGE provides brief additional responses to specific issues raised by Intervenors.

A. Intervenors' Assertions Regarding PGE's Motives are Unfounded.

To begin, PGE notes that Intervenors' August 3 comments are rife with baseless suppositions and unsupported accusations. For example, Intervenors assert that PGE seeks to "strong-arm" or "intimidate" QFs to prevent them from exercising their rights.[2] Intervenors provide no evidence to support such accusations. Indeed, the facts do not support such an accusation because PGE has been entering an unprecedented volume of contracts with QFs over the last three years. As another example, Intervenors accuse PGE of using discovery as a delaying tactic and for the "sinister" purpose of discouraging QF parties from filing complaints. Again, there is no evidence to support these hyperbolic accusations. Intervenors made similarly serious but unsupported accusation in Docket No. UM 1940 before withdrawing their baseless complaint less than three weeks after filing it. PGE has not filed its complaint or data requests in an effort to intimidate QFs and objects to Intervenors' baseless accusations.

B. The Commission is Not Preempted from Interpreting Signed PPAs.

The Commission has authority under ORS 756.500 to resolve disputes concerning activities that are regulated by the Commission. The standard Schedule 201 power purchase agreements ("PPAs") that Defendants have executed are approved by the Commission under its regulatory mandate from the legislature. QFs that sign and agree to be bound by standard Commission-approved PPAs should not be surprised that the Commission, under ORS 756.500, can resolve disputes to interpret the standard PPAs the Commission approves.

[2] *Intervenors' Comments* at 2 (Aug. 3, 2018).

The Commission and the United States District Court for the District of Oregon have agreed that the Commission can hear this dispute. Also, the Commission ruled in the *Pacific Northwest Solar* dispute that the Commission has jurisdiction to interpret standard PPAs.[3] QFs, and their associations such as Intervenors, have filed complaints at the Commission against utilities concerning standard PPAs. Intervenors' contention that QFs and their associations can file complaints against utilities at the Commission but that QFs cannot be named as defendants before the Commission is not supported by any statute, regulation, or case law. Most troubling, Intervenors' position would lead to a lack of uniformity in interpretation of the PPAs if QFs are allowed to forum-shop among federal court, 36 different state circuit courts, and the Commission.

C. PGE's Minimal Data Requests in Its Motion to Compel are Commensurate with the Needs of this Case to Determine the Price for 100 MW of Power.

Defendants refuse to engage in document discovery concerning a mere 21,000 emails in the custody of the primary custodian of record (*i.e.* the principal manager for all ten Defendants). Despite having filed this case more than six months ago in federal court, where Defendants would be required to review and produce such documents before filing a motion for summary judgment, Defendants here complain that such a task is too onerous for ten projects totaling 100 MW of power.[4] The Intervenors make no argument balancing the issue of the cost of 100 MW of power for three years versus the burden of reviewing emails from one custodian.

Intervenors' contention that QFs should not have to engage in discovery before filing summary judgment motions is contradicted by the text of ORCP 47 C itself. Under

[3] *Portland Gen. Elec. Co. v. Pacific Northwest Solar*, LLC, Docket No. UM 1894, Order No. 18-025 at 7 (Jan. 25, 2018) ("The interpretation of PURPA contracts is critical to the discharge of our regulatory responsibilities. … We believe our role and expertise in state and federal PURPA policy makes this an appropriate issue for primary jurisdiction.").

[4] *Defendants' Response to PGE's Motion to Compel Discovery, Sur-Reply to Defendants' Motion for Protective Order, and Motion for a Scheduling Order* at 10 (Aug. 3, 2018)

that Rule, a party is not entitled to summary judgment unless "there is no genuine issue as to any material fact[.]" Further, under ORCP 47 F, courts are to deny motions for summary judgment if "depositions" or "discovery" are needed.

Regardless of whether QFs file motions for summary judgment before the Commission, in state court, or federal court, the parties will normally be entitled to discovery before a ruling on the motion. Intervenors' position is without merit.

D. This Commission's Decision in UM 1805 Did Not Adjudicate Any Specific PPA and Instead Invited Parties to PPAs to Adjudicate Specific PPA Disputes Before the Commission.

Intervenors suggest that PGE is acting inappropriately by seeking resolution of the question of whether the Defendants' PPAs limit the availability of fixed prices to the first 15 years following contract execution. Intervenors suggest that this question has already been resolved in Docket No. UM 1805. But Intervenors, who initiated UM 1805, know perfectly well that in UM 1805 the Commission granted PGE's motion for summary judgment, declined to interpret any of PGE's executed PPAs (including the Defendants' PPAs), and indicated that it stood ready to interpret executed PPAs, when a party to an executed PPA asks it to do so, to determine when the 15-year fixed-price period begins. Resolution of this case concerning Defendants' 10 PPAs may involve consideration of facts and context unique to the PPAs in question. For all of the reasons discussed in PGE's other filings related to discovery in this case, PGE is entitled to discovery of evidence regarding contract formation and such evidence is relevant to the first step of contract interpretation under *Yogman v. Parrot,* 325 Or. 358 (1997).

E. Defendants, Not PGE, Caused the Thirty Months of Delay in Resolving this Dispute.

Defendants created their own time pressures: they knew about the dispute over the 15-year fixed-price period when they signed their PPAs in early 2016, and Defendants have

admitted in filings in Docket No. UM 1805 that they intentionally decided not to raise this dispute in any tribunal until they unsuccessfully moved to intervene out of time in UM 1805 in the latter half of 2017.[5] They then delayed this proceeding, UM 1931, through successive motions to stay or dismiss, despite the clear guidance from the Commission in Order No. 18-025 issued on January 25, 2018, in Docket No. UM 1894 that the Commission has primary jurisdiction over this type of dispute.[6]

PGE does not oppose an expedited process and, in fact, proposed a timeline that would have resolved this dispute faster than it is currently being resolved. In PGE's July 3, 2018, filing, at page 5, PGE proposed a compromise schedule that listed PGE's response to Defendants' motion for summary judgment as due August 13. Defendants refused to agree to that schedule. Because the parties did not agree on a schedule, the Administrative Law Judge tolled all deadlines and then Defendants further delayed the proceeding by refusing to respond to PGE's 10 discovery requests and filing a motion for a protective order.

F. The Commission is Qualified and Capable to Handle Financial Information.

Intervenors' attack on the Commission's ability to fairly adjudicate this dispute if it sees a QF's financial projections is not only insulting to the Commission, it is meritless and illogical. All parties agree that the Commission cannot modify the existing PPAs, only interpret them, so there is no chance that the Commission can re-negotiate rates. Similarly, Intervenors' contention that PGE can use any financial information that it receives *after* signing the PPA makes no sense. PGE cannot modify or negotiate the rates in the PPAs

[5] *Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition v. Portland Gen. Elec. Co.*, Docket No. UM 1805, Joint Petition to Intervene Out of Time at 4 (Sep. 8, 2017) ("The NewSun Solar Projects therefore choose not to engage in litigation against PGE over the point [interpretation of when the 15-year fixed-price period begins] … prior to executing their standard contracts.").

[6] *Pacific Northwest Solar, LLC*, Docket No. UM 1894, Order No. 18-025 at 7 ("The interpretation of PURPA contracts is critical to the discharge of our regulatory responsibilities. … We believe our role and expertise in state and federal PURPA policy makes this an appropriate issue for primary jurisdiction.").

either before *or* after a QF signs. Further, Intervenors' concern disappears if there is a protective order that allows the QFs to designate such documents "attorneys' eyes only."

II. CONCLUSION

Intervenors' contentions are without merit and the Commission should disregard Intervenors' comments and grant PGE's motions to compel and for a scheduling order.

DATED this 10th day of August, 2018.

Respectfully submitted,

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