BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	**DEFENDANTS' MOTION TO STAY PROCEEDING OR, IN THE ALTERNATIVE, TO EXTEND TIME TO ANSWER THE COMPLAINT UNTIL AFTER RESOLUTION OF A MOTION TO DISMISS**

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 QFs") hereby moves the Oregon Public Utility Commission (the "Commission") for an Order:

1. Staying this proceeding and extending the date for the NewSun QFs to either answer or move to dismiss the complaint filed by Portland General Electric Company ("PGE"), which currently is set for February 15, 2018, until 14 days after Judge Michael Simon rules on the motion to dismiss that PGE's counsel has

stated PGE will file in response to the complaint the NewSun QFs filed against PGE filed in the United States District Court for the District of Oregon (the "Federal Court Proceeding") or, if PGE elects to file an answer instead of a motion to dismiss in the Federal Court Proceeding, 14 days after PGE files such answer;

2. In the alternative, and without waiving Motion 1, allowing the NewSun QFs to file a motion to dismiss in lieu of an answer to PGE's complaint and extending the time for the NewSun QFs to file an answer to PGE's complaint until 14 days after the Commission rules on the NewSun QFs' motion to dismiss.

BACKGROUND

On January 8, 2018, the NewSun QFs filed their complaint against PGE in the Federal Court Proceeding. *Alfalfa Solar I LLC, et al. v. Portland General Electric Company*, No. 3:18-cv-00040-SI, complaint (D Or, Jan 8, 2018).[1] The NewSun QFs' complaint invokes the federal court's diversity jurisdiction, which is conferred by Article III, Section 2 of the United States Constitution and a federal statute, 16 U.S.C. § 1332. The NewSun QFs' complaint asserts a single claim for relief—namely, the NewSun QFs' seek a declaration that, the fifteen-year term of the Renewable Fixed Price Option available to the NewSun QFs under the power purchase agreements ("PPAs") between the NewSun QFs and PGE (the "NewSun PPAs") commences when the relevant NewSun QF is operational and delivering power to PGE. *Id.*

[1] A copy of the NewSun QFs' complaint in the Federal Court Proceeding (excluding exhibits) is attached hereto as Exhibit A.

The complaint was served on PGE on January 10, 2018. On January 26, 2018, PGE requested an extension of time to respond to the NewSun QFs' complaint. In support of that request, PGE's counsel in the Federal Court Proceeding submitted a declaration stating that PGE "will be filing a motion to dismiss, not an answer . . . ." *Alfalfa Solar I LLC, et al. v. Portland General Electric Company*, No. 3:18-cv-00040-SI, Declaration of Dallas DeLuca (D Or, Jan 26, 2018).[2]

On January 25, 2018, PGE commenced this proceeding. In its complaint, PGE requests that this Commission "take jurisdiction" from the federal court and find that the fifteen-year term of the Renewable Fixed Price Option available under NewSun PPAs commences on the execution date of each of the NewSun PPAs. PGE requests in the alternative that, if the Commission determines that the fifteen-year term of the Renewable Fixed Price Option commences on the Commercial Operation Date, the Commission find that the term commences on the scheduled Commercial Operation Date set forth in each of the NewSun PPAs, rather than the date on which the relevant NewSun QF actually achieves commercial operation.

ARGUMENT

1. Motion 1: Stay Proceedings Until After Federal Court Ruling

The NewSun QFs commenced the Federal Court Proceeding more than two weeks before PGE commenced this proceeding. Both proceedings concern exactly the same dispute—namely, the date on which the fifteen-year term of the Renewable Fixed Price Option available under the NewSun PPAs commences. Litigating the same issue at the same time in two separate forums

[2] A copy of the declaration of PGE's counsel in the Federal Court Proceeding is attached hereto as Exhibit B.

would create the possibility of inconsistent—and, indeed, irreconcilable—results, waste finite judicial and Commission resources, and place an unnecessary burden on the parties. The NewSun QFs therefore request that, as a preliminary matter, the Commission stay this proceeding until the federal court determines whether the Federal Court Proceeding will go forward or whether, as PGE intends to request, the federal court will refer the matter to this Commission.

Oregon courts have long followed the fundamental rule that, where two tribunals may possess concurrent jurisdiction over a dispute, "as a matter of policy the second court may not interfere with the prior court's action in proceeding to a final conclusion or the rendering of a valid judgment so long as the proceedings are pending in the prior court." *Landis v. City of Roseburg*, 243 Or 44, 50, 411 P2d 282 (1966); *see also State v. Smith*, 101 Or 127, 146-150 199 P 194 (1921) (applying this rule where federal court obtained jurisdiction before state court). "This rule is so elementary as to require no further citations of authority supporting the legal principle." *Ex Parte Bowers*, 78 Or 390, 398 153 P 412 (1915) (holding that because the juvenile court had first secured jurisdiction of the subject matter and had never dismissed the proceedings or released the child, the trial court had no authority to intermeddle with the custody of the child and its decree attempting to affect such custody was void). Further, "[t]he court having prior jurisdiction is . . . granted the power to protect its prior jurisdiction by enjoining either the parties or the other court from proceeding further with the cause." *Landis*, 243 Or at 51. Because the NewSun QFs commenced the Federal Court Proceeding before PGE commenced this proceeding, the Commission should stay this proceeding to avoid interfering with the Federal Court Proceeding.

As noted above, PGE's counsel in the Federal Court Proceeding has stated that PGE intends to file a motion to dismiss in that proceeding. Based on PGE's assertion in its complaint here that the Commission has "primary jurisdiction," *PGE's Complaint* at ¶ 5, the NewSun QFs suspect that PGE will argue that the federal court should refer this matter to the Commission under the doctrine of primary jurisdiction or otherwise should abstain from asserting jurisdiction over this dispute. The NewSun QFs believe that any such argument is misplaced. In any event, the Commission should allow the federal court to rule on whatever jurisdictional issues PGE may raise in a motion to dismiss before allowing this proceeding to go forward.

As a practical matter, if the Commission allows this proceeding to go forward, any decision the Commission might reach on jurisdictional issues that the NewSun QFs would raise in a motion to dismiss would not be binding on the federal court. That would be so even if Oregon law did not require the Commission to allow the first-filed court to go first and even if Oregon law purported to provide the Commission with primary or exclusive jurisdiction over interpretation of the contracts at issue to the exclusion of the federal court. As the Ninth Circuit has held:

> [S]tate law may not control or limit the diversity jurisdiction of the federal courts. The district court's diversity jurisdiction is a creature of federal law under Article III and 28 U.S.C. § 1332(a). Pursuant to the supremacy clause, section 1332(a) preempts any contrary state law.

Begay v. Kerr-McGee Corp., 682 F2d 1311, 1315 (9th Cir 1982). It is up to the federal court to determine based on federal law whether it has jurisdiction to hear this dispute.

If the federal court determines that it has jurisdiction, and if it declines to refer the dispute to the Commission, the federal court could enjoin this proceeding. *See, e.g., United States*

Fidelity & Guaranty Co. v. Lee Investments, LLC, 641 F3d 1126, 113 (9th Cir 2011) (holding that "district court did not abuse its discretion in enjoining the State Board proceedings after the Insurer's rescission and restitution claims had been resolved by the federal jury"); *Freehold Cogeneration Assoc., L.P. v. Bd. of Reg. Com'rs of State of N.J.*, 44 F3d 1178, 1189 & 1193-94 (3rd Cir 1995) (involving federal question jurisdiction and enjoining New Jersey's utility commission against ongoing investigation into executed PURPA contract). Despite PGE's request, this Commission should not preemptively attempt to "take jurisdiction" back from the federal court. *See PGE's Complaint* at p. 2. Instead, the Commission should wait for the federal court to rule on any jurisdictional issues PGE may raise in that court.

The NewSun QFs are not requesting that the Commission determine now what it will do if the federal court declines to refer this matter to the Commission; they request only that the Commission defer this decision until after the federal court determines what it will do. If the federal court declines to refer this matter to the Commission, as the NewSun QFs believe it will, or if PGE elects not to challenge the federal court's jurisdiction, the NewSun QFs will request that the Commission dismiss PGE's complaint without prejudice and allow the parties to resolve their dispute in the Federal Court Proceeding. If, on the other hand, the federal court refers this matter to the Commission, the NewSun QFs will answer PGE's complaint, without waiving the assertion of their right to have this dispute resolved in the federal court.

2. Motion 2: Alternatively, Allow a Motion to Dismiss In Lieu of Answer

In the alternative, and without waiving Motion 1, the NewSun QFs move the Commission for an order allowing the NewSun QFs to file a motion to dismiss in lieu of an answer to PGE's complaint and extending the time for the NewSun QFs to file an answer to

PGE's complaint until 14 days after the Commission rules on the NewSun QFs' motion to dismiss.

The Commission's procedural rules adopt the Oregon Rules of Civil Procedure absent a contrary Commission rule of procedure. OAR 860-001-0000(1). The court rules require a party to file a motion to dismiss under ORCP 21A prior to filing an answer, and in that case, provide that the answer be filed only if, and after, the motion to dismiss is denied. ORCP 15A, B. Although the Commission's procedural rules contemplate a "motion to dismiss," OAR 860-001-0390(2)(a), the Commission's rules also state that the answer "must be filed" within 20 days of the complaint. OAR 860-001-0400(4)(a). Thus, the Commission's rules could be read to require the defendant to file both a motion to dismiss and an answer at the same. The Commission's letter serving the complaint on the NewSun QFs in this case set the deadline for the answer as February 15, 2018.

If the Motion 1 request herein to stay the proceeding is denied, the NewSun QFs intend to file a motion to dismiss PGE's complaint. Therefore, to conserve the resources of the parties and to allow the NewSun QFs to focus on the motion to dismiss, the NewSun QFs request an order allowing the NewSun QFs to file a motion to dismiss in lieu of an answer to PGE's complaint and extending the time for the NewSun QFs to file an answer to PGE's complaint until 14 days after the Commission rules on the NewSun QFs' motion to dismiss. In so moving, the NewSun QFs do not waive their request to stay the proceeding in Motion 1.

CERTIFICATION OF ATTEMPT TO MEET AND CONFER

In accordance with OAR 860-001-0420(2), counsel for the NewSun QFs made a good faith effort to reach agreement with PGE on the proposed stay and the processing of this motion

in the absence of such agreement. The parties conferred via telephone and electronic mail on February 1, 2018, and February 2, 2018. Ultimately, counsel for PGE stated PGE expects it will oppose the stay request in Motion 1 herein. In the event that stay Motion 1 is denied and the Commission reaches Motion 2, PGE's counsel stated PGE is not willing to stipulate that a motion to dismiss may be filed in lieu of an answer, and PGE takes no position on the issue at this time.

Additionally, PGE supports the NewSun QFs' concurrently filed motion to modify the schedule in light of this stay motion, which includes: (1) extending the current due date for the answer (and/or motion to dismiss) from February 15, 2018, until February 22, 2018; (2) clarifying that PGE's response to this motion is due on February 9, 2018; and (3) providing a requested Commission resolution on this stay motion by February 15, 2018. The NewSun QFs are concurrently filing an unopposed motion requesting those modifications to the existing schedule.

CONCLUSION

For the reasons stated above, the NewSun QFs respectfully request that the Commission stay this proceeding. In the alternative, the NewSun QFs request that the Commission allow the NewSun QFs to file a motion to dismiss in lieu of an answer to PGE's complaint and extend the time for the NewSun QFs to file an answer to PGE's complaint until 14 days after the Commission rules on the NewSun QFs' motion to dismiss.

DATED this 2nd day of February, 2018.

By: /s/ Keil M. Mueller

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

ALFALFA SOLAR I LLC, a Delaware limited liability company, DAYTON SOLAR I LLC, a Delaware limited liability company, FORT ROCK SOLAR I LLC, a Delaware limited liability company, FORT ROCK SOLAR II LLC, a Delaware limited liability company, FORT ROCK SOLAR IV LLC, a Delaware limited liability company, HARNEY SOLAR I LLC, a Delaware limited liability company, RILEY SOLAR I LLC, a Delaware limited liability company, STARVATION SOLAR I LLC, a Delaware limited liability company, TYGH VALLEY SOLAR I LLC, a Delaware limited liability company, and WASCO SOLAR I LLC, a Delaware limited liability company,

Plaintiffs,

Case No. 3:18-cv-00040

COMPLAINT

(Declaratory Relief)

JURY TRIAL DEMANDED

v.

PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation,

Defendant

Plaintiffs Alfalfa Solar I LLC ("Alfalfa"), Dayton Solar I LLC ("Dayton"), Fort Rock Solar I LLC ("Fort Rock I"), Fort Rock Solar II LLC ("Fort Rock II"), Fort Rock Solar IV LLC ("Fort Rock IV"), Harney Solar I LLC ("Harney"), Riley Solar I LLC ("Riley"), Starvation Solar I LLC ("Starvation"), Tygh Valley Solar I LLC ("Tygh Valley"), and Wasco Solar I LLC ("Wasco"),[1] for their Complaint against Portland General Electric Company ("PGE"), allege:

OVERVIEW OF THE ACTION

1. This case concerns a dispute regarding the correct interpretation of certain written agreements between the NewSun Qualifying Facilities and PGE.

2. Each of the NewSun Qualifying Facilities entered into a power purchase agreement ("PPA") with PGE (the "NewSun PPAs"). A copy of each of the NewSun PPAs is attached hereto as Exhibits 1 through 10.

3. Each of the NewSun PPAs is an executed version of a standard form contract that PGE is required to offer to qualifying facilities ("Qualifying Facilities" or "QFs"), such as the NewSun QFs, pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA") and related federal regulations, as implemented by the Oregon Public Utility Commission (the "PUC").

4. Each of the NewSun PPAs provides that the associated NewSun QF intends to develop a solar electric power generation facility and, upon successful construction and achievement of commercial operation, will sell one hundred percent of the net power generated by the facility ("Net Output") to PGE.[2] The facility that each NewSun QF intends to develop will not

[1] Alfalfa, Dayton, Fort Rock I, Fort Rock II, Fort Rock IV, Harney, Riley, Starvation, Tygh Valley, Wasco are referred to collectively herein as the "NewSun Qualifying Facilities," "NewSun QFs" or "Plaintiffs."

[2] NewSun PPAs § 4.1.

be operational until approximately three years after the date on which the relevant PPA was executed (the "Effective Date"). During this initial development phase, the NewSun QFs will be unable to transmit power.

5. Each of the NewSun PPAs provide that PGE will purchase power from the relevant NewSun QF at "the applicable price, including on-peak and off-peak prices, as specified in [PGE] Schedule [201]."[3] Schedule 201 contains a "Renewable Fixed Price Option" available to Qualifying Facilities, such as the NewSun QFs, who will generate electricity from a renewable energy source (in this case, solar).[4] This option provides that, for a period of fifteen years, PGE will pay the relevant NewSun QF a price equal to PGE's "Renewable Avoided Costs" for all power transmitted and sold to PGE, after which the price PGE pays for the remainder of the contract will be based on a daily index price, known as the Mid-C Index Price.[5]

6. While the exact Mid-C Index Price for any given day cannot be known in advance, PGE's own estimates indicate that, at all relevant times, the Mid-C Index Price will be substantially lower than PGE's Renewable Avoided Costs.

7. Plaintiffs contend that PGE's obligation under the Renewable Fixed Price Option to pay a price equal to its Renewable Avoided Costs for a period of fifteen years commences when the facility developed by relevant NewSun QF is operational and delivering power to PGE. PGE, however, contends that its obligation to pay a price equal to its Renewable Avoided Costs commences on the Effective Date of the relevant NewSun PPA.

[3] *Id.* §§ 1.33, 1.6, and 4.2.
[4] *Id.*, Ex. D at 201-12.
[5] *Id.*

PARTIES, JURISDICTION, AND VENUE

8. Alfalfa, Dayton, Fort Rock I, Fort Rock II, Fort Rock IV, Harney, Riley, Starvation, Tygh Valley, and Wasco each are single-member, Delaware limited liability companies. The sole member of each of Alfalfa, Dayton, Fort Rock I, Fort Rock II, Fort Rock IV, Harney, Riley, Starvation, Tygh Valley, Wasco is NewSun Energy Holdings Oregon LLC ("NSEH-OR").

9. NSEH-OR also is a single-member, Delaware limited liability company. NSEH-OR's sole member is NewSun Energy Holdings I LLC ("NSEH-I").

10. NSEH-I is a Delaware limited liability company. NSEH-I's members are: (a) seven individuals, each of whom is a citizen of California, Colorado, Virginia, Canada or the United Kingdom of Great Britain and Northern Ireland (the "U.K."); (b) two single-member LLC's, both of whose single member is an individual who resides in Arizona; (c) an Arizona corporation whose principal place of business is in Arizona; (d) a British limited company whose principal place of business is in the U.K.; (e) an employee benefit plan of a California corporation which administers benefits from its principal place of business in California; and (f) an employee benefit plan of a British limited company which administers benefits from its principal place of business in the U.K. NSEH-I's members are citizens of Arizona, California, Colorado, Virginia, Canada and the U.K. None of NSEH-I's members is a citizen of Oregon.

11. PGE is an Oregon corporation with its principal place of business in Portland, Oregon. PGE is a citizen of Oregon.

12. Because Plaintiffs seek only declaratory relief, the amount in controversy is measured by the value of the object of the litigation. Here, that amount is the difference between what Plaintiffs would receive for power sold to PGE under Plaintiffs' interpretation of the PPAs

and what they would receive under PGE's interpretation. That amount exceeds $75,000, exclusive of interest and costs, with respect to each of the NewSun PPAs.

13. Diversity jurisdiction exists under 28 U.S.C. § 1332(a)(1) because this action is between, on the one hand, citizens of Arizona, California, Colorado, Virginia, Canada and the United Kingdom, and, on the other hand, a citizen of Oregon, and because the amount in controversy exceeds $75,000, exclusive of interest and costs.

14. This Court also has jurisdiction over this matter under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), because Plaintiffs seek a declaration of their rights in connection with an actual controversy between PGE and Plaintiffs within this Court's jurisdiction.

15. Venue is proper in this Court under 28 U.S.C. § 1391 because PGE has its principal place of business in Portland, Oregon, which is in the Portland Division of this District.

BACKGROUND

A. PURPA

16. PURPA was enacted as part of the National Energy Act in response to the energy crisis of the 1970s. Pursuant to PURPA, electric utilities, such as PGE, are required to purchase power generated by Qualifying Facilities, a newly-designated class of power generators which includes cogenerators and small power producers that use renewable fuel sources such as solar, to generate power. By enacting PURPA, Congress intended both to diversify the nation's energy supply and to stimulate the development of alternative sources of energy, thereby reducing U.S. dependence on foreign oil.

17. Prior to Congress enacting PURPA, utilities—operating as vertically integrated monopolies—generated the vast majority of the nation's power supply. Utilities also were responsible for virtually all new generating capacity that was being developed.

18. Utilities were reluctant to purchase power and capacity generated by independently-owned facilities. This reluctance stemmed in large part from utility ratemaking practices, which allow a utility, including PGE, to earn an authorized fixed rate of return based on the capital the utility spends to develop its own power generation, transmission, and distribution facilities, but typically do not allow a utility to receive any mark-up or profit when the utility purchases power generated by third parties. Together, these factors create a perverse incentive for utilities when it comes to their own capital expenditures (as higher costs result in greater returns), and also incentivize utilities to impede the development of competitive power sources by independently-owned facilities.

19. PURPA sought to address this issue, in part, by ordering the Federal Energy Regulatory Commission ("FERC") to prescribe rules it determined necessary to encourage cogeneration and small power production facilities.[6] Specifically, PURPA directed FERC to promulgate rules to encourage financing and construction of Qualifying Facilities, including rules that would require utilities to enter into PPAs to purchase the power output of these Qualifying Facilities and to improve Qualifying Facilities' and other independent producers' access to the transmission grid, thereby increasing competitive options in the power industry.[7]

[6] 16 U.S.C. § 824a-3(a).

[7] *Id.* § 824a-3(a)(2).

20. PURPA specified that the price utilities would be required to pay for power purchased in accordance with PURPA's mandatory purchase obligation should not exceed the incremental cost to the utility of alternative electric energy.[8] In its implementing regulations, FERC defined this amount as the utility's "avoided cost."[9]

21. In promulgating its regulations under PURPA, FERC noted that "in order to be able to evaluate the financial feasibility of a cogeneration or small power production facility, an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility."[10] FERC therefore implemented regulations requiring that Qualifying Facilities be provided with the option to sell power to a utility under a *long-term* power purchase agreement for a specific number of years at a fixed price.[11]

22. PURPA requires state regulators to implement the rules prescribed by FERC.[12] Among other things, state regulators must determine the exact length of the fixed-price period to be included in a utility's PURPA standard form contracts and the avoided-cost rates to be paid by the utility during this period.

B. Implementation of PURPA in Oregon

23. In Oregon, the PUC implements PURPA regulations and approves standard, avoided-cost rates available to Qualifying Facilities in long-term contracts with each of the three

[8] *Id.* § 824a-3(b).

[9] 18 C.F.R. § 292.101(b)(6).

[10] *See Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA, Order No. 69,* 45 Fed. Reg. 12,214, 12,218 (March 20, 1980).

[11] 18 C.F.R. § 292.304(d)(2)(ii).

[12] 16 U.S.C. § 824a-3(f)(1).

investor-owned utilities it regulates, including PGE. The PUC accomplishes this by, among other things, reviewing and approving PURPA standard form contracts that are prepared and presented for approval to the PUC by the utilities. Each utility has its own approved PURPA standard form contracts setting out the terms on which the utility will be obligated to purchase power from a Qualifying Facility who enters into such a contract.

24. PURPA standard form contracts have the additional benefit of streamlining the Qualifying Facility contracting process by reducing the number of issues subject to negotiation. This also limits a utility's ability to impede the development of Qualifying Facilities by taking unreasonable negotiating positions to deter Qualifying Facilities from entering into PPAs.

25. In 2004, the PUC began an investigation and review of Qualifying Facility contracting practices in Oregon. Among other things, the PUC reviewed eligibility requirements for Qualifying Facilities who wish to use standard form contracts, calculation of avoided costs, standard contract pricing, and the appropriate length of standard form contracts.

26. The PUC investigation of Qualifying Facility contracting practices culminated in the issuance of PUC Order Number 05-584, entered May 13, 2005. Order Number 05-584 established, among other things: (a) an eligibility threshold for a Qualifying Facility's use of a PURPA standard form contract of 10 megawatt "nameplate capacity," *i.e.*, the facility's expected maximum power output cannot be in excess of 10 megawatts-AC; and (b) an option on the part of the Qualifying Facility to receive fixed pricing for fifteen years at a rate equal to the purchasing utility's avoided cost.[13] The PUC recognized that long-term, fixed-price contracts allow

[13] PUC Order No. 05-584 at 1-2.

developers of Qualifying Facilities to estimate revenues under the PPA, which, in turn, allows them to obtain the financing necessary to develop, construct, and operate the Qualifying Facilities.[14]

THE POWER PURCHASE AGREEMENTS

27. Each NewSun QF intends to develop a 10 megawatt solar power facility.[15] Each NewSun QF entered into a NewSun PPA to sell the Net Output generated at the facility to PGE once the facility it develops becomes operational.[16]

28. Dayton, Starvation, Tygh Valley, and Wasco each entered into a PPA with PGE on January 25, 2016. Fort Rock I and Fort Rock II each entered into a PPA with PGE on April 27, 2016. Alfalfa and Fort Rock IV each entered into a PPA with PGE on June 26, 2016. Harney and Riley each entered into a PPA with PGE on June 27, 2016.

29. The Dayton PPA is an executed version of PGE's 2015 Standard Renewable In-System Variable Power Purchase Agreement. The other nine NewSun PPAs are executed versions of PGE's 2015 Standard Renewable Off-System Variable Power Purchase Agreement. Both forms of agreement were approved by the PUC for use by PGE on September 22, 2015.

30. While several provisions of Dayton PPA relating to the mechanics and timing of transmitting power to PGE are different from the corresponding provisions in the other NewSun PPAs, the terms of the Dayton PPA that are relevant to the issues raised in this Complaint are

[14] *Id.* at 19.

[15] NewSun PPAs at first Recital.

[16] *Id.* § 4.

identical to the corresponding terms of the other NewSun PPAs. Accordingly, all of the NewSun PPAs are functionally identical with respect to the matters in dispute.

31. Once a standard form contract is executed by a Qualifying Facility and the utility, the rates and terms are fixed and are not subject to modification by the PUC pursuant to its ongoing ratemaking authority. Instead, these agreements are governed by common law contract principles and are subject to interpretation and enforcement in court.

32. Pursuant to the NewSun PPAs, each NewSun QF agreed to sell its Net Output to PGE for the entire term of the PPA, which for each PPA ends sixteen years following the date on which the facility is deemed by PGE to be fully operational and reliable (the "Commercial Operation Date").[17]

33. The NewSun PPAs provide that PGE will purchase power from the relevant NewSun QF at the "Contract Price," which is defined as "the applicable price, including on-peak and off-peak prices, as specified in the Schedule."[18] The "Schedule" is defined as "PGE Schedule 201 filed with the [PUC] in effect on the Effective Date of this Agreement and attached hereto as Exhibit D, the terms of which are hereby incorporated by reference."[19]

34. The version of Schedule 201 applicable to each of the NewSun PPAs is the version effective on and after September 23, 2015. A complete copy of Schedule 201, is included as Exhibit D to the PPAs for Alfalfa, Fort Rock IV, Harney, and Riley. Exhibit D to the PPAs for

[17] *Id.* §§ 1.5, 1.7, 2.3, and 4.1.
[18] *Id.* § 1.6.
[19] *Id.* § 1.33.

Dayton, Fort Rock I, Fort Rock II, Starvation, Tygh Valley, and Wasco consists only of copies of Tables 6a and 6b from the applicable Schedule 201.

35. Schedule 201 provides for a "Standard Fixed Price Option" available to all Qualifying Facilities, and a "Renewable Fixed Price Option" available only to Qualifying Facilities, such as the NewSun QFs, who will generate electricity from a renewable energy source.[20] The Renewable Fixed Price Option is available for a term of fifteen years.[21]

36. Under the Renewable Fixed Price Option, the price PGE pays for power is based on its Renewable Avoided Costs.[22] The price varies according to the type of renewable resource used and is set forth in tables contained in Schedule 201. For solar Qualifying Facilities such as the NewSun QFs, the applicable rate tables are Tables 6a and 6b—titled "Renewable Fixed Price Option for Solar QF."[23]

37. Schedule 201 further provides that, after the term of the Renewable Fixed Price Option expires, the price paid by PGE will be "equal to the Mid-C Index Price."[24] Both Schedule 201 and the NewSun PPAs define the Mid-C Index Price as the daily average on-peak and off-peak prices in the bilateral over-the-counter market, as reported by an index known as the Intercontinental Exchange.[25]

[20] *Id.*, Ex. D at 201-4 and 201-12.
[21] *Id.*, Ex. D at 201-12.
[22] *Id.*
[23] *Id.*, Ex. D at 201-17 to 201-18.
[24] *Id.*
[25] *Id.* § 1.18.

38. While the Mid-C Index Price for any given day cannot be known in advance, PGE's own estimates indicate that, through at least 2040, the Mid-C Index Price will be substantially lower than the fixed prices set forth in Tables 6a and 6b.

A. PGE Asserts the Fixed Price Options Commence on the Effective Date

39. In December 2016, several industry associations filed a complaint against PGE with the PUC challenging PGE's publicly stated position that the fixed price options in its PURPA standard form contracts run from the Effective Date of the contract, thereby shortening the period during which a Qualifying Facility actually receives a fixed price for power delivered to PGE by the length of time it takes the Qualifying Facility to develop its power generation facility. As with any new power plant, it is impossible for a Qualifying Facility to deliver power to PGE before its power generation facility is developed and operational.

40. PGE conceded that it intended to administer its standard form contracts as if the fixed price options ran from the Effective Date.

41. On July 13, 2017, the PUC issued Order Number 17-256, in which it "clarif[ied] [its] policy in Order No. 05-584 to explicitly require standard contracts, on a going forward basis, to provide for 15 years of fixed prices **that commence when the QF transmits power** to the utility."[26] The PUC also stated that "prices paid to a QF **are only meaningful when a QF is operational and delivering power to the utility**," and that, therefore, "to provide a QF the full benefit of the fixed price requirement, **the 15-year term must commence on the date of power delivery**."[27]

[26] PUC Order No. 17-256 at 4 (July 13, 2017) (emphasis added).

[27] *Id.* (emphasis added).

42. In response to a Petition to Amend Order 17-256, the PUC issued subsequent Order 17-465. In that order, the PUC further confirmed its "requirement that the 15-year term affixed prices **commences when the QF transmits power to the utility**."[28] It also clarified that, in reaching its previous decision, it "neither examined nor addressed the specific terms and conditions of any past QF contracts . . . ."[29] It further stated: "In this decision, we do not address any existing executed contracts or PGE's current or existing standard contracts."[30] This includes the NewSun PPAs.

B. Plaintiffs Assert the Renewable Fixed Price Option in each NewSun PPA Commences On the Date the NewSun QF Delivers Power to PGE

43. Each of the NewSun PPAs provides that the relevant NewSun QF shall have completed all requirements necessary to establish commercial operation of the facility contemplated by the NewSun PPA no later than three years from the Effective Date of the relevant NewSun PPA.[31]

44. Plaintiffs estimate that each of the NewSun QFs will require the full three years to develop and achieve commercial operation of its facility, which aligns with the designated requirement to achieve the Commercial Operation Date within three years of the Effective Date.

45. The NewSun QFs cannot deliver power to PGE until the relevant NewSun QF is developed and operational.

[28] PUC Order No. 17-465 at 4 (Nov. 13, 2017) (emphasis added).

[29] *Id.*

[30] *Id.*

[31] NewSun PPAs § 2.2.2.

46. In order for the NewSun QFs to receive the Renewable Fixed Price Option for fifteen years, the term of the Renewable Fixed Price Option must commence when the relevant NewSun QF is operational and delivering power to PGE.

47. PGE's interpretation of the NewSun PPAs would mean that the Renewable Fixed Price Option effectively would be available to each NewSun QF only for approximately twelve years. Under PGE's interpretation, each NewSun QF would receive the substantially lower Mid-C Index Price approximately twelve years after the NewSun QF is operational and delivering power to PGE.

48. Plaintiffs estimate that, under PGE's interpretation of the NewSun PPAs, each NewSun QF will receive at least several hundred thousand dollars less in total payments from PGE under the relevant NewSun PPA than if each NewSun QF receives the Renewable Fixed Price Option for fifteen years after its facility is operational and delivering power to PGE.

JUSTICIABLE CONTROVERSY

49. An actual, justiciable controversy exists between each of the NewSun QFs and PGE as to whether the term of the Renewable Fixed Price Option commences when the NewSun QF is operational and delivering power to PGE, as Plaintiffs contend, or on the Effective Date of the relevant NewSun PPA, as PGE contends.

50. The NewSun QFs must obtain financing to meet their contractual obligations to develop and construct the solar power facilities described in the NewSun PPAs. In order to obtain financing, the NewSun QFs need to know whether they will receive the Renewable Fixed Price Option for the full fifteen years provided for in the NewSun PPAs.

51. Under 28 USC § 2201(a), the NewSun QFs are entitled to declaratory judgment on these actual, justiciable controversies.

CLAIM FOR RELIEF

(Declaratory Judgment)

52. Plaintiffs incorporate the allegations of all prior paragraphs of this Complaint as though fully set forth herein.

53. Plaintiffs seek a declaration that, under each of the NewSun PPAs, the term of the Renewable Fixed Price Option commences when the relevant NewSun QF is operational and delivering power to PGE.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court order all relief to which they are or may become entitled, including but not limited to the following:

A. A declaration that, under each of the NewSun PPAs, the term of the Renewable Fixed Price Option commences when the relevant NewSun QF is operational and delivering power to PGE.

B. Taxable costs.

C. Such other and further relief as is just and proper.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury on all claims and issues so triable.

DATED this 8th day of January, 2018.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

By: s/ Robert A. Shlachter

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Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

ALFALFA SOLAR I LLC, a Delaware limited liability company, **DAYTON SOLAR I LLC,** a Delaware limited liability company, **FORT ROCK SOLAR I LLC,** a Delaware limited liability company, **FORT ROCK SOLAR II LLC,** a Delaware limited liability company, **FORT ROCK SOLAR IV LLC,** a Delaware limited liability company, **HARNEY SOLAR I LLC,** a Delaware limited liability company, **RILEY SOLAR I LLC,** a Delaware limited liability company, **STARVATION SOLAR I LLC,** a Delaware limited liability company, **TYGH VALLEY SOLAR I, LLC,** a Delaware limited liability company, and **WASCO SOLAR I LLC**, a Delaware limited liability company,

Plaintiffs,

vs.

PORTLAND GENERAL ELECTRIC

Case No. 3:18-cv-00040-SI

DECLARATION OF DALLAS DELUCA IN SUPPORT OF DEFENDANT'S UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE RESPONSIVE PLEADING

COMPANY, an Oregon corporation,

Defendant.

I, Dallas DeLuca declare:

1. I am defendant's attorney. The following statements are true and correct and, if called upon, I could competently testify to the facts averred herein.

2. Plaintiffs filed their Complaint on January 8, 2018.

3. Defendant was served with the Summons and Complaint on January 10, 2018.

4. On January 26, 2018, I emailed plaintiffs' lawyer and requested a one week extension of the time to file a response to the complaint.

5. Plaintiffs' counsel has consented to this requested extension of time.

6. Defendant is acting in good faith and not for any improper purposes. The reason for the delay is the workload of the outside counsel. Additionally, defendant will be filing a motion to dismiss, not an answer, which requires extensive research and client review.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 26th day of January, 2018.

MARKOWITZ HERBOLD PC

By: */s/ Dallas S. DeLuca*
Dallas S. DeLuca, OSB #072992

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