BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	)	NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, COMMUNITY RENEWABLE ENERGY ASSOCIATION AND RENEWABLE ENERY COALITION JOINT COMMENTS RESPONDING TO PGE'S MOTION TO COMPEL

I. INTRODUCTION

The Northwest and Intermountain Power Producers Coalition ("NIPPC"), Community Renewable Energy Association ("CREA") and the Renewable Energy Coalition (the "Coalition") (collectively the "UM 1805 Complainants") submit these comments in response to the Motion to Compel filed by Portland General Electric ("PGE") in this important spinoff case.[1] The Oregon Public Utility Commission (the "Commission") should deny PGE's meritless motion and allow the simple contract interpretation at issue in this case to resolve expeditiously rather than subjecting Defendants (the "NewSun Parties") to discovery that is unnecessary, expensive, and unduly burdensome.

[1] The Commission confirmed its policy that the 15-year fixed-price period commences with power deliveries in UM 1805, but emphasized in the final UM 1805 order it "continue[s] to stand ready to interpret individual standard contract forms as they are brought to us." NIPPC, CREA and REC v. PGE, Docket No. UM 1805, Order No. 18-079 at 3 (Mar. 5, 2018).

The UM 1805 Complainants urge the Commission to consider the broader policy concerns raised by PGE's actions in the instant proceeding. The UM 1805 Complainants are not aware of any other instance where a utility has filed a complaint against a qualifying facility ("QF") and involuntarily brought them before the Commission for resolution of a dispute. This unprecedented situation warrants careful scrutiny from the Commission to avoid unintended consequences and further disruption to its well-established utility-QF processes. The failure to expeditiously process this case with the least economic burden upon the NewSun Parties will have significant impacts on PGE's ability to strong-arm and intimidate all QFs from exercising their rights. Regardless of whether it wins on the merits of the case, PGE is causing significant harm to the QF market, which will be dramatically increased if is allowed to force a QF to adjudicated a dispute before the Commission, conduct extensive discovery and require an evidentiary hearing when motions for summary judgment would be sufficient.

Finally, for some reason PGE is taking an overly burdensome litigation approach to the 15-year contract term issue, and the Commission should stop this never-ending process. PGE's actions after the Commission confirmed its 15-year fixed-price policy appear abusive and disrespectful. In other QF complaint proceedings PGE has agreed to quick and expedited resolution through motions for summary judgment,[2] but required the underlying UM 1805 proceeding to be a procedural nightmare with 40 substantive pleadings, two public meetings, numerous rulings and procedural motions, no less than *six* Commission orders, and one (so far) appeal. PGE does not appear to be acting in

[2] PGE v. Covanta Marion, Inc., Docket No. UM 1887, Prehearing Conference Report and Ruling (Oct. 25, 2017); PGE v. Pacific Northwest Solar, LCC, Docket No. UM 1894, Prehearing Conference Report and Ruling (Mar. 6, 2018).

good faith here. The Commission needs to end this bureaucratic nightmare, and quickly resolve the meaning of its standard contract through motions without discovery.

II. COMMENTS

A. The Commission's Process is Being Used to the NewSun Parties' Disadvantage

The NewSun Parties should not be forced to participate in time-consuming and expensive discovery to resolve the simple dispute over the meaning of the Commission-approved standard contract. No small QF developers have the expansive litigation budget that PGE has, and in this case the NewSun Parties did not consent to resolution in this venue. The procedural gamesmanship that can make Commission proceedings take so long and cost so much (*see*, *e.g.*, PGE's tactics in UM 1805) is very likely why no other QF has come forward to have the executed contracts so often referenced in UM 1805 addressed. The UM 1805 Complainants are outraged by PGE's actions. PGE knows that any delays favor PGE as the NewSun Parties' power purchase agreement ("PPA") deadlines approach. Ironically, the Commission's 2005 order establishing standard contracts was supposed to alleviate the pressure caused by the imbalance of power among utilities and QFs during negotiations, but it is being used here to pressure the NewSun Parties.[3] The fixed-price contract is supposed to establish financeable cash flow so that small QFs could avoid situations like the current three-year battle over a very

[3] In the Matter of OPUC Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129, Order No. 05-584 at 39 ("Standard contracts are designed to minimize the need for parties to engage in contact negotiations."); see also id. at 8 ("In Order No. 84-742, the Commission also addressed the issue of inequity of bargaining power between small QFs and utilities.").

simple contract interpretation issue. PGE's motion undermines the Commission's intent, which the Commission itself confirmed in UM 1805.

PGE's data requests are at best a thinly veiled delay tactic and at worst much more sinister. PGE Data Request No. 1, for example, asks the NewSun Parties to provide copies of all of the correspondence between the NewSun Parties *and PGE* during the PPA negotiations. Because PGE was a party to all of this correspondence, and therefore already has independent access to it, the burden of producing this information vastly outweighs its usefulness. PGE's Data Request No. 2, which is more sinister, requests emails and other internal correspondence with the NewSun Parties' financiers and investors. This would be an unprecedented violation of the NewSun Parties' highly confidential business information. The Commission is typically very responsive to utilities' concerns about denying production of their commercially sensitive information to their competitors and should respond similarly to protect QF information. PGE's data requests are inappropriate and the Commission should not sanction these kinds of litigation tactics.

The Commission's discovery rules allow discovery when it is "commensurate with the needs of the case, the resources available to the parties, and the importance of the issues to which the discovery relates."[4] In addition, the rules explain that "[d]iscovery that is unreasonably cumulative, duplicative, burdensome, or overly broad is not allowed."[5]

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4 OAR 860-001-0500(2).

5 Id.

In this case and all PURPA contract issues, the Commission should be mindful that the parties include a large utility that uses ratepayer funds to further its own business interests and independently owned power producers. These companies generally do not have a dedicated legal department or information technology staff, and where the key representative must divert massive amounts of time (a real and limited resource) to manage such a dispute, much less actually do the work to comply with discovery requests. This case PGE's discovery requests have substantial potential to disclose sensitive information to a hostile counterparty that is also a competitor. In addition, many QFs are small single owners, irrigation districts, water control districts, and other small developers which will view this and other litigation and hesitate to dispute or raise concerns against PGE if they see that any such dispute, even on a matter as easy to resolve as what the appropriate contract term is, will result in expensive and protracted litigation.

In fact, *any* discovery in the instant case is egregious because the Commission has already provided clarity regarding its policy on the 15-year fixed-price policy and simply needs to examine the precise contract language at issue here and determine whether that language is consistent with its policy. Importantly, the particular vintage of standard contracts at issue in this case were not included in the UM 1805 record. As the NewSun Parties have already pointed out, the extrinsic evidence PGE is seeking is not relevant, and the agreements at issue are standard form agreements that have been preapproved by the Commission.[6] All the Commission has left to do here is use its expertise over the

[6] Reply in Support of Defendants' Motion for Protective Order at 4-8 (July 27, 2018).

standard contracts and its orders to see whether the particular terminology used in each of PGE's standard contracts is consistent with its recently reconfirmed policy.

B. NewSun's Motion for Summary Disposition is Consistent with Commission's Stated Interests in this Case and PGE's Statements in Federal Court

NewSun has a right to file a motion for summary disposition and exercising that right is in the interest of the Commission and parties alike. To be clear, harm has already been inflicted upon the NewSun Parties and each day of delay exacerbates that harm., Allowing discovery would therefore not only be inconsistent with the stated interests of the parties, but also subject the NewSun Parties to increased damages and threaten the viability of the NewSun projects.

The Commission expressly stated that it wanted to address the matters presented in this case before a determination was made in any court proceeding to allow uniformity of resolution and to apply the Commission's expertise on the meaning of PGE's contract forms.[7] The Commission's "desire for uniform resolution" supports the NewSun Parties' proposed schedule and process.[8] Any discovery regarding the NewSun Parties' communications with PGE or its financial condition are irrelevant to the uniformity in interpretation of PGE's contract forms.

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[7] Order No. 18-174 at 4 (May 23, 2018). Judge Michael Simon also relied upon this rationale in the order staying the court proceeding. See Alfalfa Solar LLC v. PGE, Case No. 3:18-cv-40-SI, Opinion and Order, 2018 US Dist LEXIS 92771 at * 24 (D. Or. May 31, 2018) [hereinafter "Federal Court Order"] ("Given the [Commission's expertise in evaluating the contents and relevance of its previous orders to the parties' understanding of the PPA, the need for the disputed term to be interpreted uniformly, and the reduced risk of delay causing further harm to Plaintiff, it is appropriate for the Court to defer to the [Commission]").

[8] Order No. 18-174 at 4.

Likewise, while the Commission may have expertise over its orders and the utilities' standard contracts, it does not have any special expertise on the extrinsic and parol evidence PGE is seeking in its motion or adjudication of subjective understandings of ambiguous contracts that normally occurs before a jury. The simplest way to allow uniformity is to examine the various executed standard contracts without getting into all of the correspondence between any individual parties. If the Commission decides to allow extrinsic and parol evidence in these interpretation proceedings, the Commission's workload may balloon exponentially before PGE's more than 70 executed contracts have been interpreted. Longer term, allowing parties to compel evidence absent reasonable justification could paralyze the Commission. It makes much more sense to just examine each standard form.

PGE's claim that it "seeks the efficient and expedited resolution of this proceeding" is inconsistent with its overall position in the motion.[9] PGE also promised the federal district judge, the Honorable Michael Simon, that the company would not oppose expedited resolution.[10] Yet, PGE is now seeking to delay the expedition resolution proposed by the NewSun Parties. The fact that delays will inflict irreparable harm on the NewSun Parties was accepted as fact at federal court.[11] PGE's opposition to the expedited process proposed by the NewSun Parties is therefore inconsistent with the promises PGE made to Judge Simon. PGE's attorney did not say that they would not

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9 PGE's Motion to Compel at 3 (July 27, 2018).

10 Federal Court Order at 16 ("Defendant represented to the Court that Defendant would not oppose Plaintiff's motion for expedited consideration").

11 Id. at * 25 ("Plaintiffs will experience hardness if adjudication of this dispute is delayed.").

oppose an expedited resolution *after the company had concluded a lengthy fishing expedition*. Yet, that is effectively what the company is proposing to do here.

More importantly, PGE has failed to identify any credible need for discovery to respond to the NewSun Parties' motion. The Commission should acknowledge PGE's motion as a punitive delay tactic and take affirmative action to protect the integrity of its complaint process. By making discovery requests without offering any justification for them, and then filing a motion to compel, PGE is effectively manipulating the Commission's process for its own anti-competitive anti-PURPA agenda.

C. Allowing Discovery in this Case Invites Ongoing Policy Problems for All QFs

The practical implications of the precedent here is not positive for QFs—the Commission has already determined that a utility can file a complaint against a QF to resolve a dispute over an executed contract. PGE is attempting to protect its shareholders from competition, but is couching its arguments that it must win to protect its ratepayers from allegedly overpriced QF power. The UM 1805 Complainants wonder how QF power prices compare to PGE's ratepayer-funded litigation budget. If the Commission allows PGE to obtain a QF's internal documents and financing correspondence, then QFs will suffer irrevocable harm during contract negotiations. QFs may be hesitant to push PGE during even reasonable disagreements, if PGE is able to threaten this kind of cost and exposure and gain confidential financial information that it can use in other contexts.

As severe as the potential consequences are to QFs, this is not just a QF issue. This case will have lasting implications beyond the QF market. The Commission must protect the broader market from these kind of anti-competitive actions. The Commission also needs to protect PGE's ratepayers from funding PGE's efforts—which could include

reviewing thousands of unnecessary documents, endless filings over the scope of discovery needed, etc.

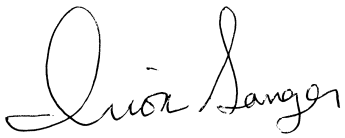
Moreover, it is one thing to turn over financing information or models in a court proceeding where the tribunal is truly indifferent to the outcome. There is no risk the judge will use the information to inform unrelated proceedings or creatively interpret the agreement against the QF if at all possible to limit QF power costs to the ratepayers. But, that is less likely in this instance. As the OPUC is charged with the statutory responsibility to protect the financial health of utilities and to reduce costs to the ratepayers, it is almost assured that someone will try to use the QF's financial projections to try and approximate some sort of "rough justice" instead of correctly interpreting the contracts. The primary reason that PGE is seeking the information is to prejudice the Commission and focus on whether the QF can still finance its projects at a less than 15-year term rather that what its standard contract actually means. The Commission should make its decision based on the plain meaning of the contract and not the financial impacts on either NewSun, PGE or its ratepayers.

III. CONCLUSION

For the reasons described above, the UM 1805 Complainants urge the Commission to expeditiously resolve the instant dispute without allowing PGE to conduct discovery or force the NewSun Parties to engage in expensive and unnecessary discovery into irrelevant matters. Capitulating to PGE on this motion would degrade the integrity of the Commission's complaint process as justice delayed is justice denied. PGE deserves to be reprimanded, not indulged. Their behavior in this matter is egregious, wasteful, and disrespectful to the Commission's processes.

Dated this 3rd day of August 2018.

Respectfully submitted,



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