BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	)	**DEFENDANTS' MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY**

INTRODUCTION AND SUMMARY OF MOTION

Pursuant to OAR 860-001-0420, defendants 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") (collectively, the "NewSun Parties"), hereby move Oregon Public Utility Commission ("Commission" or "OPUC") to stay discovery pending resolution of the NewSun Parties' recently-filed Motion for Summary Disposition.

As stated the NewSun Parties' Motion for Summary Disposition, this dispute is ripe for summary resolution. The ten power purchase agreements in issue (the "NewSun PPAs") all are based on the same standard form contract and their terms are functionally identical. The sole issue in dispute is when the fifteen-year fixed-price period in the NewSun PPAs commences. The Commission does not need to examine extrinsic evidence or other matters beyond the four corners of these standard form contracts and the regulatory context from which they arose to

resolve this dispute. Moreover, the Commission recently clarified, confirmed, and re-clarified its policy pertaining to the sole issue in dispute.

Rather than requiring the parties to engage in costly and burdensome discovery—which will be rendered unnecessary if the NewSun Parties' motion is granted—the Commission should stay discovery while the NewSun Parties' motion is pending. The Commission should allow limited discovery before it rules on the NewSun Parties' Motion for Summary Adjudication only if, and to the extent, Portland General Electric Company ("PGE") demonstrates discovery is necessary for PGE to present facts essential to justify its opposition to the NewSun Parties' motion.

This Commission asserted jurisdiction over this matter, and the United States District Court deferred to this Commission under the doctrine of primary jurisdiction, due to the Commission's expertise and understanding of the terms of the form agreements it approved and to ensure orderly and uniform resolution of the interpretation of agreements executed between utilities and qualifying facilities ("QFs") based on those agreements. As discussed in the NewSun Parties' Motion for Summary Disposition, the NewSun Parties' position—that the fixed-price period commences on commercial operation—is consistent with this Commission's longstanding policy.

Questions regarding the Commission's policy were litigated extensively in UM 1805, resulting in the Commission's clarification and confirmation (in multiple orders) that its policy is, and always has been, that Oregon regulated utilities must offer QFs fifteen years of fixed prices commencing when the QF's facility becomes operational. Nothing in the express language of the NewSun PPAs contradicts this longstanding Commission policy. Importantly, taking into consideration the subjective intent of the parties in determining the meaning of the Commission-

approved standard form contracts would adversely affect the Commission's uniform implementation of its policies relating to such agreements and would subvert the entire purpose of standard contracts.

The NewSun Parties' Motion for Summary Disposition has the potential to resolve all legal issues and dispose of this matter efficiently. If the Commission grants the NewSun Parties' motion, it will no longer be necessary to conduct or complete discovery. Even if the Commission denies NewSun Parties' motion, the Commission's decision likely will guide the parties as to what additional discovery is necessary and appropriate. Accordingly, staying discovery pending resolution of the NewSun Parties' Motion for Summary Disposition is reasonable and serves the interests of judicial economy and administrative efficiency. Allowing discovery and preparing pre-filed testimony would be a waste of the parties' and the Commission's time and resources.[1]

This is particular true in light of the broad discovery requests PGE already has served on the NewSun Parties. PGE's requests are not "commensurate with the needs of the case, the resources available to the parties, [or] the importance of the issues to which the discovery [sought by PGE] relates." *See* OAR 860-001-0500(1). Responding to these requests, which are essentially an unreasonable fishing expedition, would be unreasonably burdensome to the NewSun Parties, especially when this dispute could be resolved without need for any discovery

[1] PGE recently made similar arguments in a dispute resolution proceeding between PGE and other QFs. There, the Commission suspended discovery and directed the parties to address PGE's pending motion for summary judgment. *See PGE's Motion to Stay Discovery and Procedural Schedule*, OPUC Docket No UM 1877-UM 1882, UM 1884-UM 1886, UM 1888-UM 1890 (Jan 24, 2018); *PGE's Response to Complainants' Motion to Suspend Complainants' Response to PGE's Motion for Summary Judgment and to Set a Scheduling Conference*, OPUC Docket No UM 1877-UM 1882, UM 1884-UM 1886, UM 1888-UM 1890 (Feb 8, 2018); *Prehearing Conference Report*, OPUC Docket No UM 1877-UM 1882, UM 1884-UM 1886, UM 1888-UM 1890 (Feb 13, 2018).

at all. Moreover, if discovery is allowed to proceed now, the NewSun parties anticipate that discovery disputes likely will arise. An order staying discovery pending resolution of the NewSun Parties' Motion for Summary Disposition would allow the Commission and the parties to avoid expending resources resolving such discovery disputes until after the Commission determines whether this matter can be resolved without need for further discovery.

If PGE believes it is unable to present "facts essential to justify" its opposition to the NewSun Parties' Motion for Summary Disposition, it should state the facts that it believes are material to resolution of the NewSun Parties' motion and the reasons why it is unable to present such facts by affidavit or declaration. *See* ORCP 47 F. The NewSun parties believe PGE will be unable to demonstrate the existence of any disputed issue of material fact sufficient to preclude summary disposition of this matter, much less that it is unable to present facts essential to justify PGE's opposition to the NewSun Parties' motion by affidavit or declaration. If, however, PGE is able to make such a showing, the Commission may order a continuance to allow PGE to conduct appropriate discovery at that time relating only to those limited pertinent matters.

Moreover, if discovery is not stayed, the NewSun Parties also will need to obtain discovery from PGE regarding its subjective intent, and whether it would be reasonable for any QF to accept as genuine and true any statements made by PGE during a contracting process. Given the expense and delay entailed, discovery should proceed—if at all—only after the Commission determines that facts regarding the parties' subjective intent and/or other ancillary matters relating to the meaning of the NewSun PPAs are material to the Commission's resolution of the parties' dispute.

For these reasons, and as explained further herein, proceeding with discovery at this time is unnecessary and would only serve to impose undue burden, unnecessary delay, and significant

unnecessary expense on the parties and the Commission. The NewSun Parties therefore move the Commission to stay discovery pursuant to ORCP 36 C(1), ORCP 1 B, and OAR 860-001-0500(1) and (2), pending resolution of the NewSun Parties' Motion for Summary Disposition. In so moving, the NewSun Parties expressly reserve the right to raise all objections to PGE's individual data requests in due course under applicable rules in the event that the Commission declines to stay discovery.

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. However, PGE states that it opposes a stay of discovery.

BACKGROUND

The sole issue in dispute in PGE's complaint and request for dispute resolution is a contractual interpretation question under the NewSun PPAs. Yet PGE has served broad discovery requests on the NewSun Parties, inquiring into extrinsic matters outside the interpretive issue under which this Commission found it had jurisdiction.[2] These data requests generally include the following categories of information: (i) extensive requests for internal and external communications, financing documents, and other similar information, which presumably seek to ascertain the subjective understanding of the individual project-specific entities that entered into the NewSun PPAs (Data Request Nos. 1, 2, 5, and 7): (ii) the status of development of the NewSun Parties' unbuilt solar facilities (Data Request Nos. 3 and 4), and (iii) legal arguments that the NewSun Parties will make in this proceeding regarding the meaning of

[2] A copy of PGE's First Set of Data Requests to Defendants is attached hereto as Exhibit 1.

the contracts (Data Request Nos. 6, 8, 9, and 10). PGE served the requests on Monday, June 25, 2018, and PGE states in its requests the NewSun Parties must respond within 14 days, by July 9, 2018. Even though this dispute has been pending in the Commission and the United States District Court for six months, PGE waited until it learned the NewSun Parties' Motion for Summary Disposition would be filed to serve its discovery requests.

The information sought in four of PGE's ten data requests (Data Request Nos. 6, 8, 9, and 10), which seek legal arguments the NewSun Parties will rely upon related to the interpretation of the agreements, is contained in the NewSun Parties' Motion for Summary Disposition, including the declarations and exhibits the NewSun Parties submitted in support of their motion. PGE's remaining requests seek information and documents related at most to the parties' subjective understandings of the agreements and other matters extrinsic to the NewSun PPAs. Such information and documents would be relevant, if at all, only if the Commission determines that the disputed provisions of NewSun PPAs are ambiguous.

These remaining requests include requests for discovery of electronically stored information (known as "ESI"), including electronic mail and other documents and materials maintained in electronic form, which ordinarily take months and cost tens of thousands of dollars in legal and e-discovery vendor fees to collect and review for responsiveness and privilege. For example, the definitions describe the documents sought to include, "all writings and records of every type in your possession, control, or custody, whether or not claimed to be privileged or otherwise excludable from discovery," as well as "computer data (including E-mail), computer files, computer tapes, computer inputs, computer outputs and printouts, . . . telephone and telegraphic communications, speeches, and all other records, written, electrical, mechanical, or otherwise, and drafts of any of the above." *See PGE's Data Requests* at 1. The request broadly

targets numerous custodians of such material, including documents within the possession of "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/or Wasco Solar I LLC and any officer, director, member, partner, employee or representative of such defendants or any affiliated company." *Id*. It would take many hours and retention of e-discovery consultants to even identify the number of potential custodians of such ESI and determine the likely volume of such information that could arguably fall within the scope of the request.

PGE further requests a detailed privilege log for each individual document falling within the scope of the requests and for which the NewSun Parties claim privilege, such as attorney-client privilege. *Id.* at 3, ¶ 9. For each individual document that is withheld, PGE demands the NewSun Parties "identify each such document, and specify the number of pages it contains" as well as "(a) a brief description of the document; (b) date of document; (c) name of each author or preparer; (d) name of each person who received the document; and (e) the reason for withholding it and a statement of facts constituting the justification and basis for withholding it." *Id.*

LEGAL STANDARD

Discovery "must be commensurate with the needs of the case" and unreasonably burdensome discovery is not allowed. OAR 860-001-0500(1) and (2). Data requests are subject to the ORCP discovery rules. OAR 860-001-0540(1). Under those rules, a court may deny discovery to protect a party from "oppression, or undue burden or expense." ORCP 36 C(1). More generally, in deciding whether to grant a protective order, the ORCP should "be construed to secure the just, speedy, and inexpensive determination of every action." ORCP 1 B.

A court has broad authority to protect a party from unnecessary discovery. Pursuant to "the plain language of [ORCP 36 C], once a court concludes that a party or person is entitled to a protective order, it has the authority to protect that party or person in *any* way that justice requires." *Carton v. Shisler*, 146 Or App 513, 516, 934 P2d 448 (1997) (emphasis in original).

This includes denying discovery altogether. *See, e.g.*, *Martin v. DHL Express (U.S.A.), Inc.*, 235 Or App 503, 509, 234 P3d 997 (2010). In *Martin*, a breach of contract case, the trial court granted a motion for a protective order to prevent the discovery deposition of a witness who was in poor health. *Id.* Affirming the trial court's order, the Court of Appeals pointed to ORCP 36 C and noted that a court may deny discovery to protect a person from "annoyance, embarrassment, oppression, or undue burden." *Id*.

In another breach of contract case, *Caro v. Hansen*, 128 Or App 267, 270, 875 P2d 512 (1994), the defendant sought to postpone decision on a motion for summary judgment until discovery was completed. The trial court declined and granted summary judgment for the plaintiff. *Id*. Because the discovery sought by the defendant was "immaterial" for the court to rule on the motion for summary judgment, the trial court did not abuse its discretion. *Id*. at 273.

Federal courts have applied similar principles and stayed discovery pending the resolution of a dispositive motion, including a motion for summary judgment. *See Little v. City of Seattle*, 863 F2d 681, 685 (9th Cir 1988) (holding "[t]he trial court did not abuse its discretion by staying discovery until the immunity issue was decided"). If a complaint does not "raise factual issues that required discovery for their resolution," it is not an abuse of discretion to stay discovery while a dispositive motion is pending. *Jarvis v. Regan*, 833 F2d 149, 155 (9th Cir 1987).

Most importantly, there is no right to discovery where the matter can be resolved without the expense of discovery because the only issue is the interpretation of a contract with an integration clause. *See Wells Fargo Bank Nw. N.A. v. Taca Int'l Airlines*, 247 F. Supp. 2d 352, 359-60 (S.D.N.Y. 2002). In *Wells Fargo*, the defendant moved for summary judgment on the meaning of leases, and the relevant terms of those agreements were "not in controversy." *Id.* Rather, the only matter in dispute was "the legal inferences to be drawn from undisputed terms to determine the validity, meaning and scope of the two agreements." *Id.* Moreover, as in the case of the NewSun PPAs, "given the explicit integration clause in the Leases . . . , no parol evidence, which could require fact discovery, should be considered in interpreting the Leases." *Id.* Thus, the court granted partial summary judgment on the meaning of the agreements without discovery. *Id.*

This Commission has also denied discovery pending resolution of a threshold summary judgment motion that could resolve the dispute as a matter of law without the expense and delay of discovery. *See Theodore Fasy v. Citizens Telecommunications Company of Oregon, Inc.*, 2000 Ore. PUC LEXIS 459, OPUC Docket No. UC 553 (Dec. 20, 2000). In *Fasy*, the complaint alleged that a telecommunications provider's Caller ID service failed to provide calling number identification in a satisfactory manner and sought a Commission order mandating the telecommunications company to increase the identification rate of incoming calls. The complainant sought discovery into the telecommunications company's failure to provide more comprehensive calling number identification and its failure to exert its best efforts and expend sufficient funds. However, the administrative law judge stayed discovery pending resolution of a dispositive "motions for summary judgment" that would resolve the dispute. *Id.* The Commission's order affirmed the administrative law judge's ruling, which explained, "[b]efore

discovery may proceed, there must be answered the threshold question of whether [the telecommunications company] has violated any provisions of its tariffs, if the statements of Mr. Fasy are, in fact, all true." *Id.* at **4-5. In that case, the matter was resolved on dispositive motions, and the expense and delay of discovery was avoided.

Additionally, as noted in footnote 1 above, PGE itself recently obtained a stay of discovery pending resolution of its dispositive summary judgment motion in a dispute with a QF before the Commission.

ARGUMENT

The categories of information PGE seeks in discovery are irrelevant or already available to PGE. More importantly, discovery is not necessary to resolve this dispute. PGE seeks burdensome, costly electronic discovery on matters that are not relevant to the objective meaning of the NewSun PPAs or the Commission's policy on the matter in dispute. PGE should have to demonstrate the need for any specific discovery to resolve this matter before burdening NewSun Parties or Commission with discovery.

1. There Is No Need for Discovery to Resolve this Dispute

As explained in the Motion for Summary Disposition, the interpretation of the ten NewSun PPAs turns on the objective meaning of the agreements and the Commission's orders from which those agreements arose – neither of which support PGE's position. To decide the NewSun Parties' Motion for Summary Disposition, the Commission should determine the meaning of the contracts by examining them as a whole. *See Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997). Because the contracts are unambiguous, "the court construes the words of [the] contract as a matter of law." *Eagle Indus., Inc. v. Thompson*, 321 Or 398, 405, 900

P2d 475 (1995). There is no basis to refer to extrinsic evidence of subjective understandings and intent for the Commission to determine the meaning of the contracts.

The Oregon Supreme Court has held "in cases involving the interpretation of the parties' agreement, that it 'subscribes to the objective theory of contracts.'" *Kabil Devs. Corp. v. Mignot*, 279 Or 151, 156, 566 P2d 505 (1977) (quoting *Harty v. Bye*, 258 Or 398, 403, 483 P2d 458 (1971)). The Commission must determine "the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, *other than oral statements by the parties of what they intended it to mean*." *Harty*, 258 Or at 404 (quoting *Restatement of Contracts*, § 230) (emphasis added). The Commission should "not attempt to ascertain the actual mental processes of the parties in entering into the particular contract; rather the law presumes the that parties understood the import of their contract and the that they had the intention which its terms manifest." 17A Am Jur 2d *Contracts* § 348 (2d ed 2004). In a similar circumstance, the Oregon Court of Appeals rejected a party's alleged subjective beliefs as to the meaning of a contract, reasoning, "[w]hatever plaintiff's subjective intent and understanding might have been," that belief "could not, as a matter of law, create uncertainty in the mind of a reasonable person as to the meaning of the contract terms." *Ross Bros. Constr. Co. v. State*, 59 Or App 374, 379, 650 P2d 1080 (1982).

The irrelevance of extrinsic evidence and subjective intent is further underscored by the integration clause in each of the NewSun PPAs. Section 19.1 of each PPA provides: "This Agreement supersedes all prior agreements, proposals, representations, negotiations, discussions or letters, whether oral or in writing, regarding PGE's purchase of Net Output from the Facility." Therefore, PGE's extensive inquiry into matters beyond the four corners of the agreements is in

no way commensurate with the needs of the Commission in interpreting the agreements, and indeed directly contradicts the integration clause in the contracts themselves.

The issue in this case is when the fifteen-year fixed price term in contracts between PGE and the NewSun Parties begins. The interpretation of the contracts is controlled by the objective reading of the agreements and the Commission's clear policy that the term begins "on the date of power delivery." *Northwest and Intermountain Power Producers Coalition v. Portland General Electric Co.*, Docket No. UM 1805, Order No. 17-256, at 4 (July 13, 2017). The material facts are undisputed, and the Commission can resolve this dispute—without the need for discovery—through the Commission's determination of the Motion for Summary Disposition.

Moreover, the standard contracts at issue are not subject to negotiation. Accordingly, even in the event of an ambiguity in the executed agreements, the parties' negotiations and understandings should have no impact on the interpretation of the agreements. The whole purpose of a standard contract is to "eliminate negotiations and to thereby remove transaction costs." *Re Investigation Related to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 16 (May 13, 2005). The "exchange of draft revised standard contracts between a small QF and a utility to particularize a standard contact … is intended to address administerial *not substantive individualization of the contract*." *PaTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, OPUC Docket No. UM 1566, OPUC Order 12-316, 5 (Aug. 21, 2012) (emphasis added). If parties cannot make substantive modification of the terms of the standard contract through express modifications to its plain words, the parties communications and understandings before execution of the form certainly cannot vary the meaning of the standard contract. There is no basis for extensive investigation into "negotiations" that were

never meant to occur in the first place and did not result in any substantive modifications to the Commission-approved contract form at issue.

PGE's requested discovery is "immaterial" to resolving the contractual dispute and should therefore be denied on that basis alone. *See Caro*, 128 Or App at 273. Because there are no genuine issues of material fact that would preclude resolving this dispute, the Commission should stay discovery pending resolution of the Motion for Summary Disposition. Staying discovery would protect the NewSun Parties from oppression and undue burden and expense that would otherwise be forced on them if discovery is allowed. *See* ORCP 36 C(1). A stay would also uphold the requirements of ORCP 1 B—that the rules "be construed to secure the just, speedy, and inexpensive determination of every action."

2. PGE's Demand for Electronic Discovery Imposes Undue Expense and Delay

The NewSun Parties would incur substantial expense responding to PGE's vague, broad, and burdensome data requests regarding correspondence and communications between the NewSun Parties and PGE (which are equally accessible to PGE through its own files), internal documents regarding the NewSun Parties' pricing or revenue expectations (including financial models and projections), communications with third-parties concerning financing of the NewSun Parties' projects, and information relating to when the NewSun Parties expect their facilities to achieve commercial operation. Electronic discovery is notoriously time-consuming and expensive.[3]

[3] *See generally* Federal Judicial Center, *Managing Discovery of Electronic Information*, at preface (3d ed. 2017), available at https://www.fjc.gov/sites/default/files/2017/Managing_Discovery_of_Electronic_Information_3d_ed.pdf. As the Federal Judicial Center explains, "[d]isputes that are difficult, time-consuming, and costly to resolve may arise as to the scope of discovery of ESI; the form in which ESI is to be produced when one party finds that ESI has been delivered in a form that is not readily usable;

Here, electronic discovery easily could require months and tens of thousands of dollars in legal and e-discovery vendor fees to complete. Although trial courts have developed specific rules and processes for such electronic discovery to prevent undue burden, the Commission's rules of practice and procedure do not contain any provisions governing the orderly processing of voluminous electronic discovery that can occur in civil litigation in the courts.

Responding to these requests would be extremely burdensome for the NewSun Parties, due to their small size and limited staff, all of whom are devoted to development and management efforts. The NewSun Parties would be prejudiced if they are required to devote substantial resources to responding such extensive and unnecessary discovery. Complying with this request would require substantial work by very small companies just to locate and collect such information, much less to organize and present the material in the manner requested, at no small expense of time, distraction, and third-party cost. PGE's requests are not "commensurate with the needs of the case, the resources available to the parties, [or] the importance of the issues to which the discovery [sought by PGE] relates." *See* OAR 860-001-0500(1).

The NewSun Parties note that, if discovery proceeds, discovery disputes likely will arise regarding the scope and breadth of PGE's data requests. An order staying discovery pending resolution of the NewSun Parties' Motion for Summary Disposition would allow the Commission and the parties to avoid expending resources resolving such discovery disputes until after the Commission determines whether this matter can be resolved without need for further discovery.

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and whether inadvertent production of ESI waives attorney–client privilege or work product protection." *Id.* at 7.

PGE's single-spaced, seven-page First Set of Data Requests—which were sent to 10 different defendant entities—seeks electronically stored information that is of no use in interpreting the objective meaning of the contracts. For example, PGE has requested "all contacts or communications that representative[s]" of each defendant has had with PGE regarding each defendant's proposed qualifying facility. *See PGE's Data Request No. 1*. Not only is this information already possessed by PGE, but such contacts or communications shed no light on when the fifteen-year fixed-price period begins in standard contracts with an integration clause that excludes reliance on such extrinsic evidence.

In its next request, PGE seeks, in part, "all communications or documents exchanged with third-parties concerning financing. . . ." *PGE's Data Request No. 2*. Again, this is a vast fishing expedition for electronically stored information that has no bearing on the single issue in dispute. Like the example above, the NewSun Parties' financing has nothing to do with the start date of the fifteen-year fixed-price period.

As the two examples above and PGE's First Set of Data Requests in its entirety make clear, PGE has no reason to seek discovery other than to delay resolution of this dispute and to cause the NewSun Parties to incur substantial expenses. Having to compile irrelevant electronic records will be time consuming and expensive. Allowing discovery—when discovery is unnecessary for the Commission to decide the issue in this case—would reward PGE for using discovery to delay and penalize the NewSun Parties for seeking to obtain a prompt and binding determination of the meaning of the Commission-approved standard contract. The NewSun Parties would suffer the oppression and undue burden and expense that ORCP 1 B and ORCP 36 C(1) are meant to protect against.

If PGE argues that discovery should proceed because the standard contract it drafted is ambiguous, discovery should be denied unless the Commission reaches the same conclusion and determines that there are disputed issues of material fact that can only be resolved through burdensome electronic discovery on the NewSun Parties. At minimum, before allowing PGE to use discovery to delay the resolution of this dispute and impose significant costs on the NewSun Parties, discovery should be stayed until the Commission reaches such a conclusion that it is truly necessary.

3. The NewSun Parties Have Supplied Legal Arguments PGE Sought in Data Requests.

Additionally, staying discovery is warranted because PGE has already received the legal arguments that it sought in response to its Data Request Nos. 6, 8, 9, and 10. Those requests sought the NewSun Parties' legal arguments on several topics related to interpretation of the agreements. Seeking legal argument and attorney work product through discovery is improper. The fact that four of PGE's ten data requests sought such legal arguments again highlights that PGE's First Set of Data Requests is nothing more than an attempt to make work and cause delay for the NewSun Parties. In any event, however, PGE has now received the NewSun Parties' legal arguments through the filing of the Motion for Summary Disposition. In fact, PGE has possessed much of the same substantive arguments 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. Thus, although these data requests were improper, the requests were mooted before they have even become due.

4. PGE's Demand for Discovery Contradicts PGE's Prior Arguments

PGE's prior arguments before this Commission and the United States District Court undermine PGE's claimed need for extensive discovery to address the meaning of the NewSun PPAs.

First, PGE argued for interpretation of *all* of its previously effective standard contracts in Docket No. UM 1805. 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* Declaration of Gregory Adams in Support of Defendants' Motion for Summary Disposition, Ex, at I. For example, after the NewSun Parties brought a declaratory judgment action in federal court, PGE argued "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. According to PGE, interpreting the agreements would "limit the need for piecemeal litigation in the courts and before the Commission by providing PGE and its counter-parties with better certainty regarding what PGE's form contracts required with regard to the fixed price period." *Id.* at 5.

PGE saw no need for discovery in Docket No. UM 1805, where it attempted to litigate the issue in the absence of the NewSun Parties. The NewSun PPAs are merely completed versions of the blank form contract. Therefore, unless PGE can point to some unique element that distinguishes the NewSun PPAs from other completed versions of its blank form contract, PGE should not be entitled to discovery in this proceeding before the Commission rules on the interpretive question on which PGE already argued the Commission "has sufficient information to rule." *Id.*

Next, earlier in this proceeding, PGE argued for uniformity in order to establish jurisdiction at the Commission for its complaint against the NewSun Parties. This Commission adopted PGE's argument that "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." Order No 18-174 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. Given the Commission's reasoning for its own jurisdiction, there is no basis whatsoever for the parties to engage in extensive electronic discovery and other fact-specific inquires prior to obtaining the Commission's "interpretation" designed to result in the "uniform resolution" of the major contract problem caused by PGE's unreasonable stance towards qualifying facilities. *Id.*

Likewise, PGE represented to the United States District Court that "that the disputed provision appears in at least 72 executed PPAs." *See Alfalfa Solar I LLC v. Portland Gen. Elec. Co.*, No 3:18-CV-40-SI, 2018 WL 2452947, at **6-7 (D Or May 31, 2018). The court relied heavily on this representation in determining that the need for uniformity in interpretation of the standard contract form warranted a stay of the proceedings in court. *Id.* Engaging in extensive and costly electronic discovery to ascertain subjective understandings and intent is the antithesis of uniform interpretation of the standard contract form.

Indeed, PGE's attempt to inquire into the subjective understanding of the NewSun Parties could only be relevant if a qualifying facility's subjective intent could vary the meaning of the

Commission's standard contracts. Despite the Commission's desire for uniformity and the special significance of its interpretation, the standard contract would have a different meaning from one qualifying facility to another dependent on that qualifying facility's (and apparently its financier's) subjective understandings. Instead of a uniform interpretation of the applicable standard contract form the Commission approved, the Commission will need to individually adjudicate the subjective circumstances of each of the 72 PPAs that PGE represented are identical to the NewSun PPAs. The Commission will need to peer into the hearts and minds of all 72 of those individual qualifying facilities through electronic discovery, depositions, and other discovery methods. That is the opposite of uniformity.

Thus, PGE's own prior arguments preclude its burdensome discovery requests.

5. If Subjective Understanding is Relevant, the NewSun Parties Must Also Seek Discovery of PGE

Discovery is not a one-way street. The NewSun Parties filed their Motion for Summary Disposition in good faith to save the Commission and the parties of the need to engage in costly discovery that is plainly unnecessary in this dispute where the subjective intent of PGE and the NewSun Parties is not relevant. If, however, the Commission disagrees and determines that the subjective intent of PGE or the NewSun Parties is relevant and subject to discovery by PGE, the NewSun Parties will be forced to also engage in extensive discovery of PGE. The NewSun Parties would need to ascertain PGE's true subjective intent and motivations, and whether it would be reasonable for a QF to believe statements made by PGE related to its standard contracts and the QFs' PURPA rights. Thus, it would be proper for discovery to occur simultaneously and only after the Commission determines it is necessary. The proper course—given the substantial expense discovery could entail in this case—is to stay discovery until the Commission determines whether individual factual inquiries are necessary to interpret the agreements.

6. The NewSun Parties Reserve the Right to Object on Additional Grounds to Individual Data Requests

This motion is limited to a request to stay discovery altogether by both parties. Even if this motion were denied or subjective understandings were deemed relevant, the NewSun Parties would need to expend substantial effort to work with PGE to narrow the scope of the individual data requests it has served and to raise additional objections to those requests. The NewSun Parties do not waive the right to raise such additional objections to individual data requests pending resolution of this motion and if this motion is denied.

CONCLUSION

In short—against the backdrop of clear Commission policy and no language in the NewSun PPAs supporting PGE's position—PGE must justify why summary disposition cannot promptly resolve this matter and why any discovery it requests is required. The NewSun Parties respectfully request that the Commission grant a protective order and stay discovery unless and until the Commission determines that the NewSun PPAs are ambiguous and that there are disputed issues of material fact, ascertainable through discovery, that must be resolved to interpret the NewSun PPAs.

DATED this 5th day of July 2018.

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June 25, 2018

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Re: Portland General Electric Company v. Alfalfa Solar I, LLC *et al.*
OPUC Docket No. UM 1931

Dear Mr. Adams:

Attached please find Portland General Electric Company's first set of data requests to Defendants in Public Utility Commission of Oregon Docket No. UM 1931. Defendants have fourteen days to respond to these data requests, or until July 9, 2018.

Please provide your responses via email to Jeff Lovinger (jeff@lovingerlaw.com), Dallas DeLuca (dallasdeluca@markowitzherbold.com), David White (david.white@pgn.com), and Colin Wright (colin.wright@pgn.com).

Please do not hesitate to contact me with any questions.

Sincerely,

Jeff Lovinger

cc: Robert Shlachter (rshlachter@stollberene.com)
Keil Mueller (kmueller@stollberene.com)
Jacob Stephens (jstephens@newsunenergy.net)
Stephanie Andrus (stephanie.andrus@state.or.us)
Brett Greene (brett.greene@pgn.com)
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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 FIRST SET OF DATA REQUESTS TO DEFENDANTS**

Dated: June 25, 2018

I. DEFINITIONS

1. "Defendants" or "You" means any or all of the named defendants in the above-captioned contested case proceeding (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/or Wasco Solar I LLC) and any officer, director, member, partner, employee or representative of such defendants or any affiliated company (including without limitation NewSun Solar LLC and NewSun Energy LLC).

2. "Documents" refers to all writings and records of every type in your possession, control, or custody, whether or not claimed to be privileged or otherwise excludable from discovery, including but not limited to: testimony and exhibits, memoranda, papers, correspondence, letters, reports (including drafts, preliminary, intermediate, and final reports), surveys, analyses, studies (including economic and market studies), summaries, comparisons, tabulations, bills, invoices, statements of services rendered, charts, books, pamphlets, photographs, maps, bulletins, corporate or other minutes, notes, diaries, log sheets, ledgers, transcripts, microfilm, microfiche, computer data (including E-mail), computer files, computer tapes, computer inputs, computer outputs and printouts, vouchers, accounting statements, budgets, workpapers, engineering diagrams (including "one-line" diagrams), mechanical and electrical recordings, telephone and telegraphic communications, speeches, and all other records, written, electrical, mechanical, or otherwise, and drafts of any of the above.

   "Documents" includes copies of documents, where the originals are not in your possession, custody or control.

   "Documents" includes every copy of a document which contains handwritten or other notations or which otherwise does not duplicate the original or any other copy.

"Documents" also includes any attachments or appendices to any document.

3. "Identification" and "identify" mean:

When used with respect to a document, stating the nature of the document (e.g., letter, memorandum, corporate minutes); the date, if any, appearing thereon; the date, if known, on which the document was prepared; the title of the document; the general subject matter of the document; the number of pages comprising the document; the identity of each person who wrote, dictated, or otherwise participated in the preparation of the document; the identity of each person who signed or initiated the document; the identity of each person to whom the document was addressed; the identity of each person who received the document or reviewed it; the location of the document; and the identity of each person having possession, custody, or control of the document.

When used with respect to a person, stating his or her full name; his or her most recently known home and business addresses and telephone numbers; his or her present title and position; and his or her present and prior connections or associations with any participant or party to this proceeding.

4. "NewSun PPA" or "NewSun PPAs" refers to one or more of the ten power purchase agreements entered into between PGE and Defendants during the period between January and June 2016 that are the subject of the above-captioned contested case proceeding.

5. "NewSun QF" or "NewSun QFs" means one or more of the ten qualifying facilities that entered into one of the ten NewSun PPAs with PGE as the Seller.

6. "PGE" refers to Portland General Electric Company, plaintiff in the above-captioned contested case proceeding.

7. "Person" refers to, without limiting the generality of its meaning, every natural person, corporation, partnership, association (whether formally organized or ad hoc), joint venture, unit operation, cooperative, municipality, commission, governmental body or agency, or any other group or organization.

8. "Studies" or "study" includes, without limitation, reports, reviews, analyses and audits.

9. The terms "and" and "or" shall be construed either disjunctively or conjunctively whenever appropriate in order to bring within the scope of this discovery any information or documents which might otherwise be considered to be beyond their scope.

10. The singular form of a word shall be interpreted as plural, and the plural form of a word shall be interpreted as singular, whenever appropriate in order to bring within the scope of this discovery request any information or documents which might otherwise be considered to be beyond their scope.

II. INSTRUCTIONS

1. These requests call for all information, including information contained in documents, which relate to the subject matter of the Data Request and which is known or available to you.

2. Where a Data Request has a number of separate subdivisions or related parts or portions, a complete response is required to each such subdivision, part or portion. Any objection to a Data Request should clearly indicate the subdivision, part, or portion of the Data Request to which it is directed.

3. The time period encompassed by these Data Requests is from 2014 to the present unless otherwise specified.

4. Each response should be furnished on a separate page. In addition to hard copy, electronic versions of the document, including studies and analyses, must also be furnished if available.

5. If you cannot answer a Data Request in full, after exercising due diligence to secure the information necessary to do so, state the answer to the extent possible, state why you cannot answer the Data Request in full, and state what information or knowledge you have concerning the unanswered portions.

6. If, in answering any of these Data Requests, you feel that any Data Request or definition or instruction applicable thereto is ambiguous, set forth the language you feel is ambiguous and the interpretation you are using in responding to the Data Request.

7. If a document requested is unavailable, identify the document, describe in detail the reasons the document is unavailable, state where the document can be obtained, and specify the number of pages it contains.

8. If you assert that any document has been destroyed, state when and why it was destroyed and identify the person who directed the destruction. If the document was destroyed pursuant to your document destruction program, identify and produce a copy of the guideline, policy, or company manual describing such document destruction program.

9. If you refuse to respond to any Data Request by reason of a claim of privilege, confidentiality, or for any other reason, state in writing the type of privilege claimed and the facts and circumstances you rely upon to support the claim of privilege or the reason for refusing to respond. With respect to requests for documents to which you refuse to respond, identify each such document, and specify the number of pages it contains. Please provide: (a) a brief description of the document; (b) date of document; (c) name of each author or preparer; (d) name of each person who received the document; and (e) the reason for withholding it and a statement of facts constituting the justification and basis for withholding it.

10. Identify the person from whom the information and documents supplied in response to each Data Request were obtained, the person who prepared each response, the person who reviewed each response, and the person who will bear ultimate responsibility for the truth of each response.

11. If no document is responsive to a Data Request that calls for a document, then so state.

12. These requests for documents and responses are continuing in character so as to require you to file supplemental answers as soon as possible if you obtain further or different information. Any supplemental answer should refer to the date and use the number of the original request or subpart thereof.

13. Whenever these Data Requests specifically request an answer rather than the identification of documents, the answer is required and the production of documents in lieu thereof will not substitute for an answer.

14. To the extent that you believe it is burdensome to produce specific information requested, please contact counsel to discuss the problem prior to filing an answer objecting on that basis to determine is the request can be modified to pose less difficulty in responding.

15. To the extent Defendants object to any of the requests please contact counsel to determine if the request can be modified to produce a less objectionable request.

III. FIRST SET OF DATA REQUESTS

1. For each NewSun QF, please provide a separate response to this Data Request 1 and each of its subparts

   (A) Please identify each and every individual that represented each NewSun QF in the contracting process or in otherwise requesting, obtaining, interpreting, negotiating, or implementing the NewSun PPA for the NewSun QF in question.

   (B) Please describe the role played by each representative identified in response to Data Request 1(A).

   (C) For each representative identified in response to Data Request 1(A), please identify all contacts or communications that representative has had with PGE regarding the NewSun QF in question, including the date and subject matter of each contact or communication.

   (D) For each communication identified in response to Data Request 1(C), please produce each and every document representing the communication, attached to the communication, or associated with the communication.

2. For each NewSun QF and the NewSun PPA associated with that NewSun QF (please provide a separate response to this Data Request 2 for each NewSun QF):

   (A) Please produce all documents about pricing or revenue expected to be received for the contract term, including financial models and financial projections.

   (B) Please produce all communications or documents exchanged with third-parties concerning financing based on the pricing or revenue referred to in Data Request 2(A).

   (C) Please provide all internal documents about interpreting the disputed PPA terms or that analyze how long the fixed prices last and when they start.

3. For each NewSun PPA, please indicate whether Defendants expect to have completed all requirements under Section 1.5 and to have established the Commercial Operation Date by the deadline established in Section 2.2.2.

4. For each NewSun PPA, if the answer to Data Request 3 is no, please indicate whether Defendants expect to have completed all requirements under Section 1.5 and to have established the Commercial Operation Date within 12 months of the deadline established in Section 2.2.2.

5. Please refer to Defendant's Answer at pages 3 and 4 where Defendants state: "PGE was aware … that the NewSun Parties disagreed with PGE's interpretation and that the NewSun Parties understood PGE's standard form contracts at issue here to require PGE to pay fixed prices for 15 years from the Commercial Operation Date." Please also refer to Defendant's Answer at Paragraph 22 where Defendants state: "PGE was aware before execution of the NewSun PPAs that the NewSun Parties disagreed with PGE's interpretation and that the NewSun Parties understood PGE's standard form contracts to require PGE to pay fixed prices for 15 years from the Commercial Operation Date."

   (A) Please provide all documents reflecting or otherwise showing that PGE was "aware" of the facts that Defendants allege PGE was aware of in the allegations referred to above.

   (B) Did Defendants ever inform PGE or any Person employed by PGE or representing PGE "that the NewSun Parties disagreed with PGE's interpretation and that the NewSun Parties understood PGE's standard form contracts at issue here to require PGE to pay fixed prices for 15 years from the Commercial Operation Date"?

   (C) If the answer to Data Request 5(B) is yes, please identify each and every Person employed by PGE or representing PGE that Defendants so informed and the date or dates of each time the Defendants so informed each such Person, and the identity of the Person that so informed PGE.

6. Please refer to Defendants' Answer at Page 4 where the Defendants assert that "the provisions of [PGE's standard contract forms at issue in this case] all make sense only if the fixed price period begins at commercial operation …." Please identify every provision of the standard contract form at issue in this proceeding that allegedly does not make sense if the fixed price period begins at contract execution.

7. Please refer to Page 4 of the Answer where Defendants assert that their understanding of the 15-year fixed-price period under the NewSun PPAs "was informed by … the NewSun Parties' reasonable understanding of the policy articulated in the Commission's Order No. 05-584, which Order No. 17-256 and Order No. 18-079 confirmed was correct …." Please state Defendants' understanding, as of the time that Defendants signed the NewSun PPAs, of the referenced Commission policy.

8. Please refer to Page 4 of the Answer where Defendants refer to "the common industry practice and understanding that a term of years of fixed prices in power purchase agreements ('PPAs') for new power generation facilities typically runs from the time the seller becomes operational and begins transmitting power to the buyer, not from the date—generally years earlier—on which the seller executes the agreement …."

   (A) Please provide all documents on which Defendants rely to support their assertion of the existence of the "common industry practice and understanding" alleged and referenced on page 4 of the Answer.

   (B) For each document provided in response to Data Request 8(A), please explain how the document evidences a "common industry practice and understanding that a term of years of fixed prices in power purchase agreements … runs from the time the seller becomes operational and begins transmitting power to the buyer …."

   (C) Has the Public Utility Commission of Oregon ("Commission") indicated that it relied on the "common industry practice and understanding" referenced above in requiring the 15-year fixed-price period? If so, please identify each instance in which the Commission has so indicated and provide any documents in which the Commission has so indicated.

9. Please refer to Page 4 of the Answer where Defendants state: "… the NewSun Parties understood PGE's standard form contracts at issue here to require PGE to pay fixed prices for 15 years from the Commercial Operation Date." Please identify all of the express language in the standard form contracts at issue in this case that requires PGE to pay fixed prices for 15 years measured from the Commercial Operation Date.

10. Please refer to Page 4 of the Answer where the Defendants state: "if the NewSun PPAs were interpreted such that the 15-year fixed-price option begins on the date the contract is executed, the NewSun PPAs would contain inconsistent and contradictory terms regarding whether the applicable NewSun Party or PGE owns the Environmental Attributes of the facility in certain years of the contract." Please identify all language contained in the NewSun PPAs that would be inconsistent or contradictory regarding whether Defendants or PGE owned Environmental Attributes

if the NewSun PPAs are interpreted such that the 15-year fixed-price period begins on the date the contract is executed.