

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY,)	
)	
Complainant,)	DEFENDANTS’ MOTION FOR ORAL
)	ARGUMENT AND FOR EXPEDITED
v.)	PROCESS ON MOTION FOR SUMMARY
)	DISPOSITION
ALFALFA SOLAR I LLC, et al.)	
)	
Defendants.)	
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INTRODUCTION AND SUMMARY

Pursuant to OAR 860-001-0420, 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”) hereby move the Oregon Public Utility Commission (the “Commission”) to adopt an expedited process of briefing, oral argument, and resolution of the NewSun Parties’ concurrently filed motion for summary disposition.

BACKGROUND

On January 8, 2018, the NewSun Parties filed a declaratory judgment action in the United States District Court for the District of Oregon. *Alfalfa Solar I LLC, et al. v. Portland General Electric Company*, No 3:18-cv-00040-SI, Complaint (D Or Jan 8, 2018). Over two weeks after the NewSun Parties filed their federal declaratory judgment action, this Commission issued its order in *Portland General Elec. Co. v. Pacific Northwest Solar, LLC*, OPUC Docket No UM

1894, Order No 18-025 (Jan. 25, 2018), ruling for the first time to the NewSun Parties' knowledge that this Commission has jurisdiction to adjudicate complaints filed by a utility against a QF over the meaning of executed PURPA contracts.

PGE filed its Complaint and Request for Dispute Resolution against the NewSun Parties in this docket on January 25, 2018—the same day the Commission issued its *Pacific Northwest Solar* order. After the NewSun Parties moved to stay or dismiss PGE's complaint, this Commission issued its Order No 18-174, asserting that this Commission has concurrent jurisdiction over this dispute. The Commission agreed that the United States District Court also has concurrent jurisdiction. Order No 18-174 at 3-5. But the Commission asserted “deference [to the Commission] is warranted here” due to “the desire for uniform resolution, and the risk that a judicial decision could adversely impact the performance of our regulatory duties and responsibilities” and the Commission's belief that its “interpretation has special significance.” *Id.* at 4. The Commission's order suggested the Commission will not attempt to resolve any factual disputes and recommended that the federal court abate its proceedings, explaining that, “because we do not claim exclusive jurisdiction, we need not resolve NewSun QFs' claim that our exercise of jurisdiction violates its constitutional right to a jury.” *Id.* at 5.

On May 31, 2018, the United States District Court stayed the federal court action to allow the Commission to proceed first under the doctrine of primary jurisdiction. *Alfalfa Solar I LLC v. Portland Gen. Elec. Co.*, No 3:18-CV-40-SI, 2018 WL 2452947, at *7 (D Or May 31, 2018). The court did so, however, only after PGE represented it “would not oppose [the NewSun Parties'] motion for expedited consideration by the PUC, and further agreed not to collaterally attack any [final] decision announced in this dispute by the PUC.” *Id.* at *25.

Specifically, the court explained:

Balanced against the PUC's expertise and the need for uniformity is Plaintiffs' need for a speedy resolution of this dispute, which may be adversely affected if the Court defers to the PUC's primary jurisdiction. Plaintiffs contend that the uncertainty regarding the disputed term in the PPA has caused ongoing disruption in their attempts to obtain financing to develop their facilities. Defendant could delay final resolution of this dispute before the PUC by resisting Plaintiffs' attempts to obtain a speedy resolution and by collaterally attacking any PUC decision that Defendant finds unfavorable by renewing this dispute in state or federal court. During oral argument on this motion, however, Defendant represented to the Court that Defendant would not oppose Plaintiffs' motion for expedited consideration by the PUC, and further agreed not to collaterally attack any [final] decision announced in this dispute by the PUC. The risk that proceedings before the PUC would result in unfair delay for Plaintiffs is therefore considerably mitigated. Given the PUC'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 PUC's primary jurisdiction over this case. Because the Court has subject matter jurisdiction over Plaintiffs' claim, dismissal is not mandatory. The Court therefore exercises its discretion to stay the proceedings pending resolution of PUC Docket No. UM 1931.

Id.

Moreover, at oral argument, the court expressed skepticism of the Commission's ability to deprive the NewSun Parties of a jury trial on any disputed factual issues to which a jury trial may be available, and PGE's counsel conceded there could be jury trial issues in the case. Tr. at 20-24, 57-58 [Declaration of Gregory M. Adams in Support of Defendants' Motion for Summary Disposition ("Adams Declaration"), Ex A]. The court also relied heavily on this Commission's assertion of a need for uniformity in the interpretation and implementation of PURPA contracts. *See Alfalfa Solar I LLC*, 2018 WL 2452947, at *6-7. This counsels against any evaluation of factual circumstances unique to the NewSun PPAs in this proceeding. Accordingly, the court has deferred to this Commission to weigh in, on an expedited basis, regarding the meaning of the NewSun PPAs if such meaning can be ascertained without detailed factual inquiries.

MOTION

The NewSun Parties move the Commission to set a briefing and an oral argument schedule to expeditiously resolve the NewSun Parties' concurrently filed motion for summary disposition. As the Oregon Rules of Civil Procedure state, a "party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, *at any time*, move, with or without supporting affidavits or declarations, for a summary judgment in that party's favor as to all or any part thereof." ORCP 47B (emphasis added); *see also* OAR 860-001-0000(1) (applying civil procedure rules to commission procedures to the extent consistent with the Commission's rules).

The NewSun Parties understand that PGE prefers to first engage in pre-filed testimony and typical evidentiary proceedings that normally occur in ratemaking proceedings before the Commission, where complex economic and technical matters are at issue. However, this is not a typical Commission proceeding; this case is before the Commission to exercise primary jurisdiction over the meaning of the executed power purchase agreements. By rule, the NewSun Parties are entitled to move at this time to avoid the costly inquiry into alleged disputes of material facts, and respectfully request prompt adjudication of the issues raised in the accompanying motion for summary disposition. The only other case where the Commission has exercised primary jurisdiction over a qualifying facility contract dispute is also being resolved on summary judgment filings with oral argument. *Portland General Elec. Co. v. Pacific Northwest Solar, LLC*, OPUC Docket No. UM 1894.

Indeed, PGE's own past arguments also support resolution of the contract interpretive issue through summary disposition because, after convincing the Commission to deny the NewSun Parties' intervention in Docket No. UM 1805, PGE asked the Commission to interpret

all previously effective contract forms in its rehearing application. *See* Adams Declaration, Ex. I. For example, PGE argued, “PGE believes that the Commission has sufficient information to rule that all of PGE’s prior Commission-approved standard contract forms likewise limited the availability of fixed prices to the first 15 years following contract execution.” *Id.* at 11. It is difficult to understand why, now that the NewSun Parties are able to file their own motion for summary disposition, PGE needs to conduct a lengthy factual inquiry with pre-filed testimony before filing of dispositive motions. PGE has consistently argued this dispute requires uniform resolution and the Commission’s expertise of the orders giving rise to the NewSun PPAs. To now argue there must be pre-filed testimony and hearing procedures to resolve factual issues is contradictory at best.

As explained in more detail in the concurrently filed motion for summary disposition, the Commission has resolved disputes over the meaning of a contract under summary judgment standards. *See Electric Lightwave, Inc. v. U.S. West Communications, Inc.*, OPUC Docket No. UC 377, Order No. 99-770, at 5-9 (Dec. 22, 1999). However, “[i]f a term is found to be ambiguous, it is the jury's function to resolve its meaning.” *Ross Bros. Constr. Co. v. State*, 59 Or. App. 374, 376-77, 650 P.2d 1080, 1082 (1982). Therefore, in this case, where the NewSun Parties have invoked their right to a jury trial on any disputed issues of fact, and where the Commission has already stated it does not intend to impair that right, the Commission may resolve this dispute *only* if it is able to be resolved under the summary judgment standard. Moreover, standard factfinding procedures at the Commission with pre-filed testimony are entirely inappropriate to resolve a common law contract dispute, which are generally resolved with a trial with live direct and responsive testimony before a judge or a jury. To the extent the Commission determines the NewSun PPAs are ambiguous and cannot be resolved under

summary disposition standards, the Commission should issue an order stating it cannot resolve the contractual dispute without engaging in factfinding that could impair the right to a jury trial, and should leave the parties to return to the United States District Court to resolve such issues.

The NewSun Parties propose the following schedule for the motion for summary disposition:

PGE's Response to Motion:	Due 21 days after motion
NewSun Parties' Reply:	Due 14 days after response
Oral Argument:	Within 14 days of reply (tbd per Commission/parties' availability)
Commission Order:	Within 45 days of Oral Argument

This proposed schedule is reasonable given that the Commission and PGE have recently addressed the underlying policy issues against PGE in Docket No. UM 1805. Normally, PGE's due date for response would be only 14 days and the due date for a reply would be only 7 days. OAR 860-001-0420(4)-(5). The NewSun Parties' proposed schedule allows for additional time for written submissions. PGE has possessed much of the substantive arguments in the motion for almost a year since the same arguments were made in the NewSun Parties' motion for reconsideration filed on September 8, 2017, in Docket No. UM 1805.

Oral argument is appropriate given the complexity of the issues and the fact that oral argument would likely occur in court on such a motion. Additionally, the Commission granted oral argument under summary judgment standards in the only other case where it has asserted that it possesses primary jurisdiction over a qualifying facility contract dispute filed in court. *See Portland General Elec. Co. v. Pacific Northwest Solar, LLC*, OPUC Docket No. UM 1894. PGE represented to the United States District Court in this case that it would not oppose expedited

process at the Commission, and the court relied on that representation in deferring to this Commission under the doctrine of primary jurisdiction.

CERTIFICATION OF ATTEMPT TO MEET AND CONFER

In accordance with OAR 860-001-0420(2), counsel for the NewSun Parties made a good faith effort to reach agreement with PGE on the proposed procedural motion. The parties conferred via telephone and electronic mail on multiple occasions since the time the NewSun Parties filed their answer, but the parties have been unable to reach agreement on all issues in this procedural motion.

PGE has stated that it agrees that the NewSun Parties have a right to file a dispositive motion at any time. The NewSun Parties first made PGE aware of their intent to file such a motion on June 12, 2018, and the NewSun Parties offered to agree to a reasonable delay in their motion if PGE wanted to establish a schedule for cross motions for summary disposition. On June 20, 2018, however, counsel for PGE communicated that PGE wished to engage in discovery and pre-filed testimony before the parties file summary dispositions motions. PGE sent its proposed schedule to the NewSun Parties on June 22, 2018, which includes, among other proposals, pre-filed testimony *before* summary judgment. As explained in detail in their motion for summary disposition, the NewSun Parties submit that there are no factual issues that preclude summary disposition at this time because the NewSun PPAs are unambiguous. Moreover, if PGE believes there are factual issues, it must establish that those issues preclude summary disposition in response to the NewSun Parties' motion.

Ultimately, the NewSun Parties understand that PGE does not agree to the proposed briefing schedule or oral argument on the motion for summary disposition. The NewSun Parties further understand that PGE may propose its preferred schedule at the prehearing conference in

this matter, which is scheduled for July 3, 2018. However, the NewSun Parties alerted PGE to their intent to file their motion for summary disposition two and a half weeks ago, and do not wish to delay consideration of their motion or to delay resolution of the parties' dispute regarding the meaning of their contracts any longer.

CONCLUSION

For the reasons stated above, the NewSun QFs respectfully request that the Commission set the procedural schedule proposed in this motion.

DATED this 2nd day of July, 2018.

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1931

PORTLAND GENERAL ELECTRIC)
COMPANY,)
)
Complainant,)
)
v.)
)
ALFALFA SOLAR I LLC, et al.)
)
Defendants.)
_____)

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the following:

1. DEFENDANTS’ MOTION FOR SUMMARY DISPOSITION;
2. DECLARATION OF GREGORY M. ADAMS IN SUPPORT OF DEFENDANTS’ MOTION FOR SUMMARY DISPOSITION;
3. DECLARATION OF JACOB STEPHENS IN SUPPORT OF DEFENDANTS’ MOTION FOR SUMMARY DISPOSITION;
4. DEFENDANTS’ MOTION FOR ORAL ARGUMENT AND FOR EXPEDITED PROCESS ON MOTION FOR SUMMARY DISPOSITION; AND
5. CERTIFICATE OF SERVICE

on the following named person(s) on the date and manner indicated below, addressed to said person(s) at the address of each shown below.

Public Utility Commission of Oregon
Filing Center
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Salem, Oregon 97301-3398

- by Hand Delivery
- by Overnight Delivery
- by Facsimile Transmission
- by Email
- by U.S. Mail with postage prepaid
- by Electronic Mailing through the Filing Center

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 by Email
 by U.S. Mail with postage prepaid
 by Electronic Mailing through the
Filing Center

I further certify that the following waived physical service of this filing pursuant to OAR 860-001-0180(3)(b) and will be served by electronic mail through the Filing Center and were also separately served by email on July 2, 2018, at the following email addresses:

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DATED this 2nd day of July, 2018.

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