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David F. White
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August 10, 2018

Via Electronic Filing

Public Utility Commission of Oregon
Filing Center
201 High St SE, Suite 100
PO Box 1088
Salem OR 97308-1088

Re: **UM 1931 – Portland General Electric Company vs. Alfalfa Solar I LLC, et al.**

Attention Filing Center:

Enclosed for filing in Docket UM 1931 is Portland General Electric Company's Reply in Support of Motion to Compel and Motion for Scheduling Order, and Declaration of Dallas Deluca in Support of Portland General Electric Company's Reply.

Thank you in advance for your assistance.

Sincerely,

David F. White
Associate General Counsel

DFW:jlm

Enclosures

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 REPLY IN SUPPORT OF MOTION TO COMPEL AND MOTION FOR A SCHEDULING ORDER**

Pursuant to OAR 860-001-0420(5) and OAR 860-001-0500(7), Portland General Electric Company ("PGE") submits this reply in support of its motion to compel and its motion for a scheduling order.

I. INTRODUCTION

The Commission has routinely allowed discovery regarding qualifying facility ("QF") complaints, even in cases involving summary judgment. For example, plaintiff QFs conducted three rounds of discovery and PGE conducted one round of discovery in the 12 "Cypress Creek" cases before both sides filed cross-motions for summary judgment.[1] Here, PGE moves to compel a limited subset of its original 10 requests.

[1] *See e.g., Bottlenose Solar LLC v. Portland Gen. Elec. Co.*, Docket No UM 1877, PGE's Motion to Stay Discovery and Procedural Schedule at 3 (Jan. 24, 2018) (noting the multiple rounds of discovery prior to motions for summary judgment).

In this case, Defendants argue that discovery of evidence regarding the formation of the contracts is irrelevant to the first step of the contract interpretation process, but Defendants are wrong. In 2009, the Oregon Supreme Court clearly and definitively answered the legal question at the root of this discovery dispute – that a court can consider extrinsic evidence at step 1 of contract interpretation (step 1 involves determining whether an ambiguity exists, and, if not, what the contract means). The Court stated:

> "[I]n contract interpretation . . . in deciding whether an ambiguity exists, the court is not limited to mere text and context, but may consider parol and other evidence extrinsic to the contract."[2]

Defendants' string of citations to pre-2009 opinions to support their position[3] ignores what is now black-letter law in Oregon. In fact, Defendants even cite a post-2011 case that completely refutes their position. The federal district court, in affirming the finding and recommendation of the magistrate judge, cited numerous cases, including the 2009 Oregon Supreme Court opinion quoted above, and stated:

> "Although defendant asserts that *Yogman v. Parrott*, 325 Or. 358, 937 P.2d 1019 (Or.1997), precludes the examination of extrinsic evidence when determining a contract's ambiguity, this court agrees with the careful analysis provided by the Magistrate Judge. Extrinsic evidence concerning the circumstances of contract formation may be considered in determining whether an ambiguity exists."[4]

And the federal court, during a hearing concerning Defendants' claim against PGE, stated that the *Yogman v. Parrott* contract interpretation method includes a review of extrinsic evidence at step 1.

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[2] *State v. Gaines*, 346 Or. 160, 172 n.8 (2009) (citing *Abercrombie v. Hayden*, 320 Or. 279, 292 (1994).
[3] *Reply in Support of Defendants' Motion for Protective Order*, at 6 n.4.
[4] *Malmquist v. OMS Nat. Ins. Co.*, No. CIV. 09-1309-PK, 2011 WL 3298651 at *1 (D Or Aug. 1, 2011) (citations omitted).

> DELUCA FOR PGE: *State v. Gaines* is also clear that *Yogman* includes, at step 1, a look at extrinsic evidence.
>
> THE COURT: To see if there's an ambiguity. But it's still a judge question, not a jury question.[5]

Defendants are simply wrong when they contend that extrinsic evidence of contract formation is not considered at the first step of contract interpretation.

The Commission should grant PGE's motion to compel. To the extent that the Commission interprets the 10 PPAs entered into between PGE and Defendants during the first half of 2016 (collectively, the "NewSun PPAs") using the *Yogman* analysis framework, the first step is to determine whether there is an ambiguity in the contracts and that determination involves examining extrinsic evidence regarding contract formation. PGE is entitled to conduct discovery regarding that extrinsic evidence.

In addition, Defendants filed a claim in federal court that focused on their finances; if this case had proceeded in federal court, under Federal Rule of Civil Procedure 26(a)(1), they would have been required to produce all the information that they are objecting to producing in this Commission proceeding before they could have filed a motion for summary judgment in federal court. In other words, if Defendants are not prepared to produce the discovery here in this Commission proceeding, that means that they filed and pursued a claim in federal court that they were not prepared to litigate.

Finally, Defendants created their own time pressures: they knew about the dispute over the 15-year fixed-price period when they signed their PPAs in 2016, and Defendants have admitted in a filing in Docket No. UM 1805 that they intentionally decided not to

[5] Declaration of Dallas DeLuca, Ex. 1, Tr. at 21:16-19.

raise this dispute in any tribunal until they unsuccessfully moved to intervene out of time in UM 1805 in the latter half of 2017.[6] They then delayed this proceeding, UM 1931, through successive motions to stay or dismiss, despite the clear guidance from the Commission in Order No. 18-025 issued on January 2018 that the Commission has primary jurisdiction over this type of dispute.[7]

For those reasons, and for the reasons articulated in the specific point-by-point refutation of Defendants' arguments below, the Commission should grant PGE's motion to compel.

II. PROCEDURAL BACKGROUND

On June 25, 2018, PGE served its first set of data requests on Defendants.[8] One week later, on July 2, Defendants moved for summary disposition and expedited process. The next day, July 3, the Administrative Law Judge ("ALJ") tolled PGE's obligation to respond to Defendants' July 2 motions until further notice. Two days later, on July 5, Defendants moved for a protective order to stay discovery. Several days after that, on July 9, Defendants responded to PGE's first set of data requests by objecting and refusing to provide substantive responses to all but one of the requests.[9]

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[6] *Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition v. Portland Gen. Elec. Co.*, Docket No. UM 1805, Joint Petition to Intervene Out of Time at 4 (Sep. 8, 2017) ("The NewSun Solar Projects therefore choose not to engage in litigation against PGE over the point [interpretation of when the 15-year fixed-price period begins] … prior to executing their standard contracts.").

[7] *Portland Gen. Elec. Co. v. Pacific Northwest Solar, LLC*, Docket No. UM 1894, Order No. 18-025 at 7 (Jan. 25, 2018) ("The interpretation of PURPA contracts is critical to the discharge of our regulatory responsibilities. … We believe our role and expertise in state and federal PURPA policy makes this an appropriate issue for primary jurisdiction.").

[8] A copy of PGE's First Set of Data Requests is attached to *Defendants' Motion for Protective Order Staying Discovery* (Jul. 5, 2018).

[9] Defendants' responses to PGE's First Set of Data Requests are attached to *PGE's Motion to Compel Discovery, Sur-Reply to Defendants' Motion for Protective Order, and Motion for a Scheduling Order* (Jul. 27, 2018) (hereafter "*PGE's Motion to Compel Discovery*"). In those responses, Defendants provided a short substantive response to Data Request No. 7.

On July 13, PGE filed a response to Defendants' motion for protective order. In that response, PGE detailed why extrinsic evidence regarding the formation of the Defendants' power purchase agreements ("PPAs") is relevant and why PGE should be allowed to conduct discovery regarding such extrinsic evidence *before* PGE is required to respond to Defendants' motion for summary disposition.[10] During the weeks of July 16 and July 23, PGE attempted to negotiate a compromise solution to the parties' discovery dispute; this effort was unsuccessful. On July 27, PGE filed a motion to compel discovery. The motion incorporated PGE's July 13 response to Defendants' motion for protective order.[11] On August 3, Defendants responded to PGE's motion to compel. This filing provides PGE's reply.

III. REPLY

A. PGE's Motion to Compel Discovery Should Be Granted

PGE has demonstrated that it is entitled to the discovery requested in its motion to compel. The requested information is relevant to the formation of the NewSun PPAs. Defendants insist that the NewSun PPAs must be interpreted using common law principles of contract interpretation and the three-step process articulated by the Oregon Supreme Court in *Yogman v. Parrot*.[12]

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[10] *PGE's Response to Defendants' Motion for Protective Order Staying Discovery* at 7-12 (Jul. 13, 2018).
[11] *PGE's Motion to Compel Discovery* at 3 ("For the reasons detailed in PGE's July 13, 2018 response in opposition to Defendants' motion for protective order staying all discovery, PGE's first set of data requests are proper and Defendants should be required to provide substantive responses to those data requests *before* PGE is required to respond to Defendants' motion for summary disposition, and Defendants' motion for a protective order should be denied.") and 5 ("The Commission should order Defendants to respond to the subset of discovery requests described above for the reasons in the July 13, 2018 PGE response to Defendants' motion for a protective order staying discovery.").
[12] *See Defendants' Motion for Protective Order Staying Discovery* at 10-13 (Jul. 5, 2018); *Defendants' Reply in Support of Motion for Protective Order* at 3-8 (July 27, 2018); *Defendants' Response to PGE's Motion to Compel Discovery, Sur-Reply to Defendants' Motion for Protective Order, and Motion for a Scheduling Order* at 4-5 (Aug. 3, 2018) (hereinafter "*Defendants' Response to PGE's Motion to Compel*").

PGE disagrees that the NewSun PPAs are common law contracts that must be interpreted under *Yogman*, but unless and until the Commission rules that the NewSun PPAs will be interpreted under *PGE v. BOLI* rather than under *Yogman*, PGE must proceed as though the contracts will be analyzed under *Yogman.*[13]

As PGE has explained, in Oregon the courts (or in this case the Commission) must consider extrinsic evidence related to contract formation as part of the first step of the *Yogman* analysis.[14] For a detailed discussion of the applicable authorities supporting PGE's position, please refer to pages 7 through 12 of PGE's July 13, 2018 response to Defendants' motion for protective order. PGE incorporated this discussion by reference as part of its motion to compel discovery.[15]

Defendants disagree with PGE's analysis and argue that the courts and Commission cannot consider extrinsic evidence of contract formation as part of the first-step of the *Yogman* analysis.[16] Under Oregon Supreme Court precedent, Defendants' legal argument is wrong and PGE's motion to compel should be granted.

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[13] The correct method to interpret the NewSun PPAs and other standard Section 201 PPAs is the way a court interprets an insurance contract that contains provisions mandated by statute or regulation: where a contract term is required by statute (or administrative order), "we attempt to determine the legislature's intention in enacting that statute rather than the parties' contractual intention in entering into the insurance contract.". *See Fox v. Country Mut. Ins. Co.*, 327 Or. 500, 566 (1998); *Perez v. State Farm Mut. Auto. Ins. Co.*, 289 Or. 295, 297-98 & 299 n.2 (1980) (because insurance contract term at issue was required by statute the court "approach[ed] the issue as a problem of statutory construction."); *Emery Air Freight Corp. v. United States*, 499 F.2d 1255, 1259-60 (Ct. Cl. 1974) (court examined the administrative record to interpret the meaning of a term in the tariff-based contract between the parties); *see also PGE's Response to Defendants' Motion for Protective Order Staying Discovery* at 7-8 (Jul. 13, 2018). For the parts of the NewSun PPAs that involve negotiated terms, the Commission should interpret those sections as common law contracts under *Yogman v. Parrott* and related cases.

[14] *PGE's Response to Defendants' Motion for Protective Order Staying Discovery* at 9-10.

[15] *See* footnote 11 *supra*.

[16] *Defendants' Response to PGE's Motion to Compel Discovery* at 5 (Aug. 3, 2018) ("Under step one, extrinsic evidence of the parties' prior discussions is irrelevant to interpretation of the fully integrated, Commission-approved standard contracts at issue ….").

1. PGE's Narrowed Data Request No. 1 Requests Relevant Information and Should be Granted

PGE has moved the Commission to compel Defendants to respond to a subset of Data Request No. 1. Specifically, PGE has moved the Commission to compel Defendants to produce "all communications between Defendants and PGE regarding the NewSun PPAs, including any attachments."[17] Defendants object to this request on four grounds, none of which have any merit.

First, Defendants argue that extrinsic evidence regarding the formation of the NewSun PPAs is irrelevant to the meaning of the standard contracts.[18] This is Defendants' argument that a *Yogman* analysis applies and that extrinsic evidence of contract formation cannot be considered as part of the first step of that analysis. As discussed above, Oregon courts consider such extrinsic evidence as part of the first step of the *Yogman* analysis and the Commission must therefore reject this argument.

Second, Defendants argue that it is unnecessary and therefore unduly burdensome to compel Defendants to produce their communications with PGE because PGE already has those communications in its own records.[19] The Commission should reject this argument for at least two reasons: (a) PGE is entitled to obtain the requested communications to verify that its records accurately reflect all communications between the parties; and (b) PGE's data request seeks not only the copy of the communication sent to or received from PGE, but also any drafts or annotated versions,[20] and such drafts or

[17] *PGE's Motion to Compel Discovery* at 4.
[18] *Defendants' Response to PGE's Motion to Compel Discovery* at 4-5.
[19] *PGE's Motion to Compel Discovery* at 4.
[20] PGE's First Set of Data Requests at page 1 defines "Documents" to include "drafts" as well as "every copy of a document which contains handwritten or other notations or which otherwise does not duplicate the

annotated versions may provide valuable extrinsic evidence regarding the formation of the NewSun PPAs.

Third, Defendants suggest that it will require effort and time for Defendants to sort through emails sent to and received from PGE during the relevant timeframe and to ensure that no privileged information is produced.[21] And Defendants argue that the burden of such an effort outweighs the probative value of the information, especially because PGE already possesses the information.[22] As discussed above, PGE is attempting to verify and ensure that it does in fact possess all of the information in question, and it is possible that responsive documents will include draft language or annotations that PGE does not possess and which are relevant to this case. Further, it is hard to conceive of extrinsic evidence regarding the formation of the contracts that could be more relevant than the communications between the parties and any drafts or annotations of such communications. In addition, Defendants have made no showing that it is unduly burdensome for them to review their email and other records and produce the requested communications and attachments. A party should not be able to avoid discovery merely because it will be required to expend time and effort to provide a response.[23]

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original or any other copy." A copy of PGE's First Set of Data Requests can be found as an attachment to *Defendants' Motion for Protective Order Staying Discovery*.

[21] *Defendants' Response to PGE's Motion to Compel Discovery* at 5.

[22] *Id.*

[23] "The mere fact that compliance with an inspection order will cause great labor and expense or even considerable hardship and possibility of injury to the business of the party from whom discovery is sought does not of itself require denial of the motion [to compel]." 8B Fed. Pac. & Proc. Civ. § 2214 (3d ed.); *see also United States v. Am. Optical Co.*, 39 F.R.D. 580, 587 (N.D. Cal. 1966) ("[T]he fact that the production of documents may involve inconvenience and expense is not alone a sufficient reason for refusing discovery which is otherwise appropriate."); *U.S. ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 238 (S.D. Cal. 2015) ("[I]t cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary." (internal citations omitted)).

Fourth, Defendants argue that if they are compelled to respond to narrowed Data Request No. 1, the timeframe of the responses should be further narrowed to begin on July 30, 2015, and end for each NewSun project when the NewSun PPA for that project was executed.[24] The Commission should reject this further narrowing of Data Request No. 1. PGE has already voluntarily reduced the timeframe of Data Request No. 1 from (a) the beginning of 2014 through the present date, to (b) the beginning of 2015 through the end of July 2016.[25]

The 10 NewSun PPAs were discussed by PGE and Defendants in 2015 and 2016 and were all executed by the end of July 2016. The period for responsive documents should not be cut too fine because doing so may exclude documents that provide important evidence regarding contract formation. If, as Defendants suggest, there were no communications between PGE and Defendants regarding the NewSun PPAs prior to July 30, 2015, then that date will become the *de facto* start date for responsive documents, but that is true regardless of whether the *de jure* start date is the beginning of 2015 or July 30, 2015. In order to ensure that relevant communications are not excluded, the timeframe of narrowed Data Request No. 1 should remain from the start of 2015 through the end of July 2016.

It is also unreasonable to use different end dates for each project, because it is possible that communications occurred after one set of projects executed contracts but before all of the projects executed contracts, and that such communications may provide evidence regarding the formation of the previously executed contracts. PGE has already

[24] *Defendants' Response to PGE's Motion to Compel Discovery* at 5-6.
[25] *PGE's Motion to Compel Discovery* at 4.

proposed a significant restriction of the timeframe for Data Request No. 1 and the Commission should refuse Defendants' request to further reduce the timeframe and increase the risk that important, relevant information will be excluded.

2. PGE's Narrowed Data Request No. 2 Requests Relevant Information and Should be Granted

PGE has moved the Commission to compel Defendants to respond to PGE's narrowed Data Request No. 2 and produce all of Defendants internal documents and communications with third parties regarding the 15-year fixed-price period.[26] Defendants object to this request on five grounds, none of which have merit.

First, Defendants reiterate their argument that extrinsic evidence of contract formation is irrelevant under step one of the *Yogman* analysis.[27] As discussed above, the Commission must reject this argument because the Oregon Supreme Court clearly and unequivocally stated that courts consider extrinsic evidence of contract formation as part of the first step of the *Yogman* analysis. Defendants also reiterate their inapposite contention that their internal subjective intentions are irrelevant in contract interpretation; that is accurate only to the extent that Defendants wish to use them *to support their own position*. In contrast, Defendants' internal statements are admissible *against* Defendants. Further, Defendants' emails and letters with third-parties are *not* "internal" and instead are Defendants' external statements during contract formation.

Second, Defendants argue that PGE seeks Defendants' revenue projections or other financial information and that compelling the release of this information would constitute

[26] *PGE's Motion to Compel Discovery* at 4.
[27] *Defendants' Response to PGE's Motion to Compel Discovery* at 7.

utility-type regulation in violation of Section 210(e) the Public Utility Regulatory Policies Act of 1978 ("PURPA").[28] This is the reiteration of a meritless argument that Defendants' made in their February 22, 2018 motion to dismiss.[29] In this case, PGE has asked the Commission to interpret the NewSun PPAs, not to change their terms. The courts have held that a state utility commission can interpret the terms of a power purchase agreement without violating Section 210(e) of PURPA.[30] Here, PGE seeks extrinsic evidence regarding the contract formation so that the Commission can conduct the first step of contract interpretation under *Yogman*. Such discovery and such evidence do not violate Section 210(e) or constitute utility-type regulation because they inform the interpretation of the NewSun PPAs and are not intended to be used by the Commission to set rates or change the terms of the NewSun PPAs.

Third, Defendants argue that their revenue projections or financing models are highly sensitive commercial information and that they should not be compelled to disclose such information.[31] There are several problems with this argument. To begin with, it ignores the fact that PGE has proposed that Defendants not be required to provide their sensitive financial models so long as Defendants stipulate that their internal analysis and their financial modeling of the projects contemplated both parties' positions: 15 years of fixed prices measured from (a) contract execution (PGE's position) and (b) commercial

[28] *Id.* at 7-8.
[29] *See Defendants' Motion to Dismiss* at 12-13 (Feb. 22, 2018).
[30] *Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Public Utility Control*, 531 F.3d 183, 188-189 (2d Cir. 2008) (holding that utility commission interpretation of PPA does constitute prohibited utility-type regulation); *City of New Martinsville v. Public Service Com'n. of WV*, 729 S.E.2d 188, 196 (W. Va. 2012) (same); *See also PGE's Response to Defendants' Motion to Dismiss* at 7-9 (Mar. 9, 2018) (discussing authority supporting conclusion that state utility commission's do not violate the PURPA prohibition on utility-type regulation when they interpret the terms of a qualifying facility PPA).
[31] *Defendants' Response to PGE's Motion to Compel Discovery* at 8-9.

operation (Defendants' position).[32] Defendants proposed this stipulation when the parties were attempting to reach a compromise solution to their discovery dispute, and PGE is willing to proceeding in this manner. Use of such a stipulation would eliminate Defendants' concerns about releasing sensitive financial models.

If Defendants will not agree to the described stipulation, then they should be required to produce their financial models. Any information produced that Defendants' believe to be commercially sensitive can be protected using the Commission's standard protective order or a modified protective order intended to address the concerns raised by Defendants.[33] Finally, Defendants' contention that PGE may use Defendants' financial information against Defendants in negotiations[34] is without any merit because the NewSun PPAs have already been executed and they are standard contracts, the terms and conditions of which were not negotiated; PGE cannot use discovery in this proceeding to go backwards in time to negotiate these PPAs. In any event, Defendants will have to produce this financial information in the federal court case because Defendants allege financing costs as a basis for federal diversity jurisdiction.[35]

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[32] *PGE's Motion to Compel Discovery* at 4.

[33] *In the Matter of Public Utility Commission of Oregon, Internal Operating Guidelines*, Docket No. UM 1709, Order No. 14-358 at Appendix A, page 9 (Oct. 17, 2014) ("Many cases involve trade secrets and other commercially sensitive information. The Commission uses protective orders to allow parties the ability to review confidential information while ensuring that it is not disclosed publicly. The rules governing the use of protective orders are set forth in OAR 860-001-0080."); OAR 860-001-0080 (providing for standard protective orders and for modified protective orders where additional protection is required); *In the Matter of Revisions to OAR 860-001-0080, Protective Orders*, Docket No. AR 587, Order No. 15-243 at 2 (Aug. 25, 2015) (noting that the purpose of the Commission's standard protective is to "permit the broadest possible access to information consistent with the need to protect proprietary data."); *see also In the Matter of PacifiCorp, dba Pacific Power 2012 Transition Adjustment Mechanism*, Docket No. UE 227, Order No. 11-265 (Jul 19, 2011) (example of the Commission granting an special modified protective order to provide additional protections for extremely sensitive commercial information).

[34] *Defendants' Response to PGE's Motion to Compel Discovery* at 9.

[35] Declaration of Dallas DeLuca, Ex. 2, Complaint ¶ 48 (Jan. 8, 2018) ("Plaintiffs estimate that, under PGE's interpretation of the NewSun PPAs, each NewSun QF will receive at least several hundred thousand dollars

Fourth, Defendants argue that producing responses to narrowed Data Request No. 2 would be too burdensome.[36] Defendants note that responding to narrowed Data Request No. 2 would require them to collect, sort and review information from a year-and-a-half-long period from multiple custodians.[37] First, the proper test in discovery balances the supposed burden with the needs of the case. Here, the Commission is being asked to determine what price PGE must pay for 100 MW of power for three years, which may be a multi-million dollar issue by the time that this issue becomes ripe in 2031. Defendants themselves allege that this dispute has an economic impact of at least several million dollars.[38] Given the needs of the case, reviewing 21,803 emails is not a burden.

Second, Defendants purport to illustrate the "burden" of such an exercise by noting that Defendants' primary custodian of information, Jacob Stephens, has two email accounts with 21,803 documents (emails and attachments) from the timeframe in question.[39] Defendants assert that reviewing so many documents is unduly burdensome. Defendants have still not provided any substantiation of the alleged burden or cost, not even a single estimate from an e-discovery expert. Further, discovery in Commission proceedings (and in federal litigation like the case that Defendants filed) routinely involves review of voluminous sources of potentially responsive documents.

Here, the 21,803 emails and attachments referenced by Defendants can be rapidly and efficiently reduced to a much smaller number of potentially responsive documents

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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.")

[36] *Defendants' Response to PGE's Motion to Compel Discovery* at 9-10.

[37] *Id.* at 10.

[38] Footnote 35, *supra*.

[39] *Defendants' Response to PGE's Motion to Compel Discovery* at 10.

through accepted electronic discovery methods.[40] If Defendants' argument that a custodian with roughly 20,000 emails and attachments cannot be required to respond to a data request because of the burden of reviewing so many documents is allowed to prevail, then many data requests that are routinely responded to in Commission proceedings will no longer require a response because many parties, including PGE, have custodians whose email accounts contain more than 20,000 documents.

Defendants have put the interpretation of the 15-year fixed-price period at issue by executing the NewSun PPAs after PGE informed them that the 15-year fixed-price period begins to run at contract execution and then, after waiting two years, filing suit in federal court seeking a ruling that the 15-year fixed-price period begins to run at commercial operation. Defendants have put extrinsic evidence regarding contract formation at issue by arguing that the Commission must engage in the first step of contract interpretation under *Yogman*. Defendants have significant resources as reflected by the fact that they are proposing to develop 100 MW of solar generation and have retained two top law firms to represent them in this matter. Defendants should not be allowed to avoid responding to reasonable data requests by arguing that they are too small or understaffed to dedicate the time and resources needed to respond to data requests. If Defendants require additional time to respond to PGE's narrowed Data Request No. 2, PGE is willing to agree to a reasonable extension.

Fifth and finally, Defendants argue that if the Commission compels Defendants to respond to narrowed Data Request No. 2, production should be limited to communications

[40] Defendants' counsel, Stoll Berne, markets itself as able to provide to its clients "cutting edge . . . E-Discovery" and that it is able to "give our clients [of all sizes] the most efficient, cost-effective tools available." *Available at* https://www.stollberne.com/history/technology/ (last visited Aug. 9, 2018).

made before each respective NewSun PPA was executed.[41] As discussed above regarding narrowed Data Request No. 1, the Commission should reject this argument.

3. PGE's Data Request Nos. 6, 8, 9 and 10 Should be Granted or Defendants' Should Stipulate that Their Motion for Summary Disposition Provides a Full Response to Those Data Requests

In original Data Request Nos. 6, 8, 9 and 10, PGE asked Defendants to provide all information supporting certain facts and legal positions alleged by Defendants in their answer. In response, Defendants objected to the data requests but also stated that they have provided responses to the data requests through the arguments detailed in their motion for summary disposition.[42] In its motion to compel, PGE has proposed two alternative approaches to resolving the dispute over Data Request Nos. 6, 8, 9 and 10.

First, Defendants can stipulate that they have provided responses through their motion for summary disposition (as they state in their motion for protective order); in which case the Commission should hold that Defendants are estopped from raising arguments that involve information that would have been responsive to Data Request Nos. 6, 8, 9 and 10 but which was not raised in the motion for summary disposition.[43]

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[41] *Defendants' Response to PGE's Motion to Compel Discovery* at 12.

[42] *See Defendants' Motion for Protective Order Staying Discovery* at 6 ("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."); *see also Defendants' Response to PGE's First Set of Data Requests* (Jul. 9, 2018) at Responses to Data Request Nos. 6, 8, 9 and 10 (Defendants' response is attached to *PGE's Motion to Compel Discovery*).

[43] *PGE's Motion to Compel Discovery* at 5 ("… PGE moves the Commission or ALJ for an order that Defendants must either: (A) provide substantive responses to PGE Data Request Nos. 6, 8, 9 and 10 before PGE's response to the motion for summary disposition; or (B) stipulate that Defendants' motion for summary disposition provides a full response to those Data Requests and Defendants are estopped from raising any additional arguments that would have been responsive to PGE Data Request Nos. 6, 8, 9 and 10 but were not raised in Defendants' motion for summary disposition and the declarations filed in support of the motion for summary disposition.").

Second, and alternatively, if Defendants will not so stipulate, then they should be ordered to provide specific responses to Data Request Nos. 6, 8, 9 and 10.[44]

PGE is not proposing that Defendants' positions in their motion for summary disposition should limit their ability to respond to a PGE cross-motion for summary judgment. If PGE raises a new issue in its cross-motion, Defendants remain free to respond, even if the response involves arguments not raised in Defendants' motion for summary disposition.

B. The Commission Should Adopt the Procedural Schedule Proposed by PGE

On July 27, 2018, PGE also moved the Commission for a scheduling order. PGE proposes the following schedule:

EVENT	DATE
Defendants respond to PGE's data requests per the Commission's order granting PGE's motion to compel	14 days after the Commission's order granting PGE's motion to compel (or a later date if requested by Defendants and approved by the ALJ or Commission)
PGE's response to Defendants' motion for summary disposition and PGE's cross-motion for summary disposition	21 days after Defendants provide a complete response to PGE's data requests in compliance with the Commission's order granting PGE's motion to compel (or 21 days after a Commission order denying PGE's motion to compel)
Defendants' reply in support of Defendants' motion for summary disposition	14 days after PGE's deadline to file PGE's response to Defendants' motion for summary disposition
Defendants' response to PGE's cross-motion for summary disposition	21 days after PGE's deadline to file PGE's cross-motion for summary disposition
PGE's reply in support of PGE's cross-motion for summary disposition	14 days after the deadline for Defendants' to file their response to PGE's cross-motion for summary disposition
Oral argument	TBD
Order on summary disposition	TBD

[44] *Id.*

Defendants raise three objections to this request, none of which have any merit.

First, Defendants argue PGE's motion for a scheduling order is an untimely response to Defendants' July 2, 2018 motion for expedited process.[45] This is incorrect. The ALJ has indefinitely tolled PGE's obligation to respond to Defendants' July 2 motion. PGE did not propose the above schedule in response to Defendants' July 2 motion, but rather as an effort to propose a procedural path forward that will allow for the efficient and expedited resolution of this case.

Second, Defendants argue that PGE has no right to file a cross-motion for summary disposition.[46] This is incorrect. Under ORCP 47 A, PGE may file a motion for summary judgment at the earlier of (i) 20 days after the action commences or (ii) at any time after service of a motion for summary judgment by an adverse party on PGE.[47] Moreover, the ALJ and Commission have the authority to control the procedural schedule of this matter to provide for the orderly and efficient resolution of this case.[48] By proposing a schedule that allows for preliminary discovery and then the filing and briefing of cross-motions for summary disposition, PGE is suggesting a procedural schedule that allows the Commission

[45] *Defendants' Response to PGE's Motion to Compel Discovery* at 14 ("This portion of PGE's multi-topic motion is nothing more than an untimely response to the NewSun Parties' Motion for Oral Argument and for Expedited Process on the Motion for Summary Disposition.").
[46] *Id.* at 15 ("PGE has no right to file a cross motion for summary judgment, especially where such motion cannot be filed without first engaging in burdensome discovery.").
[47] ORCP 47 A ("A party seeking to recover on any type of claim … may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits or declarations, for a summary judgment in that party's favor as to all or any part of any claim or defense.").
[48] *See e.g.,* OAR 860-001-0000(2) (authorizing the Commission or ALJ to modify or waive any of the rules of the division—including the deadlines to respond to pleadings—for good cause); OAR 860-001-0090 (delegating to the ALJ the authority to, among other things, regulate the course of contested case proceedings, decide procedural matters, and change filing deadlines); OAR 860-001-0590 (authorizing the ALJ to schedule conferences to establish a procedural schedule, including dates for discovery).

to consider both parties' dispositive motions at the same time and avoids the inherent inefficiency of considering those motions in series.

Third, Defendants argue that the Commission should not consider whether the procedural schedule facilitates the summer vacation schedules of PGE's staff and attorneys.[49] The Commission should reject this argument. PGE has agreed not to oppose the expedited resolution of this case but that does not mean that PGE has agreed to any schedule proposed by Defendants or has agreed that its staff and attorneys will not take summer vacation. Defendants also argue that PGE should have asked Defendants' for an extension of time to respond to Defendants' motion for summary disposition, but there is no reason that PGE should have done so because the ALJ has tolled PGE's obligation to respond to that motion.

In sum, the procedural schedule proposed by PGE is reasonable and provides an efficient path forward for resolution of the current discovery dispute followed by full briefing and a decision on competing motions for summary disposition. PGE respectfully requests that the Commission adopt the schedule proposed.

III. CONCLUSION

For the reasons detailed above and in PGE's July 27, 2018 motion to compel discovery and PGE's July 13, 2018 response in opposition to Defendants' motion for protective order staying discovery, PGE requests that the Commission grant PGE's motion

[49] *Defendants' Response to PGE's Motion to Compel Discovery* at 15 ("… PGE cannot now rely on pre-existing vacation plans to delay resolution of this matter after PGE affirmatively committed to expedited processing of this matter in the United States District Court … If PGE required a reasonable extension of time to respond to the Motion for Summary Disposition, it should have asked the NewSun Parties for such extension. It made no such request.").

to compel discovery, deny Defendants' motion for protective order staying discovery, and grant PGE's motion for a scheduling order.

DATED this 10th day of August, 2018.

Respectfully submitted,

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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.	**DECLARATION OF DALLAS DELUCA IN SUPPORT OF PORTLAND GENERAL ELECTRIC COMPANY'S REPLY IN SUPPORT OF MOTION TO COMPEL AND MOTION FOR A SCHEDULING ORDER**

I, Dallas DeLuca declare:

1. I am complainant's attorney, and I make this declaration in support of complainant's Reply in Support of Motion to Compel and Motion for a Scheduling Order. The following statements are true and correct and, if called upon, I could competently testify to the facts averred herein.

2. Attached as **Exhibit 1** is a true and accurate copy of the motion hearing transcript in *Alfalfa Solar I LLC, et al. v. Portland General Electric Company,* United States District Court, District of Oregon, Case No. 3:18-cv-00040-SI, Transcript of Hearing re Defendant's Motion to Dismiss, or in the Alternative, Stay (May 30, 2018).

3. Attached as **Exhibit 2** is a true and accurate copy of the Complaint in *Alfalfa Solar I LLC, et al. v. Portland General Electric Company,* United States District Court, District of Oregon, Case No. 3:18-cv-00040-SI (Jan. 8, 2018) (without exhibits).

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

DATED this 10th day of August, 2018.

MARKOWITZ HERBOLD PC

By: _____
Dallas S. DeLuca, OSB #072992

ALFA-PUC\767757

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ALFALFA SOLAR I LLC, a Delaware limited liability company, et al.,	)	
Plaintiffs,	)	No. 3:18-cv-00040-SI
vs.	)	May 30, 2018
PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation,	)	Portland, Oregon
Defendant.	)	

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR THE PLAINTIFFS:	Robert A. Shlachter Keil M. Mueller Stoll Stoll Berne Lokting & Shlachter 209 S. W. Oak Street Suite 500 Portland, OR 97204
FOR THE DEFENDANT:	Dallas S. DeLuca Anit K. Jindal Markowitz Herbold PC 1211 S. W. Fifth Avenue Suite 3000 Portland, OR 97204
	Jeffrey S. Lovinger Attorney at Law 2000 N. E. 42nd Avenue Suite 131 Portland, OR 97213
COURT REPORTER:	Nancy M. Walker, CSR, RMR, CRR United States District Courthouse 1000 S. W. Third Avenue, Room 301 Portland, OR 97204 (503) 326-8186

P R O C E E D I N G S

THE CLERK: Your Honor, this is the time set for oral argument in Civil Case 18-40-SI, Alfalfa Solar I LLC, et al. versus Portland General Electric Company.

And could I have counsel in court, beginning with plaintiff, please identify yourself for the record.

MR. SHLACHTER: Thank you.

Good morning, Your Honor. Robert Shlachter and Keil Mueller on behalf of the plaintiffs.

THE COURT: Good morning.

MR. DeLUCA: Good morning, Your Honor. Dallas DeLuca, Anit Jindal, and Jeffrey Lovinger on behalf of Defendant Portland General Electric Company.

THE COURT: Good morning.

MR. DeLUCA: We also have Assistant General Counsel David White with us today.

THE COURT: Good morning.

All right. We are here on the defendant's motion to dismiss or, in the alternative, to stay. I have read everything that you all have provided to me. I will have some questions, I expect, but I look forward to defendant's argument.

MR. DeLUCA: Thank you, Your Honor.

We're not here to decide the substance of the question of when the 15-year period begins for the fixed rate

in the standard purchase power agreements between Portland General Electric and the 10 plaintiffs.

THE COURT: That said, can you show me where the dispute is in the language over that? Is it in basically the Schedule 201, the subsection (2)?

So what exactly are the merits of the dispute? And tie it to the language in the contract, if you don't mind, please. And then I know and then I'll let you get back to that's not why we're here.

MR. DeLUCA: Actually, Your Honor, where I'd like to start is the document that preceded the contract, that informed the contract, which is where the Public Utility Commission gave its order and said what these contracts have to have.

And that's the 2005 order, 05-584, where the Public Utility Commission said, "This is our policy. Going forward, we will have 20-year contracts for these qualified facilities, the first 15 of which will be at the fixed rate in the schedule, in the Schedule 201, and the last five at the market rate."

And that's Exhibit 3 to the first Jindal declaration.

THE COURT: Let me go back. Let's go back to my question.

MR. DeLUCA: Yes.

THE COURT: My question is: Can you show me the

specific text in the PPA that's at the heart of the dispute on the merits?

MR. DeLUCA: Sure. Plaintiffs contend --

THE COURT: No. Just show me where the text is. That's all I'm looking for.

MR. DeLUCA: The contract term --

THE COURT: I've got a PPA. And, frankly, the PPA I have in front of me is in the first-named defendant, Alfalfa Solar, docket 1.1 or 1-1.

MR. DeLUCA: Part of it has to do with the definition of "contract year" in 1.7.

THE COURT: Okay.

MR. DeLUCA: And it's a 12-month period beginning with the commercial operation date.

And if I understand their argument correctly, that is part of their argument for why that is in dispute, because the contract terminates, according to Section 2.3, in the sixteenth contract year.

THE COURT: All right. One second.

So I start with 1.7, "contract year," and note it's "commencing upon the commercial operation date."

Okay. And where do I go from there?

MR. DeLUCA: 2.3 and 2.1.

THE COURT: 2.3. Okay.

MR. DeLUCA: "This agreement shall terminate on the

completion of the last day of the sixteenth contract year."

THE COURT: Got it.

MR. DeLUCA: Above that we've got Section 2.1 that the effective date of the contract starts at when it's executed, which was back, for these contracts, in various months in the first half of 2016.

THE COURT: Okay.

MR. DeLUCA: Then we have the schedules, as you pointed out. I'll have to take my glasses off because it's way too small.

THE COURT: I know. I had to do the same thing.

And it's the schedule under "Renewable Fixed Price Option"?

MR. DeLUCA: Correct, Your Honor.

MR. SHLACHTER: We have a -- Your Honor, we have a blow-up copy of it.

THE COURT: I'll take it.

MR. SHLACHTER: Okay.

THE COURT: Thank you. My eye doctor thanks you as well.

MR. SHLACHTER: (Handing).

THE CLERK: (Handing).

THE COURT: Okay. Go ahead, Mr. DeLuca, whenever you're ready.

MR. DeLUCA: I'm sorry, Your Honor. I have it

highlighted in a different one.

(There is a brief pause in the proceedings.)

THE COURT: We highlighted the same paragraphs.

MR. DeLUCA: And I didn't highlight this one.

THE COURT: It's the second paragraph.

MR. DeLUCA: Would it be at 201-4, Your Honor?

THE COURT: It's on Exhibit 1, page 29, "Pricing Options for Standard PPA," subsection (2), "Renewable" --

MR. DeLUCA: Thank you, Your Honor. My colleague, Anit Jindal --

THE COURT: -- "Fixed Price Option," second paragraph.

MR. DeLUCA: "The option is available for a maximum term of 15 years. Prices will be as established at the time the standard PPA is executed and will be equal to the renewable avoided costs in Tables 4a and 4b, 5a and 5b, or 6a and 6b, depending on the type of QF" -- which is qualifying facility -- "effective at execution."

THE COURT: So you're saying that "effective at execution" means that's the effective date, that's when it's signed, and that's when it starts and runs for 15 years, right?

MR. DeLUCA: Correct.

THE COURT: What's your understanding of what the plaintiffs' argument is on the merits of that interpretation?

MR. DeLUCA: That under the beginning parts of the contracts, Sections 1.7 and 2.3, not to put words in their mouth, but my understanding is that because of that, it runs at commercial operation date.

THE COURT: Okay. I apologize for the interruption, but I wanted to hear and make sure I understood all of this.

And now you're welcome to go back and tell us why we're really here.

MR. DeLUCA: Sorry, Your Honor.

THE COURT: Now you can begin the argument where you wanted to.

MR. DeLUCA: Sure.

Ripeness -- because this case is not ripe. They've alleged in their complaint that the chief concerns, the pricing during those out years of the contract -- So PGE's position has been and always has been that it begins at contract execution and runs for 15 years from contract execution. Theirs is that it runs from COD, which could be up to three, maybe even four years after contract execution, COD being commercial operation date.

So that puts the dispute for these parties -- assuming that they get up and running in the year 2019, that puts the dispute out into 2031. And at that point in time, PGE's position will be, "We will pay these plaintiffs the rate at the Mid-C market." And they want to continue for an

additional three years to have the contract rates. They believe at this point in time that it's more likely than not that it will be higher than the rate that is the market rate.

But that is a contingent event. It depends on whether these get built at all, whether they continue operating at that point, whether the Mid-C market price is higher or lower. All that is contingent way in the future.

THE COURT: I'm not following you why this isn't ripe. Because as of right now, there is a disagreement between the two parties over what does a particular term or set of terms mean in the contract.

Now, depending upon what may happen in X number of years in the future, that may or may not make a difference in terms of who has to pay what and how much to whom, but for right now there's a real disagreement.

And the plaintiffs appear to take the position that based upon that uncertainty of how this is going to be interpreted, they're either facing difficulties in either getting financing or closing certain deals, and they need it resolved now, because if they have to wait -- if they're told they have to wait to get it resolved, well, then they won't be able to close certain deals or obtain certain financing. And there's no dispute that the parties are in a disagreement right now of what it means.

So I don't understand why it's not ripe for a

declaratory judgment, either by this Court or by the PUC. And we'll spend a lot more time talking about primary jurisdiction, I expect. But I don't see why it's not ripe.

MR. DeLUCA: The cases we've cited all have disputes that engaged in current disputes on a contract term but where the effects would not be felt for years and were contingent. Some of them were only one year in the future. In the *Clinton v. Acequia* case, which I'm probably mispronouncing -- A-c-e-q-u-i-a -- that case the Ninth Circuit decided in August of 1996 and decided it was not ripe because whether or not the parties liquidated the company was not due until 1997.

It was a real dispute. There may have been real hardship to one party or the other, deciding whether to go forward, but it could not bootstrap onto a ripeness issue a financing question, because everything can be financed. You'd basically throw out the doctrine of ripeness. We'd no longer have ripeness.

In the *Stewart* case, we had the person who wanted to retire, and he -- or who didn't want to retire yet. He was the longshoreman, and he had said under the policy for retirement, "I've got the benefit of the new policy, not the old policy."

THE COURT: I think that's overstating it to say this would throw out the doctrine of ripeness.

There's a situation where -- I don't agree with that.

I do think that there are some discretionary factors at play in whether a Court should or shouldn't engage in a declaratory judgment; and the argument you're making may relate to one of those factors. But in terms of ripeness as being an on-and-off switch that says if it's not ripe, the Court can't hear it, I think that's too far.

I think we should move on to another argument.

MR. DeLUCA: Your Honor, there is one other part of ripeness I'd like to address, because if their current harm that they're alleging creates this controversy in dispute is their financing question, they don't meet the $75,000 threshold or they certainly haven't alleged that they meet it, because right now they've got something contingent way in the future, and they're alleging that that will likely be $75,000 in dispute for each plaintiff, although even they admit in their briefing that nobody knows what the price is going to be.

But that's not their current dispute. Their current dispute is about financing. And all they say in their brief on page 12 is that it may increase their costs or it may lead to the failure of their ability to get financing.

THE COURT: My guess is that you have a stronger argument on primary jurisdiction. If you want to spend your time on the less strong arguments, you go right ahead.

MR. DeLUCA: Thank you, Your Honor. I just wanted to

put on the record, since it wasn't in the brief, that of course they have the statutory requirement for the $75,000; and they have not even alleged that they meet the $75,000.

THE COURT: If we ever need to get there, you are always welcome to raise subject matter jurisdiction.

MR. DeLUCA: Primary jurisdiction, the doctrine both in federal and state court is to protect the integrity of the regulatory scheme; and that's from the *Syntek Semiconductor Company v. Micro Tech* case, Ninth Circuit, 2002. And the quote is "protection of the integrity of the regulatory regime" -- "regulatory scheme," unquote.

And that's what we have here. We have a regulatory scheme where, under 16 USC 824a-3(f), the federal legislature has said that the states are implementing this part of PURPA. The states are implementing the regulation of the contracts between the QFs and the public utilities. And in the *Independent Energy Association* case, the Ninth Circuit said that these contracts are definitely part of what the state regulatory agencies are responsible for having a first crack at.

The *Independent Energy* case had other issues in it. They were trying to decide that -- also in that case was the question of whether the California PUC could actually modify the rates in the contract, and that was preempted. And we completely agree that that's preempted. And here PGE is not

attempting to have the Oregon PUC change the rates. So their case -- they've got many arguments about the PUC can't change the rates, and we completely agree.

But this case is from the Ninth Circuit, *Independent Energy*, as well as Oregon case law, *Snow Mountain*, saying that these are issues for the PUC.

THE COURT: Are they really trying to change the rates, or might that just simply be a consequence, from your perspective or your client's perspective, depending upon how one interprets the terms of the contract? And as they argue, all they want to do is interpret the various terms of the contract. The parties have a dispute on how those terms should be interpreted.

And obviously if the terms are interpreted the way the plaintiffs want it, that will have an economic impact that favors the plaintiffs. If it's interpreted the way you want it, it will have an economic impact that disfavors the plaintiffs. But it's contract interpretation, right?

MR. DeLUCA: Partially contract interpretation, but partially under Oregon law, these types of contracts, which are not common law contracts, you would look to the statutory history.

THE COURT: What do you mean by they're not common law contracts? What is a common law contract?

MR. DeLUCA: Two parties voluntarily coming into the

contract together is one of the key components of a contract. And here we do not have that.

THE COURT: Because it's not --

MR. DeLUCA: And that's -- I'm sorry, Your Honor.

THE COURT: Because it's not voluntary.

MR. DeLUCA: Excuse me?

THE COURT: Because it's not voluntary.

MR. DeLUCA: Correct. And that's --

THE COURT: Interesting.

So what's the leading case I should look at that would support the proposition that when we do not have a contract in which both parties have acted voluntarily, but one party is compelled by the law to enter into or provide this contract, the common law of contracts is displaced? What's the leading case on that I should look at?

MR. DeLUCA: The *Snow Mountain* case, Your Honor.

THE COURT: Okay.

MR. DeLUCA: *Snow Mountain v. Maudlin*, M-a-u-l-d-i-n [sic].

THE COURT: Okay. And I take it that's why the PUC, in Order 18-174, at the bottom of page 3, says "The instant proceeding is not a common law contract dispute," right?

MR. DeLUCA: I would guess that that's their basis for it, yes.

THE COURT: So the argument is based on *Snow*

Mountain, that when two parties voluntarily enter into a contractual arrangement, we look to the common law of contracts. When one party is obligated under the law, state or federal, to provide a contract or to agree to a contract under terms specified by a regulatory authority, then that takes us out of the common law of contracts and into something that is more directly regulated by federal or state laws, as the case may be; and that is all confirmed by *Snow Mountain*. Is that your position?

MR. DeLUCA: I wouldn't say as a general position for all such contracts for all regulatory agencies, because I certainly have not briefed all regulatory agencies. But at least in this instance, under the Oregon PUC's statutes, that is accurate, Your Honor.

THE COURT: Okay. I get it. I understand.

You stated in your reply brief, but I didn't see it in your opening brief -- this is your reply at internal page 12; the CM/ECF page is 18 -- that "The provisions in dispute between PGE and the NewSun QFs are present in approximately 72 standard PPAs executed before the September 2017 approval of PGE's new standard PPA."

Then you continue: "Additionally, there are approximately 25 cases currently pending before the Commission where QFs claim that they're entitled to this older PPA."

I didn't see that in your opening brief. I'm not

going to complain about that, because I think it's arguably responsive to the plaintiffs' responsive brief. But I'd like you to tell me a little bit more about the 72 PPAs and maybe even the additional 25, where they are in the process at this stage, how many are at issue in this lawsuit. We have 10 or 11 in this lawsuit?

MR. DeLUCA: Ten, Your Honor.

THE COURT: How many?

MR. DeLUCA: Ten, Your Honor.

THE COURT: Ten in this lawsuit.

So what's going on with the remaining 72 -- or remaining 62? I assume our 10 are part of that 72.

MR. DeLUCA: Correct, Your Honor.

THE COURT: And so what's going on with the remaining 62? Where are they in the process of having this issue resolved?

MR. DeLUCA: Your Honor, I can give you a brief overview. But if you'd like something more detailed, I would like to be able to turn to my colleague, Jeff Lovinger, who is Portland General Electric Company's counsel before the PUC on these issues.

THE COURT: Well, why don't you start with --

MR. DeLUCA: Sure. I'm sorry, Your Honor.

THE COURt: Go ahead and start with the brief overview.

MR. DeLUCA: There were 34 that were executed in this time period for this same --

THE COURT: How many again?

MR. DeLUCA: Thirty-four standard PPAs that were of this vintage, from the September 2015 order from the Public Utility Commission. So 10 of those 34 are here before us right now. The other 24 are not pending. The rest have similar provisions in the immediately preceding and following versions and vintages of the standard PPAs.

The other 25 are ones that would fit into these 34 or add on to these 34, but they're not signed yet because there is a dispute about whether or not they were actually offered to PGE timely. And so that's currently pending before, I believe, the PUC. I look to Mr. Lovinger to correct me if I'm wrong. There is a dispute with those, whether they made it on time before the new Schedule 201s went into effect.

THE COURT: So those would be 24 out of the 34?

MR. DeLUCA: No. On top of the 34, there would be 25.

THE COURT: Okay. So in addition to those 34, when you made reference to the approximately 25 cases currently pending before the Commission, those are ones that haven't yet been signed, right?

MR. DeLUCA: There are 34 that are the same vintage, including these 10. Of the remaining 63 --

THE COURT: Wait. Wait. You know what?
MR. DeLUCA: Sorry. Yes.
THE COURT: Let's take this one step at a time.
MR. DeLUCA: Sure.
THE COURT: On page 12 of your reply brief --
MR. DeLUCA: Okay.
THE COURT: -- tell me about 72. And then you were telling me that there is an additional approximately 25.
MR. DeLUCA: Yes, which is 97.
THE COURT: Okay. Let's keep them separate.
MR. DeLUCA: Okay.
THE COURT: Now, these additional 25, are those the ones that haven't yet been signed?
MR. DeLUCA: Correct.
THE COURT: Okay. Let's take those off the table for a while.
Of the remaining 72, those have all been signed?
MR. DeLUCA: Yes. And 34 are of this vintage.
THE COURT: Okay. Of those 72, 34 are of this vintage. Ten are here. What's going on with the remaining 24 of this vintage?
MR. DeLUCA: They're not in production yet. They're not delivering electricity yet.
THE COURT: Okay. And are they involved in any litigation anywhere to clarify anything?

MR. DeLUCA: I do not believe so.

THE COURT: Okay. So then 72 minus 34 is 38.

What's going on with those 38?

MR. DeLUCA: Again, nothing, Your Honor.

THE COURT: Okay. So is there any litigation currently -- currently going on before the PUC besides these 10 that involve the interpretation that's at issue in this lawsuit?

MR. DeLUCA: In UM 1805 we have asked the PUC to actually do this interpretation for all of them of this vintage; and that was their order saying, no, we're not going to do it in 1805. In that case we have filed a notice of appeal, so it will be on petition for judicial review to the Oregon Court of Appeals.

THE COURT: And what was the reason that the PUC gave for why they weren't going to resolve the question in that case?

MR. DeLUCA: That it wasn't before them, that they felt that it was just a question that NPSI (ph), the association, had put before them.

THE COURT: So we do know that after this lawsuit was filed, PGE commenced UM 1931. There the plaintiffs in this case, defendants in that case, filed a motion to dismiss. And last week, in Order 18-174, the PUC denied the motion to dismiss, right?

MR. DeLUCA: Right.

THE COURT: Okay.

One of the statements that the PUC gave there, on page 4, was "the desire for uniform resolution." And they said that "The risk that a judicial decision could adversely impact the performance of our regulatory duties and responsibilities," as well as the need for or the desire for uniform resolution.

I'm going to be talking to the plaintiffs a lot more about that aspect of the PUC decision. What I'd like to ask you about is what they discuss on the next page, page 5; and that is how the PUC can resolve these without running afoul of plaintiffs' potential rights to a constitutional right to a jury.

And in light of what you said about *Snow Mountain*, I'm not quite sure how this all pans out, and I would like your assistance on that. Because if we look in the world of common law contracts in Oregon for a dispute over how to interpret a contract, we start with *Yogman*. Step 1 is to ask are there ambiguities, are there material ambiguities. If the answer is no, a judge, not a jury, decides that. Well, really, a judge, not a jury, decides whether there is an ambiguity. And if there is no ambiguity, a judge, not a jury, interprets and we are done; there is no jury issue.

Under step 2, though, of *Yogman*, if a judge at step 1

concludes that there is an ambiguity, then we go to step 2 of *Yogman* where the decider of fact can look at extrinsic evidence to see if they can answer the question, what did the parties intend?

Now, this is the common law methodology of adjudicating a disputed interpretation of contracts. Is it the -- and that's where a jury trial could come in. Is it PGE's position that that methodology, the *Yogman* methodology, does not apply in this case, basically under your *Snow Mountain* argument?

MR. DeLUCA: What we've argued is that this contract would fall under -- similar to how the Oregon courts interpret insurance contract provisions that are dictated by statute, which would follow the *PGE v. BOLI* methodology, as modified by *State v. Gaines*.

By the way, *State v. Gaines* is also clear that *Yogman* includes, at step 1, a look at extrinsic evidence.

THE COURT: To see if there's an ambiguity. But it's still a judge question, not a jury question.

MR. DeLUCA: Correct, still a judge question, not a jury question.

I'm sorry. I forgot the original question.

THE COURT: The original -- the basic question is does step 2 of *Yogman* apply -- step 2 of *Yogman* would normally apply under a common law contract methodology. Is it PGE's

position that it doesn't apply in this context, based upon your *Snow Mountain* argument?

MR. DeLUCA: Well, instead of *Yogman* step 2, it would be *PGE v. BOLI* step 2, which would be looking at the equivalent of legislative history, just like under the *Fox* case for the insurance contracts.

So we would be looking at, as the PUC said in its order of last week -- its order is considered the equivalent of rules. So we look at the history of this rule, which would be all the versions of this PGE-approved -- PUC-approved PGE standard power purchase agreement going back more than a decade, and all the different orders that the contract, every time they're modified, apply to.

For example, as we saw in Jindal declaration, the very first one, the first exhibit, this one was created in September 2015 as a modification to the prior one because of PUC Order 15-130. So we need to look at all the legislative -- the equivalent legislative history before that.

THE COURT: Now, I'm not as familiar with that approach as I am with common law interpretation, but it just doesn't sound to me like that's for a jury. Am I right or wrong on that?

Does the -- under this *PGE v. BOLI* approach, where their step 2 is substituted for *Yogman* step 2, is that a jury question?

MR. DeLUCA: It would not be a jury question even if it was just in this court, because it's looking at the statutory history. And it's declaratory judgment, so it's a judge question anyway.

THE COURT: So when the PUC states on page 5 that "We need not resolve NewSun QFs' claim that our exercise of jurisdiction violates its constitutional right to a jury," what are they talking about? How could there possibly then be a constitutional right to a jury trial on just the issue of how do you interpret the contract under the framework that you're giving me?

MR. DeLUCA: I believe that's the plaintiffs, because I believe that would be their burden there.

THE COURT: All right. So your position is there's no way, no chance that there's a right to a jury in this particular dispute.

MR. DeLUCA: Not on that issue that we're talking about now. There might be other issues that come up in the case where there's a right to a jury.

But I'd also like to add, Your Honor, that the constitutional right to a jury, if they have one, is not necessarily displaced by the PUC deciding this because, as the PUC said, it's concurrent jurisdiction. There's the issue preclusion -- there's the factor of issue preclusion, but under federal precedent, issue preclusion would apply to

the facts that the PUC finds, not necessarily to the legal conclusions.

THE COURT: Right. I understand that.

So does it matter, if I agree with you on a primary jurisdiction argument -- and I guess the answer is it doesn't matter to PGE, so we'll have to hear from plaintiff on that, but you can give me a foreshadowing.

Does it matter whether I dismiss the case without prejudice or whether I stay it pending further action by the PUC under primary jurisdiction? What's the right approach?

MR. DeLUCA: Either approach is equal.

THE COURT: If, as you just said a few minutes ago, that there may be a right to a jury on some issue, does it matter, in order to protect the plaintiffs' in this case right to a jury trial, whether I dismiss without prejudice or stay?

MR. DeLUCA: If you dismiss without prejudice, as long as it hasn't been dismissed twice, they can refile. It would be -- the issue preclusion analysis, if there is one, it would be the same in either scenario. And it really depends on what the PUC actually decides. They can duck the issue or answer in a way that's not in their complaint to this Court. The issue preclusion is contingent future. I'm not sure it would even apply.

THE COURT: How long would you expect, based upon normal practice at the PUC, it to be -- for us to get -- for

all of us to get a decision on the merits of the interpretation of the contract under the proceeding of UM 1931?

MR. DeLUCA: I understand from my co-counsel, most likely under a year --

THE COURT: Okay.

MR. DeLUCA: -- which is certainly less time than it would take for a Ninth Circuit appeal from a decision from here or a full jury trial here.

THE COURT: Well, I just -- I issued an order a few months ago. One of the parties didn't like it at all. They rapidly appealed to the Ninth Circuit, asked for expedited review; and on expedited review, the Ninth Circuit affirmed me. So it happens quickly.

Okay. You are welcome to say anything else you want right now if you want to. Otherwise, we'll turn to counsel for the plaintiff; and I'll then give you an opportunity to rebut.

MR. DeLUCA: Thank you again, Your Honor. I'll sit down.

THE COURT: Thank you.

MR. SHLACHTER: Thank you, Your Honor. Again, Robert Shlachter for plaintiffs.

Your Honor, I'd like to start with the issue that you focused on having to do with, you know, primary jurisdiction

and how does a Court or a jury go about analyzing the interpretation issue.

And there actually is a case that we've cited from the Third Circuit that really deals with this issue directly, and it's much different than what has been stated by opposing counsel. And that's the *Crossroads Cogeneration Corporation* case, which is a 1998 Third Circuit case that we cited.

And it says, quote, "The rights of the parties to an executed PURPA contract are to be determined by applying normal principles of contract interpretation."

And then PGE has said, well, the terms of the agency's approval of a PURPA contract, which is what happened here, may be highly relevant in determining the parties' understanding of the respective rights.

But the Court, in *Crossroads*, understood that and said, quote, "When those terms have relevance" -- which would be, you know, the terms of agency approval -- "they are relevant only in the context of the understanding of the parties, as reflected in an objective reading of the agreement and its approval."

THE COURT: Is that inconsistent with the way Oregon approaches it under *Snow Mountain*?

MR. SHLACHTER: Okay. Well, *Snow Mountain* actually was a case of a potential contract, not the actual contract being entered into.

So when we're dealing with PUC and PGE issues, that's the critical difference. Because PURPA was set up to give a lot of authority to FERC and then to utilities like PUC to come up with suggestions and ideas on how to encourage, you know, the cogeneration business, which was really forced upon the utilities, because it wasn't in their financial interest to have these qualifying facilities. They wanted to make their money on their own facilities.

And -- and the authority for the PUC to devise these contracts within the construct of PURPA, having fixed contracts for fixed prices for fixed terms, to encourage the building of these cogens -- you needed all that -- they had certain discretion allowed in coming up with those contracts. But once those contracts were entered into and executed, then the ability of PGE to tinker with, interpret, deal with it, ended.

THE COURT: So that's how you distinguish *Snow Mountain*, because under *Snow Mountain*, you say, it was before the contract was entered into. And although Mr. DeLuca says, well, we don't have two parties voluntarily entering into a contract if state law orders the utility to enter into it, well, under what circumstances the state utility must do it and what terms they must offer, that's governed by state haw and not common law of contracts. We do a *PGE v. BOLI* analysis. Fine. That's *Snow Mountain*.

But once the contract is entered into, whether voluntarily or involuntarily, you then go back to common law contract interpretation principles. That's what you say and that's what *Crossroads* --

MR. SHLACHTER: Right. And under *Crossroads*, what you do is you also take into account the -- you know, the statutory or the PUC intent, which I want to get to in a moment, okay. But it's still a basic contract interpretation issue. It's a little bit different because there's a certain kind of history to it.

But I beg to differ a little bit with the characterization that these are involuntary contracts. The contracts are approved by PUC under the PURPA, FERC dynamics, okay. But no one is holding a gun to our head to sign it.

THE COURT: Not to yours.

MR. SHLACHTER: Okay.

THE COURT: But if PUC felt it was not in its economic interest or its rate holders' economic interests to enter into these contracts, do they have the right not to enter into them.

MR. SHLACHTER: I believe -- I'm not an electricity expert, okay. My understanding --

THE COURT: But you are powerful.

(Laughter.)

MR. SHLACHTER: But my understanding is they must

offer to these QF facilities the contract, and these contracts have to be approved by the PPA -- I mean, the PPAs have to be approved by the PUC.

But part of this beautiful PURPA scheme -- which, again, the utilities don't like -- is it keeps the QFs out of this mess at PUC. They're not regulated, okay. And because the drafters back in 1977 and '78 realized that we've got to protect these little start-up companies because we're trying to be energy independent in the light of the oil crisis, okay, that's why there were some restrictions on utilities that are favorable to people like the QFs.

So what we have now, 40 years later, though, companies -- utilities like PGE are still quite upset about having to even be in this situation of having to offer contracts to people like these start-up QFs like my client Jack Stevens, who is here. You know, these are people just trying to put together a couple solar energy facilities, which I think is good for the country and for our independence.

But we have the situation that once these contracts are executed, then we're back into a different realm of analysis.

The other thing I wanted --

THE COURT: You know, if you don't mind, I'll ask you the same question I started with Mr. DeLuca, then.

MR. SHLACHTER: Right.

THE COURT: So once we are into that analysis, what's going to be the plaintiffs' argument that "The option is available for a maximum term of 15 years. Prices will be as established," blah, blah, blah, "effective at execution."

That execution doesn't mean execution?

MR. SHLACHTER: Right, okay.

THE COURT: Not that I want to just get to the end of this whole lawsuit too quickly, but I am curious.

MR. SHLACHTER: Well, we could try it, you know, tomorrow if you want to.

THE COURT: I have the rest of the day -- no, I don't have the rest of the day.

All right.

MR. SHLACHTER: One of our concerns is justice delayed is justice denied. And the cases like *Astiana* and others talk about one reason for not exercising or deferring under primary jurisdiction is to avoid further delays. And one of the issues we have here is it's not really clear whether there is claim preclusion or not. We would argue not, with respect to the PUC, as I understand it today.

And we may -- you know, we're just delaying more. And I'll get into more of the specifics on primary jurisdiction. But we have a contract term which deals with the timing from the date of operation. You know, they talk about contract years.

And then in that section that you focused on, which is on page 29, which I handed you a blowup for, "The option is available for a maximum term of 15 years. Prices will be established at the time the standard PPA is executed."

Okay. So at execution, the future prices are set for that -- for that period.

Now, probably some of the best evidence we have of the intent, besides what the clients will testify to, is the PUC itself, because that will be part of the analysis, as I said, under *Crossroads*. You'll look at the history.

And what I did here was just make a very simple graphic of --

THE COURT: If you have two, by the way, that would be great.

MR. SHLACHTER: I've even got more.

THE COURT: One for me and one for Maile, please.

MR. SHLACHTER: (Handing).

What I'm about to talk to you about in terms of these quotes is this shows why -- another big reason why we shouldn't defer, whether you call abstention, primary jurisdiction or whatever, is because we have a simple issue and the PUC has already spoken on it.

THE COURT: Then it won't take them too long.

MR. SHLACHTER: No, but I'll explain why we're not crazy about going back to the PUC and how we love it here in

federal court, plus it's very close to my office and other reasons, but --

THE COURT: I will share, by the way, the concern I have about that. Even though I think you're perfectly right to want to be in federal court generally and close to your office generally, I'm concerned about the factor that I see discussed by the Oregon Supreme Court in *Dryer* (ph), by the Oregon Court of Appeals in *Adamson*, under primary jurisdiction, namely the desirability of uniform resolution. They talk about that in *Dryer*. The Court of Appeals in *Adamson* says the second factor of primary jurisdiction is "the need for uniform resolution of the issue."

And I think it would be a significant problem if I were to decide this case on 10 contracts, 10 PPAs, in one direction; and some other Court or the PUC or somebody -- because I have no binding authority -- would decide it differently on either the remaining 62 that have already been signed -- and I don't know what to do about the other 25. I'll put them out for right now.

But we have 62 that have already been signed. If they contain essentially the same material terms, it can't be a good way to run the system to have different Courts interpreting the same language in this context differently.

Am I wrong?

MR. SHLACHTER: Well, Your Honor, I would respond --

I would respond this way. Part of the analysis may be under a contract analysis of the express intent of the parties at the time they enter into it. And there may be some -- some differences in the language between different contracts.

What is interesting is that it was PGE who kept parties from intervening in the Northwest matter. And so now they're saying, "Oh, geez, we've got to have everything all together." And I'll get into it. It's what I'll call the chutzpah defense, which I'll define in a minute for the court reporter.

Okay. But --

THE COURT: You don't have to define it. You just do have to spell it.

MR. SHLACHTER: C-h-u-t-z-p-a-h, at least the way I understood it growing up in Cleveland, Ohio.

Okay. But let me -- I want to, for a moment -- I will get to the issue of uniformity. But that's one aspect of primary jurisdiction. First of all, you need it -- you need to require expertise. It's got to be something special. And it has to be a situation, which does not exist here, where the federal government, not the state government, but the federal government has delegated or set up a system whereby the administrators -- in this case, the PUC -- would be charged with making a decision as to an executed contract.

THE COURT: Why do you say the federal government?

Because under primary jurisdiction involving federal agencies, we look to federal law and then they see what Congress has set up. But we're here looking at -- under diversity principles, I think, we're looking at state primary jurisdiction. And that is described very clearly by the state Supreme Court, Oregon Supreme Court, in *Dryer*, by the Oregon Court of Appeals in *Adamson*.

It's pretty darn similar to federal primary jurisdiction, with the one big exception is we don't look to see what Congress has done; we look to see what the state legislature has done.

So why do you say it has to be whether Congress has delegated --

MR. SHLACHTER: I'm going to have to think about the cases on that point.

THE COURT: Take a look at *Dryer* and *Adamson*, because they basically adopt the federal version of primary jurisdiction with federal agencies at the state level with state agencies.

MR. SHLACHTER: Right, but here the --

THE COURT: And I'm trying to decide whether to take --

MR. SHLACHTER: To understand, what we're starting with is a federal system. That's PURPA.

THE COURT: No. You told me we're starting with an

Oregon common law contract --

MR. SHLACHTER: No, no, no.

THE COURT: -- and the Court has to interpret a common law contract.

MR. SHLACHTER: Yes, there's a common law contract that comes out of PURPA. But in terms of primary jurisdiction, you have PURPA, which is the federal statute that basically says, "We own the space."

THE COURT: Except what they've delegated to the Oregon PUC.

MR. SHLACHTER: Well, they delegated to FERC. And then FERC delegates somewhat to utilities -- I mean, to commissions like PUC.

THE COURT: And that's where we get in with state primary jurisdiction.

MR. SHLACHTER: But the issue is what that delegation is. It's coming from the federal court. It's not -- I mean, it's coming from the federal system of PURPA. You know, the PUC doesn't have authority to do stuff for these kinds of utility regulations of QFs that don't come from FERC and then from PURPA. So it's different than what I believe you're saying about *Adamson* and *Dryden* -- or *Dryer*.

THE COURT: *Dryer*.

MR. SHLACHTER: Okay. Because it's a limited delegation, so it's important to the primary jurisdiction

issue.

So what is being delegated? What has never been delegated from PURPA or FERC is the right to just interpret or change these contracts.

THE COURT: Of course. I completely agree with you on that.

MR. SHLACHTER: But that goes right to the issue of primary jurisdiction.

THE COURT: But you said that -- well, let me take it back. I want to be clear. I'm not sure if you said interpret. You said to change. I agree, the PUC has no authority, delegated or otherwise, to change a contract that's been entered into. But did you also say they have no authority to interpret it?

MR. SHLACHTER: Right.

THE COURT: I'm not sure I agree with that. What's your basis for that?

MR. SHLACHTER: Okay. There is no case that says that the -- something like the PUC has the right to interpret a disputed term after the contract was entered into, okay.

THE COURT: If one of the parties to that dispute is a regulated industry, is a public utility under PUC's jurisdiction, then don't they have the authority under -- under ORS 756.500 to resolve disputes?

MR. SHLACHTER: Well, again, Your Honor, I go back

to -- it has to do with how is everything created. The PUC's right to regulate these QF situations comes only from FERC, which then comes from PURPA. And PURPA and FERC never delegated to the PUC the right to make decisions on interpretation of enforcement of executed QF contracts, okay. The only time this has come up is when there's a complicated issue of -- of something like avoided costs and whether it was calculated properly or not.

But what we have here is a situation where the PUC -- and that's what I think I handed out to you -- the PUC has already spoken on the intent. So there's no esoteric expertise issue or anything needed to go to the PUC, so -- at this stage.

So the PUC, back in 2005, found that fixed rates for 15 years was "necessary to ensure the terms of the standard contract, facilitate appropriate financing for a QF project," which was what FERC had directed. We need stability for the QF projects.

Then last year, PUC Order 17-256, PUC ordered that all future PGE standard contracts must expressly state that the 15 years of fixed prices, quote, "commence when the QF transmits power."

Then it also stated, quote, "Prices paid to a QF are only meaningful when a QF is operational and delivering power to utility. Therefore, we believe that to provide a QF the

full benefit of the fixed price requirement, the 15-year term must commence on date of power delivery," close quote.

And then the coup de gras was -- you know, PGE wasn't happy with that, so then they try to have a reconsideration motion. And then the PUC, two months ago, says, "We also" -- and this is critical -- "We also reject PGE's characterization that our decision constituted the adoption of a 'new policy.' Rather . . . our decision was simply to affirm the policy with respect to the commencement date for the 15-year period of fixed prices. This policy, which had been reflected explicitly in standard contract forms for PacifiCorp and Idaho Power Company, had been, up until the filing of PGE's most recent standard contracts, neither a source of controversy nor litigation by either a QF or a utility."

So what we have here is instead of trying to worry about primary jurisdiction, we have a situation where the PUC has already spoken on the policy issue.

THE COURT: So let me make sure I understand your argument.

MR. SHLACHTER: Yes.

THE COURT: I'm going to try to repeat it back to you. Because what I asked Mr. DeLuca in the beginning, what I just asked you midway through your presentation, was what's the dispute on the merits?

And I'm looking at the -- page 29, Schedule 201. It

reads -- and I'll just paraphrase it. I'll skip the middle stuff, but it basically reads "This option is available for a maximum term of 15 years."

MR. SHLACHTER: Right.

THE COURT: "Prices will be as established," blah, blah, blah, "effective at execution."

And so I say, "effective at execution" looks like it means signing. That's PGE's position. That's not yours. What's wrong with that?

And your response is "Well, I'll tell you what's wrong with that. Look at all the things PUC has said in PUC Order 05-584, PUC Order 17-286, PUC Order 18-079. It will become quite persuasive that when you look at all of those PUC orders and the contract language," that the contract language should be interpreted your way, not PGE's way.

Do I have you right?

MR. SHLACHTER: Yes. There's even more, though.

Okay. Because you were focusing on the issue, "Prices will be established at the time the standard PPA is executed." Okay. So there's schedules attached.

THE COURT: By the way, isn't that what the dispute is here?

MR. SHLACHTER: Yes.

THE COURT: When do prices get established?

MR. SHLACHTER: No, I agree. No. No.

Okay. Prices are -- okay. There are different things. One is establishing prices, okay. And one is the length of the fixed price aspect of this contract. There are two concepts.

THE COURT: I thought it's always 15 years, but starting from when.

MR. SHLACHTER: Right. That's the issue, is 15 years starting from when, but the price schedule is a little more complicated, okay. Because what you're doing is at the time of execution of the contract, projections are made on avoided costs.

Okay. I hope I'm saying this right because, again, I'm not an energy expert. I'm doing the best I can.

THE COURT: Maybe we should send it to the PUC.

MR. SHLACHTER: I'll deal with my own primary jurisdiction later on that.

Okay. So a schedule is set up that has like 25, 30 years of pricing, whatever. Okay. And so the key part of this case is the standard fixed pricing. I guess it's called renewable -- standard renewable fixed pricing.

Okay. Now, it's set at the time the contract is entered into, the schedule is set. The reason? So you can get financing, okay. I mean, discounted cash flow and, you know, it happens now --

THE COURT: I get it. I get it.

MR. SHLACHTER: Okay. But the price, the particular price in the schedule, kicks in when you go operational.

THE COURT: Right.

MR. SHLACHTER: Okay. So Wal-Mart -- if I'm building a building for Wal-Mart and we have a fixed -- the first 15 years of the lease is set, you know, if I tell them, "Oh, no, when I build it in three years, you'll only get it for 12 years," they'll say, "What are you talking about?" That's what this case is about, okay. It's a Wal-Mart building situation.

So for financing purposes they have to set the fixed prices in advance. So that's why our position is even stronger than I think Your Honor has articulated.

THE COURT: So when I look at page 29, even though prices will be set at execution, the real dispute is when it says "The option is available for a maximum term of 15 years," the real dispute is 15 years from when? Execution or commercial operation?

MR. SHLACHTER: Right, right.

And, of course, we're arguing that to argue against that is nonsensical. You know, the whole industry -- you know, it's like they're the outlier. PGE is the outlier. Why? Because they don't want these QFs. They would love us to fail and not build a facility.

THE COURT: And part of your evidence for why the

contract should be interpreted the way you're advocating are these three PUC orders, among other evidence.

MR. SHLACHTER: Right.

THE COURT: Now, if I end up agreeing with you and then some of the other 62 QFs say, "Well, we want that same interpretation," and they file with the court, and maybe either by random assignment they go to a different federal district judge after our case is over, or maybe they go to state court, maybe they go to the PUC, and they get a different ruling, that can't be good.

MR. SHLACHTER: Well, okay. So there are two scenarios here. Again, part of the environment is the -- what may be involved are negotiations that go on on these individual contracts, okay. But the basic language for many of these contracts are the same.

THE COURT: Right. I get it.

MR. SHLACHTER: Okay. So there's a context. In contract cases, there's a context.

Okay. Now, in terms of -- I disagree with -- this is an important point. I disagree with Mr. DeLuca's comment on claim preclusion going from the PUC to federal court, because there are tremendous issues here, whether it's a really indelegable decision to the PUC that's binding as opposed to advisory, and we'd be litigating over that.

THE COURT: Even if you're right, under the doctrine

of primary jurisdiction, even if it's not claim preclusion, the Court gets the benefit of the regulatory agency's expertise on an issue.

MR. SHLACHTER: Right.

THE COURT: And if we were just talking about how to interpret a normal contract, you know, I'm not sure I'd need the PUC's expertise. But when you're telling me that part of the argument for why I should rule in your favor is when I read three excerpts from three different PUC orders, this is not my area of expertise. This is the PUC's expertise. And maybe I should defer to it, even if there is no claim preclusion.

MR. SHLACHTER: Okay. The idea of a narrow, straightforward interpretation issue on the 15-year start date with what the PUC has already spoken about, to give the statutory history, to me, it would be inefficient at a minimum -- I have other words -- to send the case on a non -- you know, esoteric avoided cost analysis kind of case to the PUC for what may very well be an advisory opinion, because it's not done in those kinds of cases.

The cases that have the primary jurisdiction is it's clear that the -- that the agency has the right to do this interpretation or the Court, to make the decision, and it's clear from the law. We don't have that here. And what also we don't have is the -- it doesn't need specific expertise.

THE COURT: But you're telling me that one of the arguments that show that you're right on the merits is this chart that you've headed or labeled "The Intent and Policies of the PUC Regarding the 15-Year Fixed Price Period Are Already Established."

And my guess is that PGE is not going to agree with you on the meaning and interpretation and import of the PUC -- what the PUC has already done. I guess that because if they were to agree with you and if you're right, we wouldn't be here. This case would be resolved.

So if they don't agree with you, then I have to figure out, if this case remains with me, what was the meaning of the intent and the policies of the PUC on these various orders? And wouldn't I be benefited -- whether it be issue preclusion or even just advisory, wouldn't I be benefited in having to know -- in learning what the PUC says on that question?

MR. SHLACHTER: Well, it's an interesting question, the way you put it. Knowledge is always -- you know, it's always great to learn more. And in every primary jurisdiction case, geez, it would be great if I -- if I get a little more information from the administrative agency, wouldn't that be wonderful. But that's not the standard, because it's not, oh, let me tee up an issue because I may gain some insight so I'll send it back to the agency. That's not the issue. You have

to weigh that issue against the *Astiana* standard of delay.

And justice delayed is justice denied here, because we can't avoid the construct that we're in. We have -- PGE and utilities like them hate the QF system. It was forced on them, kicking and screaming, okay, in 1978. And I remember the whole -- I was in D.C. at the time, okay. I remember all the brouhaha, okay. So kicking and screaming. They still don't want it, okay.

And now any delay here, knowing the financing issue, which PURPA has said is the critical reason why we set it up this way for the QF, with the advisory opinions and going back and forth and whether it's even -- you know, whether it's claim preclusion on behalf of the decision of the PUC, the delay kills us. It kills us. Because we're supposed to be operational, with some -- there's some nuances to the date. But the goal is to be operational within three years, okay.

Now, you've got one party here who -- who wouldn't let anybody intervene, by the way. I mean, just think about this, wouldn't let anybody intervene. That's the chutzpah defense: "I want uniformity, but I won't let you intervene." Okay.

So what we've got, they don't want us to build these QFs and basically compete with PGE, who makes more money on their own facilities. So the more this gets dragged out, the more likely it is we don't go operational. And then we have

zip, okay.

Now, my point on the PUC is it has to do with the case authority that talks about whether it's helpful to get some sense from the -- from the agency or not. We're saying, you know, even without these PUC orders, we don't need them, okay. We don't need them. But the fact that they exist shows there's no need to get more intent. They've spoken. That's why I've cited these things, okay.

But in our view, we win regardless of the PUC orders, because the whole industry -- it's like PGE is like marching over there to quash these QFs. And they have what I call nonsensical interpretation, that you get 15 years fixed because, you know, that's what you need in order to operate and raise money. But, oh, by the way, it's really not 15 years. That's what they're saying.

So under primary jurisdiction, Your Honor, on the -- I would argue it's not necessary that -- the delay issue is tremendous. And the case law, you know, talks directly about that delay issue.

And if you have other questions --

THE COURT: I have one more question.

MR. SHLACHTER: Yes.

THE COURT: I'm not going to rule from the bench. I'm going to take what both of you have to say, go back and reread some of the key cases, and I'll get you an opinion

fairly soon.

But if it turns out that I find primary jurisdiction to be persuasive, does it matter to the plaintiffs whether I dismiss without prejudice or just simply stay or abate pending PUC action? And, if so, why?

In other words, if you lose, how do you want to lose?

MR. SHLACHTER: That's a tough question.

THE COURT: I know.

MR. SHLACHTER: Okay. I would probably say it would be a stay.

THE COURT: By the way -- and we can talk -- let's talk it through right now, because I'm not a hundred percent positive that a stay is immediately appealable, whereas a dismissal without prejudice is a final judgment, and you can appeal that right away.

MR. SHLACHTER: Well, so I would need to confer with my colleagues on that, so I'm not going to give you a definitive answer, so I take back what I just said.

THE COURT: Okay.

MR. SHLACHTER: But the one other comment that I want to make that my colleague, Keil Mueller, mentioned is that the uniformity that we're talking about is the uniformity of a regulatory system, not necessarily -- and not needed -- a uniform interpretation of the contract, because there are -- there are other factors that go into the creation of a

contract.

And so what I want to avoid is against this deadline that we've got of justice delayed is justice denied and our need to get the financing, that the matter -- because it's always nice to get more information, but to send it to the PUC, which is likely an advisory opinion because there's been no PURPA/FERC delegation to them to decide this kind of issue, even though they would love to because that's what they do -- you know, they make decisions. They're trying to tell you that they have primary jurisdiction, but that's not their decision obviously. It was a little bit overreaching, in my view, to even suggest that.

So we will have to get back to you on this issue of if you do rule that way against us, how we deal with it. Hopefully I never have to cross that bridge. But we will get back on that.

THE COURT: And I guess on the justice delayed is justice denied issue, I suppose if I agree with you on this motion --

MR. SHLACHTER: Yes.

THE COURT: -- and then agree with you on the merits of the interpretation, whenever we resolve it on the merits -- you know, after a bench trial, motion for summary judgment, whenever -- and if PGE takes it up on appeal and the Ninth Circuit, a year and a half after they get the appeal,

then says, you know, primary jurisdiction should have applied, then you're in the worst of all possible situations, right, especially if the PUC stops what they're doing if I rule in your favor on this motion.

If I rule -- if I deny the motion to dismiss, we're going forward. There's a possibility the PUC may stop what they're doing. I don't know. I mean, I suppose you may then come back and ask me to order them to stop their proceedings. And if I do and if they stop and the Ninth Circuit eventually says I got it wrong, it should have been back to the PUC under primary jurisdiction, and then they have to start up all over again, we won't get any answer from them, binding or otherwise, binding or advisory, probably for about three years. Then you're in the worst of all possible situations.

MR. SHLACHTER: Well, Your Honor, we thought about it. But we would want to move very quickly in federal court, obviously. Okay. We think with a record and common sense, this is a no-brainer issue. Okay.

THE COURT: Let's suppose we go to a merits decision in three or four months.

MR. SHLACHTER: And we win. Okay. Let's assume -- I mean, obviously that's my wish. So we win. Okay. They take it on appeal.

Okay. Now we've got a situation where we have the PUC has spoken three different times, okay. We have the

federal court and/or a jury deciding it. Now it goes up on appeal. We're in a much better position with our finance people. This whole thing is about financing. We need the financing now. With this cloud -- which PGE loves to have this cloud, because it impedes us every day.

So can we get finality? No. I mean, with appeals, you know, it may take at least a year or more. I mean, I used to clerk on the Ninth Circuit. I know how long things take. Okay.

THE COURT: And it's taking them even longer when they no longer have your assistance.

MR. SHLACHTER: But I was in Hawaii. I didn't have a lot to do. I just wrote opinions all the time. I had the best clerkship in the world, Judge Choy.

MR. DeLUCA: Except for Judge Simon.

MR. SHLACHTER: Well, but he's not Ninth Circuit. I had the best Ninth Circuit clerkship that anyone could ever have had in the world.

Okay. So I guess I'd have to get -- well, first of all, I'm not concerned about the issue you're talking about, about the Ninth Circuit appeal, because I think there's such a body of PUC statements and a ruling positive here, that that will -- we'll be in good shape on the financing.

I'm not sure. I could be overruled by my client on that, but --

THE COURT: Is there a procedure in the PUC to ask for expedited consideration?

MR. SHLACHTER: That I don't know. I'd have to check with my colleague, Greg.

UNIDENTIFIED SPEAKER: In theory. I don't know.

THE COURT: Because your point about needing certainty for financing is a very legitimate point. I get that.

MR. SHLACHTER: All right. Thank you, Your Honor.

THE COURT: Okay. Thank you.

Mr. DeLuca. Would you start, Mr. DeLuca, by talking about *Snow Mountain*, because Mr. Shlachter said that *Snow Mountain* did not involve a completed contract, but contracts that have not yet been entered into, and that's why a *PGE v. BOLI* analysis might apply, if we're trying to figure out what does a party have to do or not have to do in terms of a contract. But *Snow Mountain*, it doesn't do what you say it does if it does not involve completed contracts and a question of contract interpretation. Is he wrong?

MR. DeLUCA: *Snow Mountain* is accurately, as we all described, about contract formation. But predicting what the Court of Appeals in Oregon would do, which is what a Court in diversity would have to do, I can't see how it could say, "Oh, it's not common law before it's formed, but then becomes common law once it is formed."

THE COURT: Well, here's why, because under normal circumstances nobody is forced to enter into a contract. If state law, statutory law, requires a party to enter into a contract, PGE or a regulated industry, and under certain terms, well, in figuring out what does that state law really require them to do, I totally get it's a *PGE v. BOLI* and *Gaines* analysis, because you're interpreting the statute. It's not a common law analysis.

But once the contract has been entered into, regardless of how we get there, be it by voluntary marriage or by shotgun marriage, then if somebody wants to enforce or interpret a contract, the Oregon Supreme Court, through *Yogman* and related common law cases, tells us how to do it. And that seems like the right analysis to me. Does *Snow Mountain* really say anything to the contrary?

MR. DeLUCA: *Snow Mountain* doesn't go as far as saying what happens once they're signed. But I would take your point two different ways. First, even if it is common law analysis, that's not weighing very heavily against primary jurisdiction. Other courts have said primary, even if it's common law --

THE COURT: I agree. That's a different issue.

MR. DeLUCA: All right. Second --

THE COURT: When I took the bench, I was leaning towards your position on primary jurisdiction, not on

ripeness, but I was not really understanding what the PUC was talking about with their statement that the instant proceeding is not a common law contract dispute. I'm not quite sure I understand them. And if I do understand them, I'm not quite sure I agree with them on that.

And I think that Mr. Shlachter's comments about *Snow Mountain* strikes me as persuasive, but I wanted to give you this opportunity to rebut that. But I agree, that doesn't have anything to do with primary jurisdiction.

MR. DeLUCA: So under *Fox*, the Oregon Supreme Court looked at another situation where parties to a contract are not quite in the same shotgun situation as here. *Fox* was the car insurance situation, where the Court said that they're going to look at it under *PGE v. BOLI*.

THE COURT: And what was the question in *Fox*? I don't recall that.

MR. DeLUCA: The statutory coverage obligation.

THE COURT: Right. So if the statute said -- okay. So I guess this is where you're going. If a statute says you must provide the terms of X, Y, Z in an insurance contract, then the insurance company provides it, the parties dispute over what term X, Y, Z means, and the Oregon appellate court in *Fox* says, well, it's a relevant analysis to ask, what was the legislative intent behind the requirement of X, Y, Z, and that's an important consideration in deciding what X, Y, Z

means, right?

MR. DeLUCA: That's exactly -- pretty much what it says: "Consequently, we attempt to determine the legislature's intention in enacting that statute rather than the parties' contractual intention in entering into the insurance contract."

THE COURT: All right. I can see that. All right. That's a good answer.

MR. DeLUCA: I'd like to go back a bit about what plaintiffs' counsel ended with, which was the timing. And growing up in Jersey City, we didn't spell "chutzpah," so I'm not sure how to spell it here, but we did submit information that shows that the plaintiffs knew about this issue before they signed this contract, and they voluntarily decided not to get a resolution of it then. And that's in the --

THE COURT: I recall that.

MR. DeLUCA: Okay.

THE COURT: Let me ask you this question -- and feel free and I encourage you to speak with your client before answering me.

If I grant your motion on the basis of primary jurisdiction, can you commit to me now that if the plaintiffs in this case, the defendants in UM 1931, seek expedited resolution before the PUC, your client will not oppose that?

Take your time.

MR. DeLUCA: We would not oppose it.

THE COURT: Pardon me?

MR. DeLUCA: We would not oppose it.

We also have a second commitment that we would make, that if PGE receives a decision adverse to it at the PUC, we will not come back to this Court to make a collateral attack on the PUC decision. It will not come back.

We retain our right to appeal to the Court of Appeals if the decision at the PUC is without substantial basis, but we will not collaterally attack it, which is one of the factors in primary jurisdiction, that it could moot the entire case here.

I'd also like to address one thing that Mr. Shlachter said about primary jurisdiction, that the Court has to have expertise. But that's not what the *Syntek* case says. It says require expertise or the uniformity in administration.

THE COURT: I know. I know.

MR. DeLUCA: And there are other instances where the Courts have looked at the Oregon PUC interpreting a contract. We provided the Court in the briefing the *PaTu* case -- which, by coincidence, Mr. Adams was on the briefing in that situation as well -- where the Oregon PUC interpreted the contract between Portland General Electric and PaTu, which is P-a-T-u, and then they went to FERC about the same issue.

And then FERC, that decision got appealed to the D.C.

Circuit. And the D.C. Circuit, FERC, none of them mentioned any problem with the fact that the Oregon PUC did contract interpretation when they looked at the dispute there. None of them had an issue or dispute or said, "Oh, you guys can't do that" whatsoever. It's clearly within the bounds of them doing that.

And I think this case is more similar to the *Verizon* case that Judge Mosman decided, where there was an issue that was -- the pole attachment, a dispute between PGE and a successor to a company that was putting on telecommunications devices. And Judge Mosman said, "Sure, it might become common law contract, but still we're going to push it over -- the primary jurisdiction over to the PUC and get information from them, even if it's advisory."

So there's a contention that PGE opposed intervention. PGE opposed a late intervention in the fall of 2017. PGE did not file anything to oppose when plaintiffs here, defendants -- or were then defendants below, sat in through a scheduling conference in December 2016 and then voluntarily decided not to participate in that proceeding in UM 1805.

And concerning -- about financing, plaintiffs have quoted selectively from the 2005 order, as I'm sure the judge has reviewed in Exhibit 3 to the first Jindal declaration. At the --

THE COURT: I may have, but I don't remember it right now.

MR. DeLUCA: Sure.

It's very clear about the 15-year issue. At the very beginning of the summary, the bullet points about the eligibility -- underlines eligibility for and term of standard contracts, end of underlining.

The third bullet point: establishing a maximum standard contract year of 20 years, allowing a QF to select fixed prices for the first 15 years of standard contract, requiring the selection of market pricing for the last five years.

It reiterates the same thing on page 20 of its order, which is saying that "Given our desire to calculate avoided costs as accurately as possible and the testimony of several parties that avoided costs should not be fixed beyond 15 years, we are persuaded that the standard contract prices should be fixed for only the first 15 years of the 20-year term."

We've got it quite clear, going back all the way to 2005. And the PUC would be able to look at all the different versions and orders that it had done between then and 2015 to decide what it meant when it approved the contracts in 2015.

Also, one other bit about the contract interpretation possibly avoiding a jury trial is in Section 17 of their

standard PPA. There is an agreement that they actually remain subject to the authority of the PUC: "This agreement is subject to the jurisdiction of those governmental agencies having control over either party or this agreement."

THE COURT: I'm not sure that is an unequivocal waiver of a jury trial sufficient to pass Seventh Amendment muster, so let's not go there.

MR. DeLUCA: Sure.

Your Honor, any other questions?

THE COURT: Not at this time. Thank you.

MR. DeLUCA: Thank you, Your Honor.

THE COURT: Any further comments, Mr. Shlachter?

MR. SHLACHTER: The only thing I'd like to mention is on the *Fox* case, which dealt with incorporating law into insurance policies, one of the differences between that case and our case is there is no statute or regulation that dictates when the 15-year fixed price period begins. So it's much different than the *Fox* situation.

But, Your Honor, I appreciate the time. We need to -- I'm sorry.

(Plaintiffs' counsel confer off the record.)

MR. SHLACHTER: I think I might have mentioned before that the standard in the industry, that PGE does not mention in its papers, is that the 15-year fixed period runs from COD, which I think is the operation date or when we're able to

deliver energy.

I think you had some questions to us that I'd have to confer with my clients on.

THE COURT: The main question would be: If I rule against you, if I grant the motion to dismiss or alternative motion to stay, because that's maybe what it is -- yeah -- does the plaintiff have a preference as to whether it should be dismissed without prejudice or the stay should be granted and the Court retains the case under a stay, in light of -- in deference to a PUC action? When do you think you'd be able to give me an answer on that?

MR. SHLACHTER: Hopefully soon, within --

UNIDENTIFIED SPEAKER: Stay.

MR. SHLACHTER: What?

UNIDENTIFIED SPEAKER: Stay.

MR. SHLACHTER: Hold on one second. Maybe I can give you an answer now.

THE COURT: I was going to ask by the end of the day, if possible.

MR. SHLACHTER: I'm not going to be around. I'm about to catch a plane.

THE COURT: Okay.

MR. SHLACHTER: Can I just confer for one minute?

THE COURT: Yes.

(Plaintiffs' counsel confer off the record.)

MR. SHLACHTER: My client and colleague, who really understands energy industry -- that's Greg Adams. I don't know if I introduced him. He's sort of the counterpart to Mr. Lovinger. He works with a lot of QFs, and he knows this stuff.

Conferring with them, we would, in the unhappy circumstance, were you going to dismiss or stay, we would prefer the stay route.

THE COURT: Understood.

And, by the way -- and I'll take it under advisement. And if that unhappy circumstance were to come about, at least you could benefit from the knowledge that you've extracted two major consolation prizes here. Because if I do grant the motion to stay, I will record in the opinion that PGE has committed that it will not oppose plaintiffs' expedited consideration on the merits decision before the PUC, and PGE will not collaterally attack the PUC's decision in this court if it's adverse to PGE.

So some people don't walk away with any consolation prizes.

MR. SHLACHTER: I would like them to say also they would not appeal, if they really wanted resolution.

THE COURT: They didn't say that, and I didn't ask them that. You can discuss that with them on your own.

MR. SHLACHTER: Thank you, Your Honor.

THE COURT: Thank you.

I'll take it under advisement. I'll try to get a decision out in the next few days.

MR. SHLACHTER: Thank you.

(Proceedings concluded.)

--oOo--

I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-titled cause. A transcript without an original signature, conformed signature or digitally signed signature is not certified.

/s/ Nancy M. Walker *6-11-18*

NANCY M. WALKER, CSR, RMR, CRR
Official Court Reporter
Oregon CSR No. 90-0091

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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

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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.

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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.

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[3] *Id.* §§ 1.33, 1.6, and 4.2.

[4] *Id.*, Ex. D at 201-12.

[5] *Id.*

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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

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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.

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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).

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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).

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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.

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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.

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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.

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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]

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[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.

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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).

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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.

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

[29] *Id.*

[30] *Id.*

[31] NewSun PPAs § 2.2.2.

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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.

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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.

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DATED this 8th day of January, 2018.

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