

**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.

RULING

DISPOSITION: MOTION FOR SUMMARY DISPOSITION, EXPEDITED  
SCHEDULE AND ORAL ARGUMENT DENIED; MOTION TO  
STAY DISCOVERY AND FOR PROTECTIVE ORDER GRANTED  
IN PART AND DENIED IN PART

**I. SUMMARY**

In this ruling, I deny motions for summary disposition, expedited schedule, and oral argument filed on behalf 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 Wasco Solar I, LLC (defendants or NewSun QFs) and direct the parties to engage in prehearing discovery with respect to particular matters within a specified timeframe.

## II. PROCEDURAL HISTORY

On January 25, 2018, Portland General Electric (PGE) filed the instant complaint seeking Commission resolution of a dispute “relating to the interpretation of ten form standard power purchase agreements executed throughout 2016.”<sup>1</sup>

On February 2, 2018, qualifying facility (QF) defendants, NewSun QFs, filed a motion to stay the proceeding due to the pendency of a federal district court case on the identical subject matter. On February 22, 2018, the defendants filed a motion to dismiss based on the same reasoning. PGE filed a response in opposition on March 9, 2018.

By a stipulated procedural schedule of the parties, NewSun QFs agreed that they would file an answer to the PGE complaint within ten days after any adverse ruling by the Commission on its motion to dismiss.<sup>2</sup> On May 23, 2018, the Commission entered Order No. 18-174 denying NewSun QFs’ motion to dismiss. In that order, the Commission found that it has concurrent jurisdiction over the parties and the subject matter of this dispute, and that the dispute relates to matters specifically delegated to the Commission under federal and state law. The U.S. District Court subsequently agreed, staying the federal action to allow the Commission to proceed first under the doctrine of primary jurisdiction.<sup>3</sup> Accordingly, by ruling of June 4, 2018, I denied NewSun QFs’ motion to stay the proceedings before the Commission. NewSun QFs filed an answer and affirmative defenses on June 6, 2018.

On July 2, 2018, NewSun QFs filed two motions: one for summary disposition, and a second for an expedited procedural schedule and oral argument. The following day, PGE, while acknowledging that NewSun QFs were within its procedural rights to file a motion for summary disposition, filed comments limited to opposing the defendants’ proposed procedural schedule and offering an alternative schedule. PGE stated that it would subsequently respond to the motion for summary disposition by arguing that there were a number of disputed issues of material fact, thus precluding summary disposition as a means to resolve the case. For that reason, PGE proposed a schedule reflective of standard contested-case procedures in its comments on NewSun QFs’ proposed schedule.

On July 5, 2018, NewSun QFs filed a motion for a protective order and stay in discovery, stating that discovery was costly and unnecessary, given that the summary disposition

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<sup>1</sup> PGE Complaint and Request for Dispute Resolution at 1 (Jan 25, 2018).

<sup>2</sup> See PGE Response to Defendants’ Motion to Stay Proceedings at 10 (Feb 9, 2018) and Defendants’ Request for Leave to Reply and Reply to Portland General Electric Company’s Response to Defendants’ Motion to Stay Proceedings at 3 (Feb 13, 2018).

<sup>3</sup> *Alfalfa Solar I LLC et al. v. Portland General Electric Company*, No 3:18-cv-00040-SI, 2018 WL 2452947, at 7 (D Or May 31, 2018).

motion was pending. PGE responded on July 13, 2018, and on July 27, 2018 PGE filed a Motion to Compel Discovery. Further responsive pleadings followed.

Between July 6 and July 20, 2018, Northwest and Intermountain Power Producers Coalition (NIPPC), the Renewable Energy Coalition (Coalition), and the Community Renewable Energy Association (CREA) (collectively intervenors) filed petitions to intervene. Without objection, they all became parties to the proceeding. The intervenors filed comments on the schedule, summary judgment, and discovery disputes.

### III. DISCUSSION

The parties thus have motions addressing three types of relief for Commission consideration:

1. Conflicting proposed schedules and the associated request for oral argument.
2. A motion for disposition of the case via summary judgment.
3. Conflicting motions on discovery.

#### A. Proposed Schedules and Request for Oral Argument

##### 1. *Positions of the Parties*

In support of its motion for a prompt summary disposition and oral argument, NewSun QFs state that all ten standard power purchase agreements (PPAs) are functionally identical and that, since no extrinsic evidence beyond the four corners of the agreement is necessary to resolve the dispute, the case is ripe for summary resolution. Accordingly, NewSun QFs propose the following procedural schedule:<sup>4</sup>

EVENT	DATE
NewSun Parties' Motion for Summary Judgment	Immediately
PGE's Response to Motion	21 days after motion
NewSun Parties' Reply	14 days after response
Oral Argument	Within 14 days of reply
Commission Order	Within 45 days of Oral Argument

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<sup>4</sup> Defendants' Motion for Oral Argument and for Expedited Process on Motion for Summary Disposition at 6 (Jul 2, 2018).

NewSun QFs state that oral argument is appropriate due to the complexity of the issues and that such an event would likely take place in a court setting.

In response, PGE argues that the Commission will need to evaluate a complex set of facts and issues regarding the evolution of its standard contract and thus proposed the following schedule reflecting the Commission’s usual practices in contested cases:<sup>5</sup>

<b>EVENT</b>	<b>DATE</b>
ALJ ruling on procedural schedule	July 3, 2018
Initial Discovery (target to complete)	July 20, 2018 (expedited deadlines if needed)
PGE’s Opening Testimony	August 10, 2018
NewSun’s Response Testimony	August 31, 2018 (expedited discovery deadlines)
PGE’s Reply Testimony	September 14, 2018 (expedited discovery deadlines)
Cross-examination statements	September 21, 2018 (1 week after reply testimony)
Hearing	September 28, 2018 (1 week after x-exam)
PGE’s Opening Brief	October 19, 2018 (3 weeks after hearing)
NewSun’s Response Brief	November 9, 2018 (3 weeks after PGE’s brief)
PGE’s Reply Brief	November 27, 2018 (2 weeks after NewSun’s brief)
Commission Decision (target date)	December 27, 2018

## **2. Ruling**

The NewSun QFs’ motion seeking an expedited procedural schedule is denied. Defendants have consistently sought to stay this proceeding (February 2 and May 25, 2018) and dismiss this proceeding (February 22 and March 16, 2018) so that it might pursue its remedy in court. In light of the conclusions set forth further below in this ruling, the NewSun QFs proposed schedule set forth in its motion cannot be adopted.

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<sup>5</sup> PGE Comments Regarding Procedural Schedule at 2 (Jul 3, 2018).

By its order of May 31, 2018, the United States District Court stayed its proceeding and acknowledged the primary jurisdiction of the Commission to resolve this case. Contrary to NewSun QFs' interpretation of the district court's order, the court did not condition its finding of our primary jurisdiction on the exclusive utilization of a summary disposition process with the dates that NewSun QFs now propose. The proceedings shall move forward promptly, consistent with the demands placed upon the Commission and without abrogating due process to the parties herein. Due to both the passage of time and the likelihood that the parties will seek alterations to the schedule as the case develops, further dates will be set after the conclusion of the initial discovery process or by other mutual agreement of the parties.

## **B. Summary Judgment**

### *1. Positions of the Parties*

Because the district court relied on the Commission's assertion of the need for uniformity in interpretation of PPAs, NewSun QFs argue that there should not be any evaluation of the factual circumstances unique to the NewSun QFs' PPAs. NewSun QFs state that it is entitled to seek summary disposition "to avoid the costly inquiry into alleged disputes of material facts."<sup>6</sup> NewSun QFs cite PGE's reconsideration application in docket UM 1805 in support of the rationale to address only the text within the contracts: "PGE believes that the Commission has sufficient information to rule that all of PGE's prior Commission-approved standard contract forms likewise limited the availability of fixed prices to the first 15 years following contract execution."<sup>7</sup>

PGE acknowledges that NewSun QFs have the procedural right to seek summary judgment, but contends that the interpretation of the PPAs requires an examination of both text and context and that an evidentiary proceeding addressing disputed facts precludes the application of summary judgment procedures. If the Commission does wish to address the issues via summary judgment, PGE asks that a schedule be adopted allowing it six weeks to respond. PGE disagrees with NewSun QFs that the issues in this case were already litigated in docket UM 1805 and claims completion of discovery and the preparation of declarations and briefs will be necessary steps for it to fairly participate in the summary judgment process.

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<sup>6</sup> Defendants' Motion for Oral Argument and for Expedited Process on Motion for Summary Disposition at 4 (Jul 2, 2018).

<sup>7</sup> *In the Matter of Northwest and Intermountain Power Producers Coalition et al. v. Portland General Electric Company*, PGE's Application for Rehearing or Reconsideration and Application to Amend Order No. 17-465, Docket No. UM 1805, at 11 (Jan. 12, 2018).

Intervenors' comments are of a more general procedural nature, expressing disapproval at the Commission's assertion of jurisdiction over a QF contract dispute when brought by a utility. Intervenors argue that, by permitting complaints brought by a utility to go forward in the ordinary course, the Commission is abetting intimidation of QFs.<sup>8</sup>

## 2. *Ruling*

The motion for summary disposition is denied. In Order No. 17-256, the Commission found that PGE's past contracts had not violated past orders, but clarified its policy that, going forward, the 15-year period of fixed prices would commence on the date the QF transmits power to the utility. Nevertheless, "[h]aving found that PGE's past standard contracts have not been in violation of our orders, we shall not require that existing executed contracts be revised."<sup>9</sup>

The Commission amended Order No. 17-256 with Order No. 17-465, noting that PGE only "may have" placed limitations on when fixed prices commenced and by striking the quoted sentence and stating in its place "[i]n this decision, we do not address any existing executed contracts or PGE's current or existing standard contracts."<sup>10</sup> Finally, in Order No. 18-079, the Commission stated "we continue to stand ready to interpret individual standard contract forms as they are brought to us \* \* \*"<sup>11</sup>

In these decisions, the Commission has clarified that it expects the analysis and interpretation of specific, previously-executed PPAs to occur in subsequent litigation such as the instant cases. In the case of these NewSun QFs agreements, the Commission is to address *de novo* what the respective contracts meant. The approach of the courts in the State of Oregon on the conduct of this process is well-established:

To interpret a contractual provision \* \* \*, the court follows three steps. First, the court examines the text of the disputed provision, in the context of the document as a whole. If the provision is clear, the analysis ends.

When considering a written contractual provision, the court's first inquiry is what the words of the contract say \* \* \*. To determine that, the court looks at the four corners of a written contract, and considers the contract as a whole with emphasis on the provision or provisions in question. The meaning of disputed text in that context is then determined. In making

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<sup>8</sup> Arguments of this nature are beyond the scope of the questions presented for disposition and are not addressed in this ruling.

<sup>9</sup> *In the Matter of Northwest and Intermountain Power Producers Coalition et al. v. Portland General Electric Company*, Docket No. UM 1805, Order No. 17-256 at 4 (Jan. 12, 2018).

<sup>10</sup> *Id.* Order No. 17-465 at 4 (Nov 13, 2017).

<sup>11</sup> *Id.* Order No. 18-079 at 3 (Mar 5, 2018).

that determination, the court inquires whether the provision at issue is ambiguous. Whether terms of a contract are ambiguous is a question of law. In the absence of an ambiguity, the court construes the words of a contract as a matter of law.

Because the contractual provision at issue is ambiguous, we proceed to the second of the three analytical steps that the court follows in interpreting contracts. That step is to examine extrinsic evidence of the contracting parties' intent.

If a contract is ambiguous, the trier of fact will ascertain the intent of the parties and construe the contract consistent with the intent of the parties. Words or terms of a contract are ambiguous when they reasonably can, in context, be given more than one meaning.<sup>12</sup>

The parties' earlier arguments and prior Commission decisions related to the contractual provisions at issue here support the need for a more robust examination than allowed through summary judgment. In their initial complaint in docket UM 1805, intervenors criticized PGE's standard contract as not being clear: it lacked the "unambiguous fashion" of the PacifiCorp and Idaho Power PPAs and a contextual interpretation of the PGE contract was therefore required. The Commission's orders in that docket similarly turn on the premise of ambiguity in the PGE standard contract with respect to the commencement of the 15-year period of fixed prices. Indeed, the federal court acknowledged that the parties' mindsets were central to our disposition of the case: "Given the PUC's expertise in evaluating the contents and *relevance of its previous orders to the parties' understanding* of the PPA \* \* \*."<sup>13</sup>

In the presence of ambiguity, which then leads to the second step—an exploration of context and the need for assessment of additional evidentiary offerings—summary disposition ceases to be an available procedural option. The parties are therefore encouraged to jointly prepare a proposed schedule consistent with this ruling.

### **C. Motion to Compel Discovery and Protective Order Staying Discovery**

While providing responses to some of PGE's data requests, there remain requests for which NewSun QFs seek a protective order and rejection of PGE's demands. PGE seeks responses to data requests to be provided prior to filing its response to NewSun QFs' motion for summary disposition and a second set of responses to be provided

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<sup>12</sup> See, e.g., *Yogman v. Parrot*, 325 Or 358, \*\*\* (1997)(citations omitted).

<sup>13</sup> *Alfalfa Solar I LLC et al. v. Portland General Electric Company*, No 3:18-cv-00040-SI, 2018 WL 2452947, at 17 (D Or May 31, 2018).

subsequently. The data requests for which PGE seeks a Commission directive to NewSun QFs before responding to the motion for summary disposition are subsets of PGE Data Requests Nos. 1 and 2, as follows:

- Data Request No. 1 subset: Please produce all communications between Defendants and PGE regarding the NewSun PPAs, including any attachments.
- Data Request No. 2 subset: (A) Please produce all of Defendants' internal documents and communications regarding or discussing: (i) the 15-year fixed-price period under the NewSun PPAS or PGE's standard contract forms; or (ii) PGE's position on the 15-year fixed-price period. (B) Please produce all communications between Defendants and any third-parties related to or discussing: (i) the 15-year fixed-price period under the NewSun PPAS or PGE's standard contract forms; or (ii) PGE's position on the 15-year fixed-price period. The responses to this subset of Data Request No. 2 do not need to include specific financial models but must include any communications about financial modeling to the extent those communications reference or rely upon either 15-year fixed-price period interpretation.
- Defendants stipulate, in lieu of producing specific financial models, that their internal analysis of the projects contemplated both parties' positions: 15 years of fixed prices measured from (a) contract execution (PGE's position) and (b) commercial operation (Defendants' position).<sup>14</sup>

### ***1. Positions of the Parties***

NewSun QFs claim that the Commission does not need to examine evidence extrinsic to the four corners of the ten, functionally identical PPAs and the regulatory context from which they arose. The Commission's extensively-litigated policy is all that matters. NewSun QFs claim that the PPAs are not ambiguous and therefore no need exists to go to the second step of contract interpretation—the intent of the parties. Furthermore, NewSun QFs argue that PPAs are form agreements rather than ones which are individually negotiated, and the only terms are not substantive individualization of the contract. Such contracts do not consider extrinsic evidence.

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<sup>14</sup> “Responses to these subsets is limited to the time period 2015 through August 2016, which is the time period for the formation of the PPAs, *i.e.* the context under which the PPAs were formed, which is the issue that Defendants have made relevant in their motion for summary disposition.” PGE Motion to Compel Discovery at 4 (Jul 27, 2018).



PGE argues that the Commission will have to analyze the context of the PPAs—the circumstances concerning the formation of the contracts. PGE states that NewSun QFs’ description of the events in docket UM 1805 are essentially incorrect.

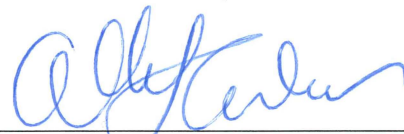
**2. Ruling**

From the foregoing, it is clear that Commission resolution of these cases requires an examination of the elements constituting the parties’ states of mind at the time these contracts were executed and whether any clarification with respect to the contracts’ terms are necessary to more accurately reflect that intent. Applying the *Yogman* standard to the instant proceeding, documents shedding light on the parties’ understandings and states of mind as they were in the process of preparing for and negotiating the PPAs are central to the resolution of this case and, therefore likely to provide relevant evidence. Thus, the documents identified in PGE’s Data Requests Nos. 1 and 2, as set forth above, are properly subject to discovery and must be available to all parties.

With respect to the Data Request No. 1 subset, it may well be that all of the documents of the Data Request No. 1 subset are currently in PGE’s possession and therefore unnecessary for NewSun QFs to produce. Consequently, with respect to the Data Request No. 1 subset, PGE is directed to prepare a list of those documents in its possession and provide that list to NewSun QFs within seven (7) days of the issuance of this ruling along with a declaration that it is unaware of any additional documents within the scope of the data request. Within seven (7) days thereafter, NewSun QFs shall either provide copies of documents properly within Data Request No. 1 subset that were omitted from the PGE list or submit a declaration that it is unaware of any additional documents and waives the right to produce such documents at a later date without PGE’s consent.

With respect to the Data Request No. 2 subset, no schedule for NewSun QFs’ response will be set at this time. If the response to a particular request is identified by a party as being unreasonably tardy or, conversely, unduly burdensome, and the parties are unable to resolve the matter between them, the question may be brought to the Commission for resolution on an expedited basis.

Dated this 23rd day of August, 2018, at Salem, Oregon.



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Allan J. Arlow  
Administrative Law Judge