



## **BACKGROUND**

On January 8, 2018, the NewSun QFs filed their complaint against PGE in the Federal Court Proceeding. 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. The complaint was served on PGE on January 10, 2018.

On January 25, 2018, PGE commenced this proceeding. In its complaint and request for dispute resolution, PGE requests that this Commission issue a declaratory judgment on the very same contractual interpretation issue raised in the NewSun QFs' complaint in the Federal Court Proceeding.

On February 2, 2018, the NewSun QFs filed a motion to stay (“NewSun QFs' Motion to Stay”) this proceeding until 14 days after Judge Michael Simon had ruled on a motion to dismiss the Federal Court Proceeding that PGE had indicated it would file. PGE opposed the NewSun QFs' Motion to Stay.

On February 2, 2018, the NewSun QFs also filed a procedural motion requesting that the Commission rule that the NewSun QFs may file a motion to dismiss (“NewSun QFs' Motion to Dismiss”) this proceeding in lieu of an answer, and that if such motion to dismiss were denied, the answer be due after a ruling denying the NewSun QFs' Motion to Dismiss. The NewSun QFs and PGE subsequently stipulated to the answer being due 10 days after an order denying the

NewSun QFs' Motion to Dismiss, which Administrative Law Judge ("ALJ") Michael Grant granted as the due date for the answer, as confirmed by electronic mail message from ALJ Grant to the parties dated February 21, 2018.<sup>1</sup>

The Commission did not, however, rule on the NewSun QFs' Motion to Stay before the agreed-to due date for the NewSun QFs' Motion to Dismiss of February 22, 2018. Thus, the NewSun QFs filed the NewSun QFs' Motion to Dismiss on that date.

Meanwhile, in the Federal Court Proceeding, PGE filed its motion to dismiss or, in the alternative, stay ("PGE's Federal Motion to Dismiss") on February 7, 2018. The NewSun QFs have opposed that motion. Oral argument on that motion is set for May 30, 2018.

On May 23, 2018, which is coincidentally just seven days prior to oral argument in the Federal Court Proceeding, this Commission issued its Order No. 18-174, denying the NewSun QFs' Motion to Dismiss. According to Order No. 18-174, the Commission believes it has "concurrent jurisdiction" with the U.S. District Court over the declaratory judgment action at issue in the Federal Court Proceeding. Order No. 18-174 at 4. With regard to concurrent jurisdiction, the Order incorrectly states that the "NewSun QFs do not argue that, absent the pendency of the proceeding before the District Court, the Commission would lack such jurisdiction." *Id.* In fact, however, the NewSun QFs argued extensively, and intend to continue arguing, that this Commission lacks subject matter jurisdiction over PGE's pleading that initiated this proceeding. *See, e.g., NewSun QFs' Motion to Dismiss* at 10-35 (Feb. 22, 2018); *NewSun QFs' Reply in Support of Motion to Dismiss* at 7-26 (March 16, 2018). The Order goes on to

---

<sup>1</sup> This electronic mail message stated that it would be docketed in the proceeding, but to date it does not appear on the Commission's online edockets page for the proceeding. The message is attached hereto as Attachment 1 for reference.

state: “While we recommend abatement of judicial proceedings, the U.S. District Court remains free to determine when and how to address all matters before it . . . .” Order No. 18-174 at 5.

The Order further asserts that, although the Commission apparently believes it has concurrent jurisdiction with courts over contract disputes, the Commission is not bound by the “first-to-file” doctrine that allows for orderly processing of disputes where concurrent jurisdiction exists. *Id.* According to the Order, the “first-to-file doctrine thus does not automatically give a court primary or exclusive jurisdiction over an agency.” *Id.*

However, the Commission’s Order No. 18-174 does not expressly rule on the NewSun QFs’ Motion to Stay this proceeding until after Judge Michael Simon has ruled on PGE’s Federal Motion to Dismiss. Thus, it appears from Order No. 18-174 that the current schedule calls for the NewSun QFs to file an answer to PGE’s pleading in this proceeding within 10 days of the Order, which would make the answer due by June 4, 2018.

### **RENEWED MOTION TO STAY PROCEEDINGS**

The NewSun QFs disagree with the reasoning and conclusions of Order No. 18-174, and the NewSun QFs do not intend to voluntarily abate the Federal Court Proceeding as assumed in the Order. As noted above, both this proceeding and the Federal Court Proceeding 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. The Commission’s Order No. 18-174 introduces considerable confusion and risk of inconsistent and possibly irreconcilable rulings on the merits of the underlying dispute. As the Commission itself acknowledges in the Order, the U.S. District Court “remains free to determine when and how to address all matters before it . . . .” Order No. 18-174 at 5. If that is so, the Commission’s own process would be well informed by the U.S. District Court’s ruling on the jurisdictional issues

raised by PGE in that proceeding. The NewSun QFs submit that, under the circumstances, a stay is appropriate until after the U.S. District Court rules on PGE's Federal Motion to Dismiss to provide all parties further clarity as to how they intend to proceed.

Additionally, given the timing of the Commission's issuance of its Order just seven days before oral argument in U.S. District Court, the NewSun QFs are compromised in their ability to determine their next steps in response to the Commission's Order No. 18-174 due to the need to focus efforts on preparation for oral argument in the Federal Court Proceeding. This additional reason warrants extension of time to file the answer, which appears to be otherwise due June 4, 2018.

PGE will not be prejudiced by a stay. The NewSun QFs are not aware of any urgency on PGE's part to resolve the underlying contract dispute. Indeed, PGE has argued in the Federal Court Proceeding that this matter will not be ripe until 2031, undermining any claim of urgency on its part. Likewise, the Commission's Order No. 18-174 identifies no basis on the Commission's part for urgency to proceed to the merits before additional clarity is provided by a ruling on the jurisdictional issues raised by PGE in the Federal Court Proceeding. The only parties that have expressed any urgency in having this dispute resolved are the NewSun QFs, and their preference is to allow the U.S. District Court to have the opportunity to rule on the jurisdictional issues before further action is taken with respect to this proceeding.

Thus, for the reasons stated herein and the reasons previously stated in the NewSun QFs' Motion to Stay, the NewSun QFs renew their motion requesting that this Commission stay this proceeding until after Judge Michael Simon rules on PGE's Federal Motion to Dismiss.

#### **REQUEST FOR EXPEDITED CONSIDERATION**

The NewSun QFs request expedited response time and consideration of this motion.

Normally, PGE's response to a procedural motion would due within be seven days, which would be by June 1, 2018. OAR 860-001-420(4). However, PGE has already responded to the NewSun QFs' Motion to Stay, as initially filed, and a ruling is needed by June 1, 2018 to stay the proceeding before the NewSun QFs would otherwise be compelled to file their answer on June 4, 2018. Thus, the NewSun QFs submit that expedited response and consideration of this renewed motion for stay is warranted. The NewSun QFs recommend that PGE's response be due within four days, by May 29, 2018, and that the Commission rule on the motion by June 1, 2018.

#### **CERTIFICATION OF ATTEMPT TO 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 this renewed stay motion and the requested expedited processing of this motion. The parties conferred via electronic mail on May 25, 2018. However, the parties do not agree. Counsel for PGE, Mr. Jeff Lovinger, stated that PGE continues to oppose a stay and opposes expedited processing of this motion.

#### **CONCLUSION**

For the reasons stated above, the NewSun QFs respectfully request that the Commission issue an Order or procedural ruling staying this proceeding until 14 days after Judge Michael Simon rules on the motion to dismiss that PGE has filed in response to the complaint the NewSun QFs filed against PGE in the United States District Court for the District of Oregon.

DATED this 25th day of May 2018.

By: /s/ Gregory M. Adams  
**Gregory M. Adams**, OSB No. 101779  
Richardson Adams, PLLC  
515 North 27th Street  
Boise, ID 83702  
Telephone: (208) 938-2236  
Facsimile: (208) 939-7904  
Email: greg@richardsonadams.com

-and-

**Robert A. Shlachter**, OSB No. 911718  
**Keil M. Mueller**, OSB No. 085535  
Stoll Stoll Berne Lokting & Shlachter  
PC.  
209 SW Oak Street, Suite 500  
Portland, OR 97204  
Telephone: (503) 227-1600  
Facsimile: (503) 227-6840  
Email: rshlachter@stollberne.com  
kmueller@stollberne.com

Attorneys for Defendants

UM 1931

DEFENDANTS' RENEWED MOTION TO STAY  
PROCEEDING AND EXTEND TIME TO FILE AN  
ANSWER

ATTACHMENT 1



**From:** [GRANT Michael](#)  
**To:** [Greg Adams](#)  
**Cc:** [MENZA Candice](#); [Dallas DeLuca](#); [David White](#); [Jeff Lovinger](#); [Keil Mueller](#); [Rob Shlachter](#)  
**Subject:** RE: UM 1931 Filing of Motion to Dismiss in lieu of Answer  
**Date:** Wednesday, February 21, 2018 2:38:05 PM

---

Parties to UM 1931:

This email, which will be docketed in this proceeding, serves to provide confirmation that the NewSun QFs may file a motion to dismiss in lieu of an answer, as stipulated to between the parties. The due date for an answer, if required, will be 10 days following the Commission's decision on the motion to dismiss.

**Michael Grant**

Chief Administrative Law Judge  
Public Utility Commission of Oregon Public Utility Commission  
(503) 378-6102

---

**From:** Greg Adams [mailto:Greg@richardsonadams.com]  
**Sent:** Wednesday, February 21, 2018 1:01 PM  
**To:** GRANT Michael <mgrant@puc.state.or.us>  
**Cc:** Dallas DeLuca <dallasdeluca@markowitzherbold.com>; David White <David.White@pgn.com>; Jeff Lovinger <jeff@lovingerlaw.com>; Keil Mueller <KMuell@stollberne.com>; Rob Shlachter <RShlachter@stollberne.com>  
**Subject:** UM 1931 Filing of Motion to Dismiss in lieu of Answer

Judge Grant,

On behalf of the NewSun QFs (defendants) in this matter, we would like to clarify whether the NewSun QFs may file a motion to dismiss in lieu of an answer, which is an unopposed issue at this point. PGE had not initially decided whether it would support or oppose the filing of a motion to dismiss in lieu of an answer at the time that was initially requested as part of the procedural motions filed by the NewSun QFs on February 2, 2018. By ruling dated February 5, 2018, the motion to extend the date for the answer/motion to dismiss was extended to February 22, 2018, which is tomorrow.

However, as of PGE's February 9, 2018 filing, PGE and NewSun stipulated that, in the event the stay motion is denied, the NewSun QFs can file a motion to dismiss before filing an answer, and will then file an answer, if at all, within 10 days of the Commission's decision on the NewSun QFs' motion to dismiss. *See PGE's Stay Response* at 10 (Feb. 9, 2018).

The Commission has not ruled on the stay motion, and therefore the NewSun QFs anticipate filing a motion to dismiss tomorrow. We would like to make sure the record is clear as to the right to file that motion in lieu of an answer, and that the due date for the answer would be 10 days after a ruling on the motion to dismiss.

We could file a formal motion to this effect or be available for a prehearing conference to discuss the matter if you like.

Thanks again in advance for your assistance.

Greg Adams  
Richardson Adams, PLLC  
515 N. 27th Street, 83702  
P.O. Box 7218, 83707  
Boise, Idaho  
Voice: 208.938.2236  
Facsimile: 208.938.7904

Information contained in this electronic message and in any attachments hereto may contain information that is confidential, protected by the attorney/client privilege and/or attorney work product doctrine. Inadvertent disclosure of the contents of this email or its attachments to unintended recipients is not intended to and does not constitute a waiver of the attorney/client privilege and/or attorney work product doctrine. If you have received this email in error, please immediately notify the sender of the erroneous receipt and destroy this email and any attachments of the same either electronic or printed. Thank you.

**\*\*\*Please use caution when opening links, attachments or responding to this email as it originated outside of PUC.\*\*\***