Portland General Electric Company
Legal Department
121 SW Salmon Street • Portland, Oregon 97204
503-464-8315 • Facsimile 503-464-2200

Donald J. Light
Assistant General Counsel

April 6, 2018

Via Electronic Filing

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

Re: BOTTLENOSE SOLAR, LLC (UM 1877); VALHALLA SOLAR, LLC (UM 1878); WHIPSNAKE SOLAR, LLC (UM 1879): SKYWARD SOLAR, LLC (UM 1880); LEATHERBACK SOLAR, LLC (UM 1881); PIKA SOLAR, LLC (UM 1882); COTTONTAIL SOLAR, LLC (UM 1884); OSPREY SOLAR, LLC (UM 1885); WAPITI SOLAR, LLC (UM 1886); BIGHORN SOLAR, LLC (UM 1888); MINKE SOLAR LLC (UM 1889); and HARRIER SOLAR LLC (UM 1890) v. PORTLAND GENERAL ELECTRIC COMPANY

Attention Filing Center:

Enclosed is Portland General Electric Company's Reply in Support of its Motion for Summary Judgment in the above-named dockets for filing.

Thank you for your assistance.

Sincerely,

Donald J. Light
Assistant General Counsel

DJL:hp
Enclosure

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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

BOTTLENOSE SOLAR, LLC (UM 1877); VALHALLA SOLAR, LLC (UM 1878); WHIPSNAKE SOLAR, LLC (UM 1879); SKYWARD SOLAR, LLC (UM 1880); LEATHERBACK SOLAR, LLC (UM 1881); PIKA SOLAR, LLC (UM 1882); COTTONTAIL SOLAR, LLC (UM 1884); OSPREY SOLAR, LLC (UM 1885); WAPITI SOLAR, LLC (UM 1886); BIGHORN SOLAR, LLC (UM 1888); MINKE SOLAR, LLC (UM 1889); HARRIER SOLAR, LLC (UM 1890), Complainants, vs. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	**PORTLAND GENERAL ELECTRIC COMPANY'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

I. INTRODUCTION

These cases are about whether 12 qualifying facilities ("QFs") are entitled to sell net output to Portland General Electric Company ("PGE") at pre-June 1, 2017 rates that are approximately 12 percent higher than the rates the Commission approved to go into effect on June 1, 2017.[1] None of the Complainants have a contract that entitles them to sell to PGE at pre-June 1, 2017 rates. Rather, each Complainant has alleged that it established a legally enforceable obligation ("LEO") prior to June 1, 2017.

A LEO is a set of regulatory rights that entitle a QF to sell net output to a utility at the rates in effect when the LEO is established. State commissions are charged with determining when a LEO arises. In Oregon, the Public Utility Commission of Oregon ("Commission") has adopted a clear LEO rule that relies on the Commission's standard contracting process, involving a series of 15-business day steps. Specifically, a QF initiates the standard contracting process by providing a utility with certain required information about the proposed QF project. Once the utility has received all required information, it must provide the QF with a draft power purchase agreement ("PPA") within 15 business days. If the QF requests any changes to the draft PPA, and the QF has provided all information needed by the utility to prepare a revised draft PPA, then the utility must provide a revised draft PPA within 15 business days. This process continues until the QF accepts a revised draft PPA without requesting any changes, at which point the utility must provide an executable PPA within 15 business days.[2]

---

[1] *See, Valhalla Solar LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1878, Declaration of Rebecca Brown in Support of PGE's Motion for Summary Judgment ("Brown Declaration") at ¶¶ 3 and 4 (Jan. 24, 2018).

[2] *See, In the Matter of Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities,* Docket No. UM 1129, Order No. 06-538 at 35-36 (Sep. 20, 2006) (Commission mandates that each utility adopt a tariff with a standard contracting process that involves four 15-business day steps); *In the Matter of Public Utility Commission of Oregon Investigation into Qualifying Facility Contracting and Pricing,* Docket No. UM 1610, Order No. 16-174 at 23-27 (May 13, 2016) (Commission adopts LEO rule and reiterates four step standard contracting process with 15 business day deadlines for each step);

Once the QF has received an executable PPA, it may unilaterally sign the executable PPA and establish a LEO.[3] Alternatively, if a QF can demonstrate it was entitled to receive an executable contract under the standard contracting process before a rate change and that the utility obstructed this process, then the QF can file a complaint and the Commission will determine whether a LEO was formed on a case-by-case basis.[4] When the Commission applies this standard contracting process and its LEO rule to the facts of these cases, it becomes clear that none of the Complainants established a LEO before the June 1, 2017 rate change.[5]

II. SUMMARY OF REPLY

The arguments contained in Complainants' March 9, 2018 response are without merit and should be rejected for the following reasons.

First, federal courts have held that each State—not the Federal Energy Regulatory Commission ("FERC")—must decide when a LEO is established under the State's regulations implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Further, the FERC orders cited by Complainants do not hold that a QF must be allowed to control the timing of the formation of a LEO. And the FERC advisory orders do not hold that a QF must be allowed to form a LEO simply by engaging in negotiations, stating the terms of sale (and later requesting revised terms of sale), and unequivocally committing to sell to a utility. Rather FERC's orders hold that a state commission violates PURPA if it conditions the existence of a LEO on: (a) a *fully* executed PPA, (b) a *fully* executed interconnection agreement, or (c) the filing of a

---

Portland General Electric Company's Revised Application to Update Schedule 201 Qualifying Facility Information—Compliance Filing, Schedule 201 at Sheet No. 201-2 (filed Sep. 14, 2017, effective Sep. 18, 2017) (Schedule 201 guidelines outlining the standard contracting process).

[3] Order No. 16-174 at 3 and 27-28.

[4] *Id.*

[5] *See* Docket No. UM 1878 (Valhalla), Portland General Electric Company's Motion for Summary Judgment (Jan. 24, 2018) ("PGE's Motion for Summary Judgment") for detailed discussion of why the Commission can conclude as a matter of law that none of the Complainants established a LEO before the June 1, 2017 rate change.

complaint *before* the date of the allege LEO. The Oregon Commission's LEO rule does not violate any of these prohibitions. As a result, in resolving these cases, the Commission should apply its own well-reasoned LEO rule articulated in Order No. 16-174, rather than Complainants' one-sided and unsupported LEO position.

Second, Complainants misconstrue the applicable standard contracting process. When PGE provided Complainants with initial draft standard PPAs (between May 15 and May 23, 2017) and the Complainants each responded by requesting changes to those contracts (between May 23 and May 26, 2017), the next step in the process was for PGE to provide revised draft contracts within 15 business days—which it did (on June 14, 2017).[6] Complainants' requests for changes to their initial draft contracts did not constitute acceptance of an executable contract nor did the requests for change obligate PGE to provide executable PPAs within 15 business days.

Third, contrary to Complainants' suggestion, the parties did not negotiate standard contracts for almost six months before the June 1, 2017, rate change. Seven of the Complainants allege they sent one-page letters to PGE on December 8, 2016, in which they declared themselves to have formed LEOs without ever having provided PGE with any project information—not even the location, nameplate capacity, or motive force of their proposed projects. These December 2016 letters were not sent to the proper address, and PGE has no record of having received the letters. Even assuming the letters were sent to PGE in December 2016, the record contains no evidence of any further communication between these seven Complainants and PGE until they submitted initial project information and initiated the Schedule

[6] *See e.g.,* Docket No. UM 1878, Complaint (Valhalla) at ¶ 39 (alleging that PGE provided a revised draft PPA on June 14, 2017). PGE provided a revised draft PPA on June 14, 2017, to 9 of the 12 Complainants. None of these 9 Complainants has indicated that it accepts all of the terms of the revised draft PPAs. PGE did not provide a revised draft PPA on June 14, 2017 to the remaining 3 Complainants (Bighorn, Minke and Harrier) and it appears that none of these 3 Complainants has followed up with PGE to obtain a revised draft PPA—rather all 3 Complainants filed their August complaints and have sought to resolve their claims through litigation rather than by completing the standard contracting process.

201 process between late March 2017 and late April 2017. There is simply no evidence the parties engaged in six months of negotiations before June 1, 2017.

Fourth, PGE did not act in bad faith when it requested a May 17, 2017 effective date for its annual rate update. The Commission confirmed in Order No. 17-177 (issued May 19, 2017) that Order No. 14-058 (issued February 24, 2014) authorized a utility to seek an effective date that is *within* 60 days of its May 1 rate update, and that QFs should expect that an annual rate update can become effective anytime within that 60-day period. Complainants' argument that PGE acted in bad faith is an impermissible collateral attack on Order No. 14-058 and Order No. 17-177 and should be rejected.

Fifth, PGE did not delay progress toward an executable contract by 10 to 19 business days as argued by Complainants. As detailed below, Complainants' argument is not supported by the facts. But even if the Commission assumes *arguendo* that PGE delayed some Complainants by 10 to 19 business days, it does not change the outcome of these cases. If the Commission accounts for an alleged 19 business day delay by moving the earliest date any of the Complainants requested changes to their draft contracts from May 23, 2017, to April 26, 2017, such a Complainant still was not entitled to an executable contract before the June 1 rate change. Under the Commission's standard contracting process, once a QF requests a change to a draft contract, the utility must provide a revised draft contract within 15 business days and if the QF then accepts the revised draft without requesting any changes the utility must provide an executable contract within the next 15 business days. This means that under the Commission's applicable standard contracting process, if a Complainant had requested changes to its draft contract on April 26, 2017 instead of May 23, 2017, it would not have been entitled to an executable contract until June 8, 2017, *at the earliest*. So even applying a 19-business day delay,

which is not supported by the facts in these cases, none of the Complainants would have been entitled to an executable contract or to a LEO before the June 1 rate change.

Finally, the Commission should deny Complainants' request for alternative relief. In their response to PGE's motion for summary judgment Complainants state: "If the Commission determines that the Complainants are not entitled to the pre-June 1, 2017 rates, then the Commission should at least determine that [Complainants] are entitled to the pre-September 18, 2017 rates."[7] The Commission should deny this request as procedurally improper. The request advances a claim not found in the complaints. Moreover, as detailed below, Complainants were not entitled to an executable PPA before September 18, 2017, because they did not respond to the revised draft PPAs that PGE provided on June 14, 2017.

For all of these reasons the Commission should reject the arguments made by Complainants in their March 9, 2018 response and grant PGE's January 24, 2018 motion for summary judgment. PGE's motion for summary judgment and this reply demonstrate that the undisputed facts in the pleadings, the documentary evidence submitted by PGE, the documentary evidence submitted by Complainants, and the disputed facts taken in the light most favorable to Complainants, all allow the Commission to conclude as a matter of law that none of the Complainants established a LEO before PGE's avoided cost rates changed on June 1, 2017.

III. REPLY

A. The Commission – not FERC – has the authority to determine Oregon's LEO rules, and the Commission's LEO rules are consistent with FERC's LEO orders.

Complainants assert that under the holdings in a series of FERC declaratory orders, a QF can establish a LEO simply by declaring itself unequivocally committed to sell its net output to a

[7] *See* Docket No. UM 1878 (Valhalla), Complainants' Response to PGE's Motion for Summary Judgment, at 35 (March 9, 2018) ("Complainants' Response").

utility.[8] Complainants argue that any approach to the formation of a LEO that requires a QF to comply with an administrative process imposed by a state commission violates these FERC orders and PURPA.[9]

In their March 9, 2018 response, Complainants purport to demonstrate this proposition by citing to five FERC declaratory orders (*Cedar Creek*, *Rainbow Ranch*, *Murphy Flat*, *Grouse Creek*, and *FLS Energy*).[10] Complainants assert these FERC orders mandate that a QF can establish a LEO simply by engaging in contract negotiations with a utility, informing the utility of the material terms of the proposed sale of net output, and then unequivocally committing to sell to the utility under such terms.[11]

The orders cited by Complainants do not support their position on when a LEO is formed. Rather, Complainants' rely on dicta in some of the FERC decisions, make broad generalizations based on that dicta, and announce their own LEO rule which they misrepresent as a rule mandated by FERC. More, Complainants fail to acknowledge that FERC's LEO orders are non-binding advisory opinions and that state commissions are authorized by PURPA and FERC regulations to establish the parameters for when a LEO occurs.

---

[8] Complainants' Response at 1 ("At its core, a QF has the power to determine the date for which avoided costs are calculated by simply tendering an agreement that obligates it to provide power.") and 15 ("… a state commission rule requiring contract execution to form a LEO is invalid as a matter of law … where a contract has not been executed prior to a rule change, a LEO can at minimum still be created where negotiations took place, the material terms were finalized, and the QF unequivocally committed to sell to the utility prior to the rule change.").

[9] *Id.* at 15 ("… a state rule that requires, per se, that certain procedural steps be completed prior to LEO formation is also invalid as inconsistent with PURPA and FERC regulations.").

[10] *Id.* at 14-15 (citing to *Cedar Creek Wind LLC*, 137 FERC ¶ 61,187 (Oct. 4, 2011) ("*Cedar Creek*"), *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (Apr. 30, 2012) ("*Rainbow Ranch*"), *Murphy Flat Power LLC, et al.*, 141 FERC ¶ 61,145 (Nov. 20, 2012) ("*Murphy Flat*"), *Grouse Creek Wind Park, LLC, et al.*, 142 FERC ¶ 61,187 (Mar. 15, 2013) ("*Grouse Creek*"), and *FLS Energy, Inc., et al.*, 157 FERC ¶ 61,211 (Dec. 15, 2016) ("*FLS Energy*").

[11] *Id.* at 15 (note that PGE disagrees with Complainants' view of when a LEO is formed and disagrees that the material terms of a proposed PPA are agreed to by the QF and utility simply because the QF has proposed revised terms and requested an executable PPA).

The Commission has adopted a LEO rule that is built on the standard contracting process established by the Commission.[12] The Commission's LEO rule does not conflict with the holdings in *Cedar Creek, Rainbow Ranch, Murphy Flat, Grouse Creek,* or *FLS Energy*. There is no reason for the Commission to alter its existing LEO rule because the FERC precedent cited by Complainants is not in conflict with the Commission's LEO rule, and even if the FERC decisions were in conflict with the Commission's LEO rule, the FERC decisions are not binding on the Commission.

1. The FERC decisions cited by Complainants are not binding on the Commission.

The federal courts have held that FERC's declaratory orders regarding LEO formation are advisory only and are not binding on state commissions. And the federal courts have held that the States – not FERC – have the authority to decide when and how a LEO is established. This means that each State may have a different standard for the creation or establishment of a LEO.

For example, Texas adopted a requirement that a LEO "arises only when a qualified facility can deliver power within 90 days."[13] This requirement was upheld by the Fifth Circuit Court of Appeals in the *Power Resource Group* decision because "FERC regulations grant the states discretion in setting specific parameters for LEOs."[14] The Court went on to explain that pursuant to PURPA, "FERC has given each state the authority to decide when a legally

[12] Order No. 16-174 at 3 and 23-28.
[13] *Power Resources Group, Inc. v. Pub. Util. Comm'n of Tex.*, 422 F.3d 231, 237 (5th Cir. 2005) (hereinafter *Power Resources Group*).
[14] *Id.* at 238.

enforceable obligation arises in that state" and that "defining the parameters for creating a LEO is left to the states and their regulatory agencies."[15]

In 2014, the Fifth Circuit upheld a different Texas regulation pertaining to the creation of a LEO, explaining:

> *Power Resource III* thus forecloses the dissenting opinion's first argument, that under the plain language of FERC's Regulation, all Qualified Facilities must always be allowed to enter into Legally Enforceable Obligations. Instead, *Power Resource III* held that state regulatory agencies—rather than FERC—were empowered to define the parameters of the circumstances in which Qualified Facilities could form Legally Enforceable Obligations. It is this essential holding which binds us here: under the cooperative federalism scheme created by PURPA, it is the PUC, rather than FERC, that defines the parameters for when a Qualified Facility may form a Legally Enforceable Obligation.[16]

The Court of Appeals for the District of Columbia recently explained that FERC's declaratory orders are not actually binding precedent when it comes to PURPA issues assigned to the States by PURPA and FERC's PURPA regulations (like the standards for the creation of a LEO):

> FERC claims that the PURPA-related aspects of its orders are non-binding and that we therefore lack jurisdiction to review them. ... We agree with FERC that this jurisdictional issue is controlled by *Midland*. Although FERC's order in that case contained some language that appeared mandatory — in particular, it directed that a cooperative utility "shall" reconnect with a specific PURPA qualifying facility — we nonetheless treated the order as declaratory because it contained "neither any deadline ... [for] compl[iance] nor any possible consequence of non-compliance." So too here. Although FERC's orders contain language that appears mandatory — *e.g.*, "ordering Portland General to accept PáTu's entire net output," and stating that Portland "must take from PáTu its entire net output," — they neither set deadlines for compliance nor specify any repercussions for non-compliance. Given this, and given FERC's concession that the orders are declaratory, we have no jurisdiction to review them. Even so, we are mystified by FERC's continued use of mandatory language to resolve PURPA

[15] *Power Resources Group* at 238-239; *See also Metro. Edison Co. et al.,* FERC Docket No. EL95-41-000, 72 FERC ¶ 61,015, Order Denying Petition for Enforcement and Declaratory Order at 15 (July 6, 1995) ("It is up to the States, not this Commission, to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law.").
[16] *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 396 (5th Cir. 2014).

> disputes in orders that it later insists are purely hortatory. Although *Midland* holds that such mandatory language, without more, is in fact declaratory, FERC could avoid a great deal of confusion and waste of judicial resources by not using words like "shall" and "must," and by making clear in its orders — as opposed to later in this court — that its discussions of PURPA-related issues are advisory only.[17]

The *Cedar Creek, Rainbow Ranch, Murphy Flat, Grouse Creek,* and *FLS Energy* cases identified by Complainants all fall into the category of orders from FERC that are hortatory or advisory only and not controlling on the Oregon Commission.

The non-controlling nature of these FERC cases is clearly demonstrated by *JD Wind*, another FERC declaratory order addressing the concept of a LEO. In *JD Wind*, a developer asked FERC to enforce PURPA and invalidate a Public Utility Commission of Texas decision that held a developer needed to be able to deliver firm power in order to establish a LEO.[18] FERC rejected the developer's request for enforcement, leaving the developer to bring its own enforcement action in federal district court.[19]But in its declaratory order, FERC did note its agreement with the developer on the merits:

> [T]he Texas Commission's decision denying JD Wind a legally enforceable obligation, and the requirement in Texas law that legally enforceable obligations are only available to sellers of "firm power," as defined by Texas law, are inconsistent with PURPA and our regulations implementing PURPA ...[20]

However, FERC's holding that the Texas commission violated PURPA by imposing too limiting a LEO standard was rejected by the Fifth Circuit Court of Appeals. When that court had the opportunity to review the decision of the Texas commission, the court held:

> In sum, Exelon has failed to show that PURPA and FERC's Regulation mandate that all Qualifying Facilities be able to create Legally Enforceable Obligations at any time. PURPA allows states discretion in determining when a Legally Enforceable Obligation is created, and PUC Rule 25.242 falls within that

[17] *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 701-702 (D.C. Cir. 2017) (internal citations omitted).
[18] *JD Wind 1, LLC et al.*, 129 FERC ¶ 61,148, at P. 2-4 (Nov. 19, 2010).
[19] *Id.* at ¶ 22.
[20] *Id.* at ¶ 23.

> discretion. The PUC is therefore entitled to deference in defining the parameters for creating Legally Enforceable Obligations. Here, the PUC has reasonably distinguished between Qualifying Facilities that can, and cannot, provide firm power. As Occidental notes, mandatory long-term contracts between generators and utilities can burden customers by imposing prices well above the actual market prices. The PUC made a reasonable decision that only those Qualifying Facilities capable of providing reliable and predictable power may enter into such arrangements. Thus, Exelon has not proven that the PUC failed to implement FERC's PURPA regulations.[21]

The *JD Wind* case demonstrates that FERC's declaratory orders regarding the boundaries of the LEO concept are not binding precedent on state commissions and that it is ultimately up to the Oregon Commission to determine the standards for creating a LEO under the Oregon system of implementing PURPA.

2. The FERC decisions cited by Complainants do not support Complainants' LEO argument.

As discussed above, the FERC decisions cited by Complainants are advisory opinions and are not binding or controlling on the Oregon Commission. In addition, the FERC decisions cited by Complainants do not contain the holdings suggested by Complainants. Complainants allege the FERC decisions provide that a QF must be allowed to form a LEO after engaging in negotiation, stating the material terms of a proposed sale, and unequivocally committing itself to sell to the utility.[22] The FERC decisions cited by Complainants contain no such holdings. Rather, Complainants have generalized and expanded on the dicta found in several of the FERC decisions and formulated Complainants' own preferred version of a LEO rule.

The first FERC decision cited by Complainants is *West Penn Power Co.*, a case in which FERC stated: "States have the initial power to determine the specific parameters of when a LEO

[21] *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 400 (5th Cir. 2014) (internal citations omitted).
[22] *See* footnotes 8 and 11 *supra.*

is formed."[23] The Commission has exercised this authority with its clear LEO rule, and Complainants' position on LEOs is nothing more than a collateral attack on the Commission's rule.

The next four FERC decisions—*Cedar Creek, Rainbow Ranch, Murphy Flat,* and *Grouse Creek*—all involved a decision by Idaho Public Utilities Commission ("Idaho PUC") to lower the eligibility cap for standard prices from 10 average megawatts to 100 kilowatts, effective December 14, 2010, because the Idaho PUC was concerned that standard rates were too high.

In *Cedar Creek*, the QF and utility had been negotiating five contracts for about six months.[24] The utility provided final draft contracts in late November 2010 and the QF responded with edits shortly thereafter.[25] The utility then provided final contracts to the QF on December 9, 2010, the QF signed the contracts on December 13, 2010, and the utility signed on December 22, 2010.[26] The Idaho PUC rejected the contracts because they were not fully executed until after the December 14, 2010 change in eligibility cap.[27] The Idaho PUC adopted a "bright-line rule" that no LEO could be formed before the contracts were fully executed.[28]

The QF petitioned FERC to initiate an enforcement action under which FERC would sue the Idaho PUC in federal court and would assert that the Idaho PUC's actions violated PURPA. FERC declined to initiate an enforcement action and instead issued a declaratory order.[29] In that declaratory order FERC held that its regulations distinguished between a contract and a LEO and that by requiring a fully executed contract as a prerequisite to a LEO, the Idaho PUC was

[23] *West Penn Power Co.*, 71 FERC ¶ 61,153 at 61,495 (1995).
[24] *See, Cedar Creek*, 137 FERC ¶61,006 at P. 38.
[25] *Id.*
[26] *Id.*
[27] *Id.* at P. 5.
[28] *Id.*
[29] *Id.* at P. 1.

ignoring that distinction and therefore violating PURPA and FERC's regulations implementing PURPA.[30]

In the last few paragraphs of the order, FERC noted that the question of whether a LEO was actually established between the QF and utility was not properly before FERC but FERC then offered its opinion (as pure dicta) that it felt the facts presented (six months of negotiations, the utility provided a final contract, and the QF signed the final contract before the rule change) pointed to the reasonable conclusion that a LEO was formed.[31] It is important to recognize that these final conclusions by FERC were pure dicta and that they were made in the context of the Idaho system for implementing PURPA, which did not mandate the same standard contracting process mandated in Oregon.

The *Rainbow Ranch* case involved a different QF and different utility but essentially the same facts as the *Cedar Creek* case and led to the same result. FERC declined to initiate an enforcement action and issued a declaratory order stating that a state commission violates PURPA if it makes a fully executed PPA a precondition to a LEO.[32]

In *Murphy Flats*, a third QF asked FERC to initiate an enforcement action based on the same general facts as *Cedar Creek* and *Rainbow Ranch*. This time FERC decided to initiate an enforcement action in federal court, which was dismissed by stipulation of the parties, as discussed below.[33]

---

[30] *Cedar Creek*, 137 FERC ¶61,006. at P. 36.
[31] *Id.* at PP. 38-39 (FERC noted that the question of whether the QF actually formed a LEO was not properly before it—"[w]hether the conduct of Cedar Creek and Rocky Mountain Power constituted a legally enforceable obligation subject to the Commission's PURPA regulations is not before us" and "we are not ruling on the issue of whether a legally enforceable obligation was incurred"—FERC then offered its opinion, as pure dicta, that the facts of the case suggested to FERC that a LEO had been established).
[32] *Rainbow Ranch*, 139 FERC ¶ 61,077 at PP. 1 and 24.
[33] *Murphy Flat*, 141 FERC ¶ 61,145 at P. 1.

In *Grouse Creek,* the Commission was again asked to start an enforcement action based on the Idaho PUC's decision that a QF did not LEO before the December 14, 2010 eligibility change when neither the QF nor the utility signed the contract before December 14, 2010, and the QF did not file a complaint alleging a LEO before the December 14, 2010 change in eligibility cap.[34] In this case FERC also agreed to initiate an enforcement action and issued a declaratory order holding that a state commission violates PURPA if it makes the existence of a LEO contingent on the QF filing a complaint seeking a LEO *before* the date of the alleged LEO or related rule change.[35]

In both the *Murphy Flat* and *Grouse Creek* cases, FERC filed complaints against the Idaho PUC in the United States District Court for the District of Idaho.[36] However, those two cases were ultimately dismissed by stipulation of the parties after the Idaho PUC entered into a memorandum of agreement and acknowledged that a LEO may be incurred prior to the formal memorialization of a contract in writing.[37]

The final FERC decision cited by Complainants is *FLS Energy*, a case arising out of Montana and involving a decision by the Montana PUC to the effect that no LEO existed because the QF had not yet obtained a fully executed interconnection agreement.[38] The QF petitioned FERC to initiate an enforcement action. FERC declined,[39] but issued a declaratory

[34] *Grouse Creek*, 142 FERC ¶ 61,187 at PP. 1, 6, 35, 36, and 40.
[35] *Id.*
[36] *FERC v. Idaho PUC*, Case No. 1:13-cv-141, Complaint (Mar. 22, 2013) (complaint filed by FERC against the Idaho PUC before the United States District Court for the District of Idaho to enforce PURPA arising out of the *Murphy Flat* and *Grouse Creek* petitions to FERC to initiate enforcement proceedings) (a copy of the complaint is available at: https://www.eenews.net/assets/2013/03/29/document_gw_01.pdf).
[37] *Id.*, Memorandum of Agreement Between FERC and the Idaho PUC (Dec. 24, 2013) (MOA in which the Idaho PUC agreed: "The Idaho PUC acknowledges that a legally enforceable obligation may be incurred prior to the formal memorialization of a contract to writing." And FERC and the Idaho PUC agreed to submit a Joint Stipulation for Voluntary Dismissal to the U.S. District Court) (copy available at: https://www.ferc.gov/legal/mou/mou-idaho-12-2013.pdf).
[38] *FLS Energy*, 157 FERC ¶ 61,211 at P. 22.
[39] *Id.* at P. 2.

order stating that a state commission violates PURPA if it requires a fully executed interconnection agreement as a prerequisite to the formation of a LEO.[40]

From the six FERC decisions cited by Complainants, the Commission can derive the following holdings: (1) states have the power to determine the specific parameters of when a LEO is formed; (2) FERC believes it violates PURPA for a state commission to make a fully signed PPA a prerequisite of a LEO; (3) FERC believes it violates PURPA for a state commission to make a fully executed interconnection agreement a prerequisite of a LEO; and (4) FERC believes it violates PURPA for a state commission to hold that when a rule change will occur and the QF seeks to claim a LEO before the rule change, the QF must file a complaint before the rule change. None of these holdings conflict with the Oregon Commission's approach to determining whether a LEO has been established.

3. The Commission should apply the LEO rule it articulated in Order No. 16-174.

The Commission has established a thorough and well-reasoned approach to standard contracts and the establishment of a LEO. Under that approach a QF must proceed through the standard contracting process, obtain an executable contract from the utility, and unilaterally sign the executable contract to establish a LEO. Alternatively, if the QF can demonstrate that it was entitled to receive an executable contract under the standard contracting process before a rate change and that the utility obstructed that process, then the QF can file a complaint and the Commission can find a LEO on a case-by-case basis.[41]

There is no reason to abandon this process. As discussed above, nothing about FERC's declaratory orders requires the Commission to modify its approach. Complainants' arguments to

[40] *FLS Energy*, 157 FERC ¶ 61,211 at P. 26.
[41] Order No. 16-174 at 3 and 24-28.

the contrary misconstrue the applicable law and constitute an impermissible collateral attack on the Commission's LEO rule and Order No. 16-174. When the Commission applies its existing standard contracting process and its well-reasoned LEO rule, the Commission can and should conclude as a matter of law that none of the Complainants established a LEO before the June 1, 2017 rate change.

B. Complainants' Misconstrue the Standard Contracting Process

Under the facts of these cases, PGE provided draft standard PPAs to the various Complainants between May 15, 2017, and May 23, 2017.[42] Each Complainant then requested changes to the draft standard PPAs between May 23, 2017 and May 26, 2017.[43] Among the changes requested, each Complainant asked PGE to change the scheduled initial delivery date (the date that goes in the blank space in Section 2.2.1 of the form contract) and the scheduled commercial operation date (the date that goes in the blank space in Section 2.2.2 of the form contract).[44] These are key, substantive terms of any standard PPA. They establish the date by which the QF is committing to begin initial delivery of energy and the date by which the QF commits to achieve commercial operation. Failure to meet these deadlines has consequences for the QF and initiates a process that can lead to termination of the standard PPA.[45] They are not trivial terms, and they are necessary to complete any standard PPA, and yet Complainants assert they should have been able to request changes to these terms within days of the June 1, 2017

[42] *See* PGE's Motion for Summary Judgment at 10 (Table D provides the date PGE provided each Complainant with an initial draft PPA and footnote 13 cites to support in the record for these dates).
[43] *See Id.* at 12 (Table F provides the dates on which each Complainant requested changes to its initial draft PPA and footnote 19 cites to support in the record for these dates).
[44] *See e.g.*, Brown Declaration at Exhibit C, pages 10 and 12 (copy of May 24, 2017 email from Cypress Creek representative Chris Norqual to PGE representative Angeline Chong stating that Cypress Creek requests change to dates in Section 2.2.1 and Section 2.2.2 of the draft PPAs for the Bottlenose, Whipsnake, Leatherback and Pika projects, and copy of May 26, 2017 email from Mr. Norqual to Ms. Chong seeking similar change to draft PPAs for the Valhalla and Skyward projects).
[45] *See e.g.*, Docket No. UM 1878 (Valhalla), Complaint, Attachment A at 11 (Attachment A is a copy of a PGE standard contract in effect on May 31, 2017, and Sections 9.1.6 and 9.2 on page 11 of that contract form make it clear that a QF's failure to meet its scheduled commercial operation date can result in termination of the contract).

avoided cost update and *still* be entitled to the pre-June 1 avoided cost. Complainants' position is effectively that they were entitled to special treatment.

Complainants argue that the material terms of the PPAs were finalized and agreed to by the parties when each Complainant indicated that it sought specific changes to the initial draft standard PPA and requested an executable PPA between May 23, 2017 and May 26, 2017.[46] Complainants' view is completely contrary to the Commission's standard contracting process, which governs the creation of a standard PPA and which forms the basis upon which the Commission's LEO rule is built.

In Order No. 06-538, the Commission first ordered the utilities to adopt a standard contracting process that involved a series of 15-business day stages.[47] The Commission ordered each utility to file a tariff that provided: (a) the utility would provide a draft PPA to a QF within 15 business days after the utility receives all required QF information; (b) the utility would respond to any written comments or proposals that the QF provides in response to the draft PPA within 15 business days; (c) the utility would provide a final draft PPA within 15 business days after receiving any additional or clarifying project information; and (d) the utility would provide an executable contract within 15 business days after the parties reach agreement on all terms and conditions.[48]

In response to this requirement, all three utilities filed revised rate schedules and the Commission approved those rate schedules as consistent with the Commission's required

[46] Complainants' Response at 21-22 and 31.
[47] Order No. 06-538 at 35-36.
[48] *Id*.

standard contracting process.[49] The Commission then used this standard contracting process as the basis of its LEO rule.

In Order No. 16-174, the Commission adopted a LEO rule, which it summarized as follows:

> A LEO will be considered established once a QF signs the final draft of an executable contract provided by a utility to commit itself to sell power to the utility. A LEO may be established earlier if a QF demonstrates delay or obstruction of progress towards a final draft of an executable contract, such as a failure by a utility to provide a QF with required information or documents on a timely basis. Through the complaint process, the Commission will resolve a dispute and determine the avoided cost price to apply on a case-by-case basis.[50]

In reaching this approach, the Commission expressly relied upon its existing standard contracting process and built its LEO rule on top of that process.[51] The Commission and its Staff characterized that standard contracting process as follows:

> [A]ll three utilities have similar processes for developing and executing a standard contract: (1) a QF initiates the process by submitting certain information, the utilities then have 15 days to provide a draft standard contract; (2) the QF may agree to the terms of the draft contract and ask the utility to provide a final executable contract, or suggest changes; (3) the utility provides iterations of the draft standard contract no later than 15 days after each round of comments by the negotiating QF; and (4) when the QF indicates that it agrees to all the terms in the draft contract, the utility has 15 days to forward a final executable contract to the QF.[52]

Based on this clearly stated summary of how the standard contracting process is intended to work, the Commission adopted a LEO rule that requires a QF to proceed through the standard contracting process and obtain an executable contract from the utility, then the QF can unilaterally sign that executable contract and establish a LEO.[53] Alternatively, if, under the

---

[49] *See, e.g.,* Docket No. UM 1129, Order No. 07-065 (Feb 27, 2007) (order approving PGE's revised Schedule 201 and revised standard contract forms as compliant with the requirements of Order No. 06-538).
[50] Order No. 16-174 at 3.
[51] *Id.* at 27.
[52] *Id.* at 24.
[53] *Id.* at 2 and 27.

standard contracting process described above, the QF is entitled to an executable contract before a rate change and the utility obstructs progress in a way that prevents the QF from obtaining the executable contract before the rate change, then the QF can file a complaint and the Commission can determine whether a LEO should be found to exist prior to the rate change because of the utility's obstruction.[54]

Complainants ask the Commission to abandon both the Commission's clearly stated contracting process and the Commission's well-reasoned LEO rule. Complainants admit that they received initial draft PPAs between May 15, 2017, and May 23, 2017.[55] And Complainants admit that they requested changes to their initial draft PPAs between May 23, 2017, and May 26, 2017.[56] Under the Commission's standard contracting process and LEO rule, the next step in the process was for PGE to provide a revised draft PPA to each Complainant within 15 business days (i.e., by June 14, 2017). But the Complainants want the Commission to ignore this requirement and to instead invent a new process and standard whereby the Complainants are deemed to have established a LEO when they requested changes to the initial draft PPAs between May 23, 2017, and May 26, 2017.

Complainants try to achieve this improper result by several means. They argue that as soon as they responded to the draft PPAs and stated which changes they wanted, that an executable contract existed because all material terms had been agreed.[57] Clearly this is not the

[54] Order No. 16-174 at 2 and 27.
[55] *See* PGE's Motion for Summary Judgment at 10 (Table D and footnote 13 provide cites to supporting allegations in the complaints).
[56] *See Id.* at 12 (Table F and footnote 19 provide cites to supporting allegations in the complaints).
[57] Complainants' Response at 6 ("The material terms of the PPAs were finalized when each Complainant indicated that it agreed to the draft PPA and requested an executable PPA, even if there were some minor changes requested."); this position completely ignores the Commission's standard contracting process which provides that a utility must provide a revised draft PPA within 15 business days of the date a QF requests changes to an initial draft PPA and this position mischaracterizes Complainants' request to change the scheduled initial delivery date and

case. First, it cannot be said that both Complainants and PGE "agreed" to the final material terms of the contracts simply because Complainants proposed a series of revisions on May 23 through May 26, 2017. Indeed, PGE ultimately rejected several of the requested changes as inappropriate. Second, under the standard contracting process, once Complainants requested changes to their draft contracts, PGE had 15 business days to provide a revised draft contract (in fact PGE did so on June 14, 2017).[58] If in response to the revised draft contracts, the Complainants had indicated that they accepted all terms and conditions without modification (something they could have done on June 14, 2017, but still have not done), then PGE would have had 15 business days (until July 6, 2017) to provide executable contracts. Thus, under the standard contracting process, Complainants were not entitled to executable contracts before July 6, 2017 (and then only if they had accepted the June 14, 2017 drafts without request for change).[59]

Complainants also assert that once they responded to the initial draft contracts by requesting several changes, including changes to the scheduled initial delivery date and the scheduled commercial operation date, PGE was required to provide Complainants with an executable contract within 15 business days.[60] But this is simply not what is required under the Commission's standard contracting process. Under that process, when Complainants requested

---

request to change the scheduled commercial operation date as "minor changes" when such changes are in fact material, substantive changes to the terms originally proposed by Complainants.

[58] *See* footnote 6 *supra.*

[59] *See* PGE's Motion for Summary Judgment at 13 ("Assuming *arguendo* that each of the Complainants accepted all of the terms and conditions in the revised draft contracts provided by PGE on June 14, 2017, then the *earliest* that each Complainant would have been entitled to an executable PPA would have been 15 business days later on July 6, 2017."). Note that PGE's Motion for Summary Judgment included a table as Exhibit A that summarizes information provided in the body of the motion for summary judgment and that the last column of this table erroneously states that June 14, 2017 is the earliest date an executable contract would have been due based on the date the Complainants requested changes to their initial draft contracts. This last column of the table in Exhibit A should have stated that July 6, 2017, was the earliest possible date an executable would have been due, consistent with the discussion on page 13 of PGE's motion for summary judgment. PGE regrets any confusion caused by this error and has submitted a corrected Exhibit A as an errata filing in all 12 of the above-captioned complaint proceedings.

[60] Complainants' Response at 26.

changes to the initial draft PPA, PGE was then required to provide a revised PPA within 15 business days.[61]

Complainants argue that PGE's insistence on following the 15-day steps or stages of the standard contracting process is not necessary and that it has the effect of preventing them from obtaining the earlier, higher avoided cost rates.[62] But the standard contracting process is the process that has been mandated by the Commission. There is no reason to depart from that process, and PGE is not required to deviate from that process simply because a QF seeks to rush through the process to qualify for a rate that is scheduled to be replaced by a new, more accurate rate.[63]

Complainants have also argued that it is unreasonable for PGE to take a full 15 business days to conduct each step in the standard contracting process.[64] The Commission should reject this argument for several reasons.

First, the Commission has already held that it is reasonable for a utility to take up to 15 business days to complete each step in the standard contracting process. In Order No. 06-538, the Commission approved Staff's recommendation "that the Commission direct all three utilities to revise their tariffs to indicate a 15-business day timeline for steps (a) through (d) [of the

[61] *See* Order No. 06-538 at 35-36 (the Commission orders each utility to implement a standard contracting process that includes a 15-business day period for responding to any written comments and proposals that a QF provides in response to draft agreements); Order No. 16-174 at 24 (describing the standard contracting process that each utility is required to follow as involving "the utility provid[ing] iterations of the draft standard contract no later than 15 [business] days after each round of comments by the negotiating QF [and] when the QF indicates that it agrees to all terms in the drat contract, the utility has 15 [business] days to forward a final executable contract to the QF."); and PGE Schedule 201 at Sheet No. 201-2 (providing for an initial draft PPA within 15 business days of PGE receiving all required project information, a revised draft PPA or final draft PPA within 15 business days of a written request from the QF, and an executable PPA within 15 business days of the date the parties are in full agreement as to all terms and conditions of the draft PPA).

[62] Complainants' Response at 25-26.

[63] *See* PGE's Motion for Summary Judgment at 6-13 (The "Summary of the Relevant Facts" contained in PGE's motion for summary judgment details the dates on which each step of the standard contracting process occurred with regard to each project; *see especially,* Tables A through F and the "Summary of the Key Facts" on page 13).

[64] Complainants' Response at 25-26.

standard contracting process]."[65] In so doing, the Commission effectively determined that a utility acts reasonably if it responds to a QF's written proposal to change a draft PPA within 15 business days. In sum, it is *de jure* reasonable for a utility to respond within 15 business days.

Second, during the period in question in these cases (approximately March through June 2017), PGE was processing at least 45 separate requests for standard contracts.[66] It is therefore entirely reasonable and understandable that PGE's staff would require at least 15 business days to process each stage of each of those applications.

Third, as a matter of fact, PGE did not always take the full 15 business days to conduct every step of the standard contracting process.[67]

Fourth, it is irrelevant whether PGE has ever conducted any of the steps in the standard contracting process in less than a full 15 business days in prior instances. The Commission's orders allow a utility to take up to 15 business days to response to each stage of the standard contracting process and responses within 15 business days are therefore *de jure* reasonable.

Finally, even if PGE had been required to provide an executable PPA in response to Complainants' requests for changes to the initial draft PPAs (which it was not), the executable PPAs would have been due within 15 business days of the May 23, 2017, or May 26, 2017 requests for changes to the draft PPAs. As a result, none of the Complainants would have been entitled to an executable PPA before the June 1, 2017 rate change. As PGE explained in its motion for summary judgment, this is not how the Commission's standard contracting process

[65] Order No. 06-538 at 36 ("Staff recommends that the Commission direct all three utilities to revise their tariffs to indicate a 15-business day timeline for steps (a) through (d) [of the standard contracting process] *** we find Staff's recommendations about the information that should be included in tariffs to be appropriate, and direct all three utilities to modify tariffs to include such information.").
[66] *See* Docket No. UM 1728, PGE's Application to Update Schedule 201 Qualifying Facility Information at 1 (May 1, 2017).
[67] *See, e.g,* PGE's Motion for Summary Judgment at 10 (Table D demonstrates that PGE took 14 business days to provide draft PPAs for the Valhalla, Skyward, Cottontail, Osprey and Wapiti projects and 13 business days to provide draft PPAs for the Bighorn, Minke and Harrier projects).

works, but even if it were, the Complainants could not have established a LEO before June 1, 2017. [68]

C. PGE and Complainants did not negotiate contracts for six months before the June 1 rate change.

Contrary to Complainants' suggestion, the parties did not negotiate standard contracts for almost six months before the June 1, 2017, rate change.[69] Enclosed with their response to PGE's motion for summary judgment, Complainants have included copies of letters allegedly submitted to PGE by 7 of the 12 Complainants on December 8, 2016.[70] Complainants have entered nothing into the record to demonstrate that there was any contact between Complainants and PGE from December 2016 through late March 2017.[71]

The December 2016 letters provide no project information—not even the proposed location, nameplate capacity, or motive force of the proposed QF project. The December letters simply state that each of the seven Complainants was declaring itself to have unequivocally committed to sell output to PGE and therefore believed that it had established a LEO under

[68] *See* PGE's Motion for Summary Judgment at 31 ("Complainants imagine … the utility … owes the QF an executable PPA within 15 business days of the request for changes [to the initial draft PPA]. This is not the system established by Schedule 201 or the Commission's rules or policies. But even if it was, and even if the Complainants and PGE had reached full agreement on all terms on May 23, 2017, when Complainants initially proposed their changes, PGE would then have 15 business days to provide an executable contract. So even under Complainants incorrect version of the facts and applicable legal process, PGE would not have owned Complainants an executable PPA before June 14, 2017, which is after the June 1 rate change.").

[69] Complainants' Response at 1 ("In most instances, negotiations had passed almost six months before avoided cost rates were reduced by the OPUC, effective on June 1, 2017."), 16 ("The parties had been negotiating for 2 to 6 months prior to that rate change."), 20-21 ("Therefore, Complainants negotiated with PGE for between 40 days and 6 months prior to that rate change.").

[70] *See* Complainants' Response, Declaration of Chris Norqual at Attachments C through F and Declaration of James Ortega at Attachments A through C (copies of one-page letters dated December 8, 2016, addressed from seven of the Complainants to PGE providing no project information but claiming to have established a LEO).

[71] The letters themselves state that the QF in question established a LEO through "FERC self-certification, a formal PPA request, completion of a draft PPA, as well as other communication with the utility" but there is no evidence that has been submitted in these cases, alleged in the complaints, or available in PGE's records which indicates that any of the seven Complainants in question engaged in any such activity or communication with PGE prior to the December 8, 2016 letters.

FERC precedent. None of the Complainants provided PGE with any project information until dates between March 22, 2017, and April 26, 2017.[72]

The December 2016 letters were not sent to the proper address, and PGE has no record of having received the letters. Even assuming the letters were sent to PGE in December 2016, the record contains no evidence of any further communication between those seven Complainants and PGE until the seven Complainants submitted initial project information and initiated the Schedule 201 process between late March 2017 and late April 2017. There is no evidence that the parties were engaged in six months of negotiations.

D. PGE did not act in bad faith when it requested a May 17, 2017 effective date for its May 1, 2017 annual rate update.

PGE did not act in bad faith when it requested a May 17, 2017 effective date for its annual rate update. The Commission determined, through Order No. 17-177, that a utility can seek any effective date that is within 60 days of the May 1 filing date, and that QFs should expect that annual rate updates could become effective anytime within that 60-day period.[73] Complainants' argument that PGE acted in bad faith[74] is an impermissible collateral attack on Order No. 17-177 and should be rejected.

In Order No. 17-177, the Commission adopted Staff's recommendation to approve PGE's May 1, 2017 rate update and revised the effective date to be June 1, 2017.[75] In the Staff report adopted by the Commission in Order No. 17-177, Staff noted that the requirement for a May 1

[72] *See* PGE's Motion for Summary Judgment at 7 (Table A indicates the date on which each Complainant provided PGE with initial project information and footnote 9 cites to evidence in the record for each such date).
[73] *In the Matter of Portland Gen. Elec. Co. Updates Qualifying Facilities Avoided Cost Payments, Schedule 201*, Docket No. UM 1728, Order No. 17-177 at 1 and at Appendix A, page 6 (May 19, 2017); *See also* PGE's Motion for Summary Judgment at 25 (quoting Chair Hardie's comments during the Commission's May 18, 2017 special public meeting to the effect that stakeholders should expect that the Commission will make the annual standard avoided cost rate update effective within 60 days of May 1 and as rapidly as Commission Staff can review and recommend approval of the update).
[74] Complainants' Response at 30.
[75] Order No. 17-177 at 1.

annual rate update was established by Order No. 14-058. And Staff noted that Order No. 14-058 provides that a May 1 rate update will become effective *within 60 days* of the May 1 filing. Applying Order No. 14-058 to the facts of PGE's 2017 rate update, Staff stated:

> Staff recommends that the Commission allow the updated avoided cost prices to become effective on May 19, 2017. As noted above, Order No. 14-058 only requires that the update be effective within 60 days after the filing. Staff believes that the Commission provided this flexibility so that the time between filing and effectiveness could change depending on how much investigation is needed to verify the inputs used by the utility. In this case, relatively little time is needed.
>
> Staff understands the QFs' interest in predictability. However, Staff disagrees that specifying the date the May 1 Update will be effective in all circumstances is warranted. All stakeholders know that utilities will file a May 1 update and know which inputs will be updated. They also know that the update will be effective within 60 days of filing. Staff believes that this process provides sufficient predictability.
>
> ***
>
> Staff believes that the increased number and capacity of solar QFs requesting pricing, in addition to the volume of solar QF contracts already in place, support PGE's position that prompt Commission action is warranted.[76]

The Commission agreed with Staff's conclusion that under Order No. 14-058, a utility may request and the Commission may grant an effective date that falls within 60 days of the annual May 1 rate filing. The Commission expressly adopted this analysis in Order No. 17-177 and the Commissioners clearly agreed with this rationale during their May 18, 2017 special public meeting to consider this issue.[77]

There is no basis upon which to conclude that PGE acted improperly or in bad faith when it filed its annual rate update on May 1, 2017, and requested a May 17, 2018 effective date. And there is no basis to assert that the Commission acted improperly when it granted a June 1, 2017

[76] Order No. 17-177, Appendix A at 6-7 (May 19, 2017) (quotes are from Staff's May 19, 2017 report and recommendation which was adopted by the Commission with a change of effective date from the recommended date of May 19, 2017, to an adopted date of June 1, 2017).
[77] *See* PGE's Motion for Summary Judgment at 24-26 (discussing the Commission's determinations at the March 18, 2017 special public meeting and quoting the Commissioner's relevant statements).

effective date rather than the June 28, 2017 effective date preferred by Complainants. PGE's May 1 filing was public information and Complainants had no reasonable basis to assume that the 2017 rate update would become effective on June 28, 2017, because Order No. 14-058 clearly states an annual rate update may become effective *within 60 days* of being filed on May 1. The Commission has already considered these issues and arguments at length and resolved them during its May 18, 2017 special public meeting and in Order No. 17-177. Complainants' argument that PGE behaved in bad faith when it requested a May 17, 2017 effective date is without merit, is an impermissible collateral attack on Order No. 17-177 and Order No. 14-058, and should be rejected.

E. PGE did not delay progress toward an executable contract by 10 to 19 business days.

In their March 9, 2018 response to PGE's motion for summary judgment, the Complainants argue that PGE's actions improperly delayed the standard contracting process by 10 to 14 business days with regard to 10 of the 12 projects.[78] Of note, Complainants do not even argue that there was any delay with regard to 2 projects—Valhalla and Skyward. As discussed below, the evidence does not support Complainants' argument that PGE should be penalized for 10 to 14 days of alleged delays in 10 of the 12 cases. However, even if the Commission assumes a 10- to 14-business day delay on 10 of the 12 projects *for the sake of argument only*, it makes no difference to the outcome of these cases. Even accounting for an alleged (and incorrect) 10- to 14-business days of delay, none of the Complainants were entitled to obtain an executable contract before the June 1, 2017 rate change.

[78] Complainants' Response at 27-33 (see particularly Table C on page 33 for a list of the delays that Complainants argue should be applied to specific projects) and at Attachment B (detailing the specific delays Complainants argue should be applied to each project).

1. There are no allegations that PGE missed any deadlines or caused any delay with regard to the Valhalla and Skyward projects.

Complainants do not argue for any delay penalty with regard to the Valhalla and Skyward projects. For those projects, the QFs submitted initial project information on April 26, 2017.[79] Fourteen business days later, on May 15, 2017, PGE timely provided Valhalla and Skyward with initial draft PPAs.[80] On May 23, 2017, Complainants requested a number of changes to the draft PPAs.[81] On May 26, 2017, Complainants modified their request for changes to the draft PPA, but still requested a changed Section 2.2.1 date (the scheduled initial delivery date) and a changed Section 2.2.2 date (the scheduled commercial operation date).[82]

Under the Commission's applicable standard contracting process, PGE then had up to 15 business days to provide a revised draft contract responding to these requests for changes.[83] On June 14, 2017, which was 12 business days after the modified May 26, 2017, request for changes and 15 business days after the original May 23, 2017 request for changes, PGE timely provided both Valhalla and Skyward with a revised draft PPA.[84] Valhalla and Skyward never responded to those July 14, 2017 revised draft PPAs. Rather they stopped engaging in the standard contracting process and filed complaints against PGE alleging that they had formed LEOs before June 1, 2017.

Under the applicable standard contracting process, Valhalla and Skyward were not entitled to an executable PPA before June 1, 2017. There is no allegation that PGE missed any of the applicable deadlines or otherwise delayed the standard contracting process for Valhalla or

[79] *See* PGE's Motion for Summary Judgment at 7 (see Table A and footnote 9 for citation to the record in support of this date).
[80] *Id.* at 10 (see Table D and footnote 13).
[81] *Id.* at 12 (see Table F and footnote 19).
[82] *Id.*
[83] *See* pages 16-17 and footnotes 47-52 *supra.*
[84] *See* Docket UM 1878 (Valhalla), Complaint at ¶ 39; Docket No. UM 1889 (Skyward), Complaint at ¶ 38.

Skyward. Under these undisputed facts, the Commission can and should conclude as a matter of law that Valhalla and Skyward did not establish a LEO before June 1, 2017, and the Commission should grant summary judgment and dismiss the Valhalla and Skyward complaints.

2. There were not 10 to 19 business days of delay associated with the remaining 10 projects.

The Commission should reject the 10 to 19 business day delay periods that Complainants ask the Commission to apply in 10 of the 12 cases because the requested delay periods are not supported by the facts in these cases.

a. There is no basis for applying a 3-business day delay because of allegedly unclear requests for additional information.

Complainants allege a 3-business day delay because 7 Complainants felt the need to meet with PGE to understand PGE's additional information requests.[85] Complainants state that for 7 projects: (a) PGE requested additional information on April 13, 2017, (b) the 7 QFs sought a meeting with PGE to better understand the additional information requests, and (c) that meeting occurred 3 business days later on April 18, 2017.[86] Complainants want to penalize PGE 3 business days for each of these projects on the theory that PGE unreasonably obstructed or delayed the project's progress by 3 business days because of these facts. The Commission should reject this argument. The fact that PGE requested additional information, the Complainants requested a meeting to discuss the requests, and PGE engaged in such a meeting within 3 business days of submitting the additional information requests provides no basis to conclude that PGE was engaged in delay or obstruction.

[85] Complainants' Response at Attachment B, column 5 (asserting that PGE should be penalized by 3 business days of alleged delay with regard to the Cottontail, Osprey, Wapiti, Bottlenose, Whipsnake, Leatherback, and Pika projects because PGE requested additional information from those projects on April 13, 2017, and meet with the developers of the projects three business days later, on April 18, 2017, to discuss the requests for additional information); *see also* Complainants' Response at 27-28 (apparently referring to the same set of facts but asserting that PGE should be penalized for an alleged 4 business days).
[86] *Id.*

First, PGE had no obligation to meet with Complainants within any specified time frame. Second, as alleged by Complainants, PGE met with Complainants rapidly—within 3 business days of the date PGE provided the additional information requests. Meeting within 3 business days of a request does not constitute delay, especially when the Commission considers that PGE was dealing with 45 different requests for contracts at that time and that PGE had no obligation to meet or to do so within any particular timeframe. The Commission should reject the suggestion that it add 3 business days of delay to seven projects (Cottontail, Osprey, Wapiti, Bottlenose, Whipsnake, Leatherback, and Pika) over this issue. There is simply no evidence to support such a 3-business day penalty.

b. There is no basis for applying 4 to 7-business days of delay because PGE sought a May 17, 2017 effective date and obtained a June 1, 2017 effective date for the May 1, 2017 rate update.

Complainants want to assign between 4 and 7 business days of delay to PGE because PGE did not notify complainants that PGE would be seeking a May 17, 2017 effective date for its 2017 annual rate update.[87] The Commission should reject this suggestion. There is no requirement that PGE provide advanced notice of the date that it will propose as the effective date for its annual rate update. The date PGE files its annual rate update—May 1—is known in advance by all stakeholders. And the fact that PGE must propose an effective date within 60 days of that date is also known by all stakeholders. Any stakeholder can therefore plan on the basis of the fact that an annual rate update will be filed on May 1 each year and that the utility is free to

[87] Complainants' Response at Attachment B, column 6 (asserting that PGE should be penalized by from 4 to 7 business days of alleged delay with regard to all projects except the Valhalla and Skyward projects because Complainants claim they would have responded more rapidly to PGE's additional information requests if they had known that PGE was going to request a May 17, 2017 effective date for its May 1 annual rate update); *see also* Complainants' Response at 30 (asserting the same argument).

request an effective date for the rate change that falls at any point within 60 days of May 1 (in fact both Staff and the Commission recognized this fact in Order No. 17-177).[88]

QF representatives argued at length that it was improper for PGE to propose a May 17, 2017 effective date and that the Commission was required to assign an effective date in late June.[89] The Commission considered these questions at a special public meeting on May 18, 2017, and concluded: (a) that there is no Commission policy that May 1 updates will become effective in late June; (b) that May 1 updates can become effective on any date within 60 days of May 1 once they have been reviewed and recommended for approval by Staff; and (c) that PGE did nothing wrong in proposing a May 17, 2017 effective date.[90] There is no basis to conclude that PGE acted improperly or should be penalized or held to have delayed the standard contracting process because it did not provide *advanced* notice of the date it would request for as an effective date for its annual rate update.

Moreover, the Commission ultimately granted a June 1, 2017 effective date, rather than the May 17, 2017 effective date requested by PGE and recommended by Staff, at least in part, because the Commission wanted to provide some relief to QFs in light of their claims that they had insufficient notice that PGE could or would request a May 17, 2017 effective date. In effect, the Commission has already granted a 15-day adjustment to alleviate the alleged surprise of PGE asking for an effective date earlier than the end of June (even though PGE was well within its rights to ask for a May 18, 2017 effective date under Order No. 14-058). There is simply no principled reason for declaring PGE responsible for from 4 to 7 additional business days of delay

[88] Order No. 17-177 at 1 and Appendix A at 6 (Commission adopts Staff recommendations including Staff conclusion that stakeholders knew in advance that PGE's May 1 annual rate update could become effective at anytime within 60 days of the May 1 filing and that this knowledge provides "sufficient predictability.").
[89] *See e.g.,* Docket No. UM 1728, Renewable Energy Coalition's Comments (May 15, 2017).
[90] *See* Order No. 17-177; *see also*, PGE's Motion for Summary Judgment at 21-25 (discussing the Commission's May 18, 2017 special public meeting and quoting relevant statements by Commissioners).

under the standard contracting process based on the fact that PGE requested a May 17, 2017 effective date and obtained a June 1, 2017 effective date. The Commission should reject Complainants' position on this issue.

c. There is no basis for applying a 5 to 6-business day delay because PGE allegedly refused to meet with Complainants.

Finally, Complainants argue that PGE should be penalized by 5 to 6 business days for allegedly failing to meet with Bighorn, Minke, Harrier, Bottlenose, Whipsnake, Leatherback, and Pika.[91] But Complainants have not provided any evidence that PGE acted inappropriately or failed to meet its obligations under Schedule 201. In general, Complainants are arguing that PGE failed to make itself available for a meeting as rapidly as they would have liked.

The 5-business day delay that Complainants argue for with regard to the Bottlenose, Whipsnake, Leatherback and Pika projects appears to be based on the same facts used by Complainants to argue for an additional 3-business day delay: specifically Complainants allege that they requested a meeting on April 13, 2017, and admit that PGE met with them 3-business days later.[92] As discussed above, the fact that it took 3 business days to meet with Complainants is not evidence of any unreasonable delay, and it certainly should not be double counted as the source of an alleged 3-day delay and a second alleged 5-day delay. There is simply no principled basis for assigning 8-business days of delay to PGE when the alleged facts are that Complainants requested a meeting on April 13 and PGE met with Complainants 3-business days later on April 18, 2017.

[91] Complainants' Response at Attachment B, column 4 (arguing for 5 to 6 business days of delay for the Bighorn, Minke, Harrier, Bottlenose, Whipsnake, Leatherback and Pika projects because PGE allegedly failed to meet with Complainants when requested by Complainants or as quickly as Complainants wanted); *see also* Complainants' Response at 28-30 (asserting the same argument).
[92] Complainants' Response at 28-29.

Complainants also argue for a 6-business day delay related to the Bighorn, Mike and Harrier projects,[93] but Complainants were attempting to rush through the standard contracting process or skip steps in the process in late May 2017 in an effort to secure a contract before the June 1 rate change. Complainants therefore sought meetings with PGE in the last days of May 2017 when PGE was busy processing at least 45 pending requests for contracts. Complainants were seeking special treatment during the last few days before the June 1 rate change; however, PGE continued to apply the regular standard contracting process and regular timelines for all applications, including Complainants' requests for changes to their draft PPAs. PGE sent each Complainant a clear message that it intended to proceed under its regular standard contracting process and that the next step in that process would involve PGE providing a revised draft contract within 15 business days of Complainants' May 23 or May 26, 2017 requests for changes to the draft contracts.[94] On the record before the Commission, there is no basis for penalizing PGE by 5 to 6 days for delays that Complainants allege should be associated with their requests to meet with PGE.

For the reasons discussed above, the record does not support the Commission concluding that PGE should be penalized for from 10 to 19 business days of alleged delays associated with 10 of the 12 projects. These alleged delays have been manufactured by Complainants and are not supported by the record in these cases. Complainants were attempting to rush their applications and skip steps in the standard contracting process mandated by the Commission. PGE responded appropriately to Complainants' applications for contracts and to their requests for meetings. The

[93] Complainants' Response at 29-30.
[94] *See* Docket No. 1878 (Valhalla), Brown Declaration at Exhibit D (Jan. 24, 2018) (examples of emails from PGE to Complainants indicating that PGE was in receipt of Complainants' late May 2017 requests for changes to their draft PPAs and that PGE would respond pursuant to the regular standard contracting process which provides 15 business days for PGE to provide a revised draft PPA or to request any additional information needed to prepare a revised draft PPA).

Commission has already effectively "built in" a 15-day adjustment by granting a June 1, 2017 effective date rather than the May 17 date requested by PGE or the May 19 date recommended by Staff. There is no basis to apply the 10 to 19-business day penalty manufactured by Complainants.

3. Even if the 10 to 19-business day penalty is applied, Complainants were not entitled to executable contracts before the June 1 rate change.

As discussed above, the 10 to 19 business day delay periods sought by Complainants are without merit and should be rejected, but even if they are applied *for the sake of argument only*, Complainants still were not entitled to receive executable standard PPAs before June 1, 2017, and they therefore cannot be found to have established LEOs before the June 1 rate change.

If the Commission accounts for an alleged 19 business day delay by moving the earliest date any of the Complainants requested changes to their draft contracts (May 23, 2017) back 19 business days (to April 26, 2017), such a Complainant still was not entitled to an executable contract before the June 1 rate change.[95] Under the Commission's standard contracting process, once a QF requests a change to a draft contract, the utility must provide a revised draft contract within 15 business days and if the QF then accepts the revised draft *without requesting any changes* the utility must provide an executable contract within the next 15 business days. This means that under the Commission's standard contracting process, if a Complainant had requested changes to its draft contract on April 26, 2017 (instead of May 23, 2017), it would not have been entitled to an executable contract until June 8, 2017 *at the earliest*. So even applying a 19-

[95] It should be noted that this analysis arguable overstates the argument even if the Commission was convinced that PGE engaged in 19-days of delay (which it did not). Nine of the twelve Complainants followed up their initial May 23, 2017 request for changes with a subsequent May 24 or May 26, 2017 request for changes. *See* PGE's Motion for Summary Judgment at 12, Table F. As a result, for those projects were Complainants argue for a 19-business day delay, the correct analysis would be to adjust backward each project's second, May 26, 2017, request for changes by 19-business days to May 1, 2017 (not April 26, 2017). Either way, regardless of whether an *assumed* 19-business day delay is applied *arguendo* from May 23, 2017 or from May 26, 2017, the results are the same—PGE would not have owed the Complainants an executable PPA before the June 1, 2017 rate change.

business day delay, which is not supported by the facts in these cases, none of the Complainants would have been entitled to an executable contract or to a LEO before the June 1 rate change.

E. The Commission should refuse to grant the alternative relief requested by Complainants.

The Commission should refuse to grant the Complainants' request for alternative relief. In the last section of their response to PGE's motion for summary judgment Complainants state that if the Commission decides Complainants did not establish a LEO before June 1, 2017, the Commission should hold that Complainants established a LEO entitling them to sell their net output at the rates in effect from June 1, 2017, through September 17, 2017.[96] The Commission should deny this request.

First, the request for alternative relief is not supported by any of the claims for relief alleged or advanced in the complaints. It would be procedurally inappropriate for the Commission to entertain Complainants' request for alternative relief because the claim for alternative relief was not advanced in the complaints and PGE has not consented to resolution of the case on a grounds not alleged in the complaint.[97] Complainants could have alleged claims for alternative relief as part of their August 2017 complaints but chose not to do so. Instead, they waited more than 6 months after filing their complaints, and waited until after PGE has answered their complaints and prepared and filed a dispositive motion for summary judgment, before they asserted a claim for alternative relief in the form of a request for June 1, 2017 rates. This claim,

[96] Complainants' Response at 34-35.

[97] *Bidiman v.* Gehrts, 133 Or. App. 145, 151 (1995) (trial court rightly refused to consider claim for relief not pled in complaint where defendant had not expressly agreed to try the case on the basis of the un-pled claim for relief); *Central Oregon Fabricators, Inc v. Hudspeth,* 159 Or. App. 391, 404 (1999) (trial court erred in granting relief on the basis of a claim not asserted in the complaint and Oregon Court of Appeals noted: "In law or equity, a decree or judgment must be responsive to the issues framed by the pleadings and a trial court has no authority to render a decision on issues not presented for determination."); *Navas v. City of Springfield*, 122 Or. App. 197, 201 (" Defendant is entitled to rely on the theory pleaded by plaintiff to frame the issues to be tried. The rule is that a complaint must separately state each claim and within each claim, it must identify alternative theories of recovery as separate counts. ORCP 16 B. Generally, a trial court has no authority to render a decision on an issue not framed by the pleadings. ORCP 18 A.").

raised at such a late date and without any motion for leave to amend the complaints, is prejudicial to PGE's defense of these cases and should be denied.

Second, there has been no demonstration that Complainants established a LEO before September 17, 2017. There are no factual allegations in the complaints to support such a conclusion. Moreover, PGE provided nine of the Complainants with revised draft standard PPAs on June 14, 2017, and none of those Complainants has provided any response to those revised draft contracts.[98] Under the Commission's standard contracting process, Complainants must, at the very least, indicate that they accept the revised draft contracts without change and ask PGE to produce executable contracts. PGE would then have 15 business days to provide such contracts and Complainants could then unilaterally sign the executable contracts and establish a LEO. But Complainants cannot establish a LEO by abandoning the standard contracting process.

IV. CONCLUSION

For the reasons detailed above and in PGE's January 24, 2018 motion for summary judgment, the Commission can and should grant summary judgment with regard to all three claims for relief in each of the above-captioned complaints and should dismiss each complaint with prejudice. PGE's motion for summary judgment and this reply demonstrate that the undisputed facts in the pleadings, the documentary evidence submitted by PGE, the documentary evidence submitted by Complainants, and the disputed facts taken in the light most favorable to

///

///

///

[98] *See* footnote 6 *supra*.

Complainants, all allow the Commission to conclude as a matter of law that none of the Complainants established a LEO before PGE's avoided cost rates changed on June 1, 2017.

DATED this 6th day of April, 2018.

Respectfully submitted,

Donald Light, OSB #025415
Assistant General Counsel
Portland General Electric Company
121 SW Salmon Street, 1WTC1301
Portland, Oregon 97204
(503) 464-8315 (phone)
(503) 464-2200 (fax)
donald.light@pgn.com

Jeffrey S. Lovinger, OSB #960147
Law Offices of Jeffrey S. Lovinger
2000 NE 42nd Avenue, Suite 131
Portland, OR 97213-1397
(503) 230-7120 (office)
(503) 709-9549 (cell)
jeff@lovingerlaw.com