BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1877-UM 1882, UM 1884-UM 1886, UM 1888-UM 1890

In the Matters of BOTTLENOSE SOLAR, LLC; VALHALLA SOLAR, LLC; WHIPSNAKE SOLAR, LLC; SKYWARD SOLAR, LLC; LEATHERBACK SOLAR, LLC; PIKA SOLAR, LLC; COTTONTAIL SOLAR, LLC; OSPREY SOLAR, LLC; WAPITI SOLAR, LLC; BIGHORN SOLAR, LLC; MINKE SOLAR, LLC; HARRIER SOLAR, LLC, Complainants, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	COMPLAINANTS' SUPPLEMENTAL RESPONSE

I. INTRODUCTION

The Complainants' Bottlenose Solar, LLC, Valhalla Solar, LLC, Whipsnake Solar, LLC, Skyward Solar, LLC, Leatherback Solar, LLC, Pika Solar, LLC, Cottontail Solar, LLC, Osprey Solar, LLC, Wapiti Solar, LLC, Bighorn Solar, LLC, Minke Solar, LLC, and Harrier Solar, LLC (collectively the "Complainants") file this Supplemental Response in response to Portland General Electric Company's ("PGE's") Motion for Summary Judgment and in support of Complainants' Cross-Motion for Summary Judgment. In a separate proceeding, PGE has taken a contrary and inconsistent position

regarding legally enforceable obligations ("LEOs") that the Oregon Public Utility Commission (the "Commission") should consider prior to issuing a decision in this proceeding. Specifically, PGE asserted in another case, that once a power purchase agreement ("PPA") is signed, it supersedes any LEO that could have been formed prior to the date of contract execution. This is contrary to the position PGE took in these cases that the way to preserve a LEO to older rates is to execute a PPA at current rates while litigating the issue of whether it is entitled to the older rates. PGE's overall position appears to now be that, if the Commission agrees with a qualifying facility ("QF") on a disputed issue regarding the rates or contract terms, then the QF will only be eligible for the rates in effect at the time ultimate resolution of its case, which could be years after the genesis of the dispute.

II. BACKGROUND

On May 31, 2017, each of the Complainants tendered executed PPAs to PGE at the avoided cost rates then in effect. PGE refused to execute those PPAs, arguing that they were not final draft executable PPAs prepared by PGE and thus that Complainants had not established LEOs entitling them to the then-existing rates. PGE's position at the time was that Complainants were instead required to accept the avoided cost rates that went into effect on June 1, 2017. In early August 2017, each of the Complainants subsequently filed these complaints against PGE requesting that the Commission issue an order directing PGE to enter into PPAs at the pre-June 1, 2017 avoided cost rates.[1]

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[1] The Complainants and PGE have filed cross motions, each arguing that as a matter of law, and based on agreed upon facts, they are entitled to summary

During the pendency of these complaints, PGE's avoided cost rates changed and dropped on September 18, 2017[2] and May 23, 2018.[3] They may drop again prior to the completion of the case. In light of these developments, Complainants contend in the alternative that, if they lose their claims to the pre-June 1, 2017 rates, they are at least entitled to the rates in effect after June 1, 2017 but before September 18, 2017.[4] This is because the filing of the Complaint placed the issue of the appropriate avoided cost rates before this Commission, and it would have been unreasonable and inequitable to require Complainants to execute PPAs at rates lower than those Complainants contend they are entitled to as a condition of preserving their eligibility for the June 1, 2017 rates should Complainants not prevail in this dispute. By executing PPAs at the June 1, 2017 rates,

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judgment with respect to Complainants' eligibility for the pre-June 2017 rates. The Complainants have also argued that, if the Commission does not grant summary judgment in their favor, then there are disputed material facts and they should be allowed to submit evidence in support of their claims for the pre-June 1, 2017 rates.

[2] Re PGE Application to Update Schedule 201 QF Information, Docket No. 1728, Order No. 17-347 at 1 (Sep. 14, 2017).

[3] Re PGE Application to Update Schedule 201 QF Information, Docket No. 1728, Order No. 18-189 at 1 (May 23, 2018).

[4] See Complainants' Cross-Motion for Summary Judgment at 10 (Apr. 6, 2018) ("In the alternative and at a minimum, formed a legally enforceable obligation under the terms and conditions of PGE's Standard PPA in effect between June 1, 2017 and September 18, 2017 and at PGE's Schedule 201 avoided cost rates in effect between June 1, 2017 and September 18, 2017."), See also e.g. Bottlenose Solar, LLC v. PGE, Docket No. UM 1877, Motion for Leave to File First Amended Complaint, at Attachment A First Amended Complaint at ¶ 117 (Apr. 20, 2018) ("If the Commission finds that Bottlenose Solar has not formed a legally enforceable obligation prior to June 1, 2017, then, at the very least, Bottlenose Solar has formed a legally enforceable obligation after June 1, 2017, as of the time this Complaint was filed, or at least before PGE's avoided costs changed again on September 18, 2017.").

Complainants would have effectively forfeited their rights to assert a claim to the pre-June 1, 2017 rates.

Complainants are filing this supplemental response to bring the Commission's attention to another recent case that supports Complainants position with respect to their eligibility for the June 1 rates if their claim to the earlier rates is rejected.

On April 30, 2018, another QF unrelated to the projects at issue in these cases, Parrott Creek Solar, LLC ("Parrott Creek"), filed a Complaint with the Commission asserting that it had established a LEO as of April 30, 2018.[5] PGE filed its Answer on August 13, 2018.[6] By that time, the parties had executed a PPA; signed by Parrott Creek on June 14, 2018 and by PGE on June 28, 2018.[7] PGE asserted in its answer to Parrott Creek that once the PPA was signed, it superseded any LEO that could have been formed prior to the date of contract execution.[8]

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5 Parrott Creek Solar, LLC v. PGE, Docket No. UM 1945, Complaint at ¶ 42 (Apr. 30, 2018).

6 Parrott Creek Solar, LLC v. PGE, Docket No. UM 1945, PGE's Answer (Aug. 13, 2018) (available at: https://edocs.puc.state.or.us/efdocs/HAC/um1945hac16212.pdf).

7 Id. at Exhibit A at 17 (Aug. 13, 2018).

8 Id. at 3 ("even if Complainant had established a legally enforceable obligation on or before April 30, 2018, to sell the net output of its proposed project to PGE at the standard renewable avoided cost rates in effect on April 30, 2018, any such legally enforceable obligation was superseded and nullified by the June 28 PPA and is therefore void and unenforceable").

III. SUPPLEMENTAL RESPONSE

PGE's positions are inconsistent. In these cases, PGE has taken the position that no LEO can be formed without first executing a PPA.[9] PGE's contends that the Complainants should have executed PPAs with PGE at the lower and later avoided cost rates in effect after the date of their claimed LEO (between June 1, 2017 and September 18, 2017), and then pursued litigation requesting the higher and older avoided cost rates that they believe they are entitled to (the pre-June 1, 2017 rates). In other words, PGE argued that, to avoid being subject to the rates in effect at the end of their litigation, the Complainants should have effectively reserved their right the post-June 1 but pre-September 18, 2017 rates by executing PPAs, and then continue to litigate their rights to the pre-June 1, 2017 rates. However, PGE's filing in the Parrott Creek makes it apparent that, if the Complainants had done that, then they would have fallen into PGE's trap and PGE would have argued that they gave up their claims to the pre-June 1, 2017 rates.

The Complainants did not seek to execute PPAs at the lower post-June 1, 2017 rates for two reasons. First, a belief that they established LEOs prior to PGE's June 1, 2017 avoided cost change and so they did not seek to execute the PPAs with the later and lower avoided cost rate. Second, a fear that PGE would make the exact argument it made in the Parrott Creek cases: that the later-signed PPA supersedes any earlier LEO.

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[9] PGE's Motion for Summary Judgment at 18 (Jan. 24, 2018) ("It is further apparent that both Staff and the Commission intended that a LEO is established when the QF signs the executable contract").

PGE's more complete, but inconsistent position, has become clear. PGE wants to have it both ways when a dispute arises and the prices or terms offered by a utility differ from that of those claimed by the QF. It wants to prevent QFs from establishing a LEO without first executing a PPA (its position in this case), and also it wants to prevent QFs who have executed a PPA from asserting that they had established a LEO at an earlier date (its position in the Parrott Creek case).

To avoid PGE's arguments made in the Parrott Creek case that a LEO entitling a QF to an earlier rate is extinguished by signing a new PPA, the only reasonable course of action is for the QF to not execute a PPA at lower rates and instead file a complaint (what the Complainants did in these cases). However, based on PGE's arguments in this proceeding, if it loses its primary arguments regarding its entitlement to a LEO, then the QF will be subject to the then current avoided cost rates at the time of final resolution. This could be years later, especially if a case is appealed to the Federal Energy Regulatory Commission or court.

In the end, the only way to reconcile PGE's arguments is that PGE wants to force a QF to choose to pursue litigation (and risk being only eligible for the rates years after their litigation commenced) or abandon their litigation and give up any rights to earlier rates by executing a new PPA with PGE. This approach will effectively preclude many QFs from seeking relief from the Commission and embolden PGE and other utilities to insist upon unreasonable terms, conditions and requirements, and delay resolution of litigation so that the lowest rate possible applies at the end of a proceeding.

PGE's position is also inconsistent with the Commission's LEO standard, which provides that "[t]hrough the complaint process, the Commission will resolve a dispute

and determine the avoided cost price to apply on a case-by-case basis."[10] That is, once a dispute concerning the applicable avoided cost rate is presented to the Commission in a complaint proceeding, it is for the Commission to determine the applicable rate. The QF should not have to continue jumping through successive rounds of procedural contracting hoops in order to establish its rights to each new rate that may be approved during the course of the litigation. Instead, the Commission should allow a QF to seek resolution of a disputed issue without risking being penalized for attempting to have a dispute resolved.

IV. CONCLUSION

As such, the Commission should not find that Complainants are ineligible for the post-June 1, 2017 and pre-September 18, 2017 rates simply because they did not sign executable PPAs. Rather, the Commission should consider the facts and circumstances of these cases and that PGE's delays warrant granting LEOs, even though the Complainants did not sign an executable PPA provided by PGE. Therefore, the only options should be that Complainants are either eligible: 1) for the pre-June 1, 2017 rates based on when they executed their PPAs (if the Commission rules in the Complainants favor on the merits of the case); or 2) the pre-September 18, 2017 rates when they could have obtained PPAs if they had not sought to pursue their legal claims for the earlier rates (if the Commission rules in PGE's favor on Complainants primary claim).

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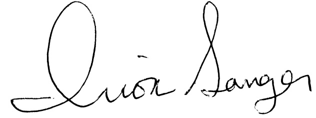
[10] Re Commission Investigation into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 3 (May 13, 2016).

Dated this 13th day of September 2018.

Respectfully submitted,



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