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November 4, 2019

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
PO Box 1088
Salem, OR 97308-1088

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

Attention Filing Center:

Enclosed for filing in the above-named docket is Portland General Electric Company's Sur-Reply Opposing Defendants' Application for Reconsideration.

Thank you for your assistance.

Very truly yours,

Dallas S. DeLuca

920943

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	)	**PORTLAND GENERAL ELECTRIC COMPANY'S SUR-REPLY OPPOSING DEFENDANTS' APPLICATION FOR RECONSIDERATION**

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As ordered by the October 24, 2019, ruling in this proceeding, Portland General Electric Company ("PGE") respectfully submits this sur-reply opposing the October 1, 2019, application for reconsideration filed by defendants Alfalfa Solar I LLC, Dayton Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, Riley Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, and Wasco Solar I LLC (collectively "defendants" or "NewSun Parties").

I. SUMMARY

The Public Utility Commission of Oregon ("Commission") should deny defendants' application for reconsideration. The application raises six arguments. The first argument is new but without merit; the remaining five reiterate arguments defendants made in their summary judgment briefing. The new argument fails because it infers a mistake of fact where none exists. The remaining five arguments should be rejected because they reiterate arguments previously briefed by defendants and properly rejected by the Commission. A request for reconsideration is not an opportunity to re-argue points previously argued and decided by the Commission. NewSun's October 23, 2019, reply added nothing of substance to its application for reconsideration.

II. ARGUMENT

A. NEWSUN'S REPLY MISSTATES PGE'S ARGUMENT ABOUT SECTION 2.3.

Defendants' reply wrongly states that PGE argued that *all* of defendants' arguments reiterate prior arguments;[1] defendants ignore the express text in PGE's response. In its response, PGE acknowledged that one of defendants' arguments—the argument concerning Section 2.3 of the power purchase agreements ("PPAs")—was new. PGE stated that "[e]xcept for the argument

[1] Defs.' Request for Leave to Reply & Reply in Support of Application For Recons. ("Defs.' Reply) at 3 (Oct. 23, 2019).

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above [regarding Section 2.3 of the PPAs], defendants and Intervenors do not raise any new arguments[.]"[2] Also, even a cursory glance at the Table of Contents in PGE's response shows that defendants are incorrect in how they describe PGE's argument concerning Section 2.3. PGE admitted it was a new (but incorrect) argument. Defendants are simply wrong in how they describe PGE's response. In addition to mischaracterizing PGE's response, defendants' reply provides no further support for this meritless new argument, as addressed in more detail below.

Concerning their other five arguments for reconsideration, defendants make the meritless argument—without any legal support and contrary to the Commission's precedent[3]—that recycling previously-made arguments is appropriate for an application for reconsideration. The Commission has repeatedly held that re-arguing points already argued at an earlier stage of the proceeding is not *good cause* for further examination of an issue essential to the decision. And the Commission has repeatedly held that an applicant's disagreement with the Commission's resolution of an issue previously briefed and argued does not represent an error of fact or law justifying reconsideration.[4] Defendants' reply does not deny that the last five arguments in the application for reconsideration reiterate points already argued and rejected during the summary judgment briefing. Rather, defendants contend that because the Commission decided the case contrary to defendants' view, the Commission committed legal errors that justify reconsideration of the very arguments previously considered and rejected by the Commission. For the reasons already discussed by PGE in its response at pages 5 through 19, the Commission can and should reject these old, reiterated arguments and deny reconsideration.

[2] PGE's Resp. to Defs.' and Intervenors' Applications for Recons. ("PGE's Resp.") at 5.
[3] *See id.* at 5-8 (arguing and citing numerous prior orders of the Commission that denied reconsideration where the applicant "merely reiterates its prior argument and its disagreement with our decision and its underlying reasoning" (citation omitted)).
[4] *See id.* at 5-8 (quoting and discussing Commission Orders denying reconsideration where losing party simply restates previously rejected arguments).

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B. THE "INVITED ERROR" DOCTRINE APPLIES BECAUSE DEFENDANTS ARE ASKING THE COMMISSION TO REVERSE ITSELF.

Defendants' application for reconsideration asks the Commission to overturn the Order and reverse its decision to grant summary judgment to PGE and to deny summary judgment to defendants.[5] That is the essence of an appeal: after one phase of litigation is completed and there is a ruling, an appeal is a request to reverse that ruling. Because defendants' application for reconsideration is functionally an appeal, the doctrine of invited error applies. There is no case law or statute that prevents the Commission from applying the doctrine of invited error on an application for rehearing.

Here, the Commission did not make the error that defendants contend exists in Order No. 19-255 regarding Section 2.3 of the NewSun PPAs.[6] The Commission stated at least four times in Order No. 19-255 that it interpreted just the executed contracts, nothing more.[7] As explained in PGE's response, the Commission did not make any error of fact concerning whether Section 2.3 of the executed PPA was identical to the form PPA.[8] But if there was an error, the Commission should use the invited error doctrine and deny defendants' application for reconsideration (because it is functionally an appeal) for the reasons stated in PGE's response to the application.[9]

[5] Defs.' Application for Recons. at 1 (Oct. 1. 2019).
[6] *Id.* at 4-5 ("The first basis on which the Commission should grant reconsideration of the Order is to correct the false assumption that certain language in Section 2.3 of the PPAs comes from the Commission-approved standard contract templates on which the contracts are based, when in fact that language was added by the NewSun Parties."); Defs.' Reply at 5 n.1 (same).
[7] *See, e.g.* Docket No. UM 1931, Order No. 19-255 at 1 (Aug. 2, 2019) ("We find that based on the specific language of the contracts in question, summary judgment should be granted for PGE."); *id.* at 9-11 (stipulated facts refer only to the executed contracts); *id.* at 13 ("we are presented with a set of executed contracts"); and *id.* at 15 (stating analysis based on "the contracts before us").
[8] PGE's Resp. at 2-5.
[9] *Id.*

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C. DEFENDANTS' ARGUMENT THAT THE FORM PPA ALLOWS A TERM OF MORE THAN 20 YEARS IS SIMPLY WRONG AND, AS DEFENDANTS' ADMIT, IS NOT RELEVANT TO THE START DATE FOR THE FIXED PRICE PERIOD.

Defendants' reply argues that under Section 2.3 of PGE's standard contract *forms*, a Seller is free to select a contract term that exceeds 20 years from contract execution, simply because Section 2.3 of the form does not state the Seller cannot do so.[10] Defendants are wrong. Schedule 201 in effect at the time and attached to the form PPA clearly states that the maximum term a Seller can select is 20 years.[11] And the standard contract clearly states the PPA term begins at contract execution.[12] Together, these provisions mean that a qualifying facility ("QF") was not free to select a Termination Date more than 20 years after contract execution, a position that PGE explained to defendants before they signed the PPAs.[13] But this is an academic question that the Commission did not need to address to resolve UM 1931 because here the NewSun QFs each entered into a contract that explicitly stated in Section 2.3 that the contract would terminate "on the completion of the last day of the sixteenth (16th) Contract Year" which would be a maximum of 20 years after contract execution.[14]

In short, Order No. 19-255 appropriately considers the words of the *executed* NewSun PPAs, including Section 2.3, and concludes: "For the contracts before us, interpreting the entire agreement by reading Schedule 201 together with the PPA's definition leads to the conclusion that 15 years of fixed pricing is available *from the effective date*."[15] Under the Commission's analysis,

[10] Defs.' Reply at 5 ("Section 2.3 [of the standard contract form] allows the seller to select the termination date, thereby allowing any number of possible terms of effectiveness.").
[11] Order No. 19-255 at 11.
[12] *Id*. at 10 (quoting PPA for definition of "Term" and "Effective Date").
[13] NewSun Parties/111, Stephens/1 (Oct. 21, 2015, email from Bruce True to Jake Stephens stating that "the contract must run no more than 20 years from EXECUTION, not commercial operation.") (emphasis in original).
[14] Order No. 19-255 at 10 (quoting language of Section 2.3 of the NewSun PPAs) and 14, n. 18 (explaining why this language effectively limits the term of the NewSun PPAs to 20 years from the Effective Date under normal circumstances—i.e., in the absence of Force Majeure or other abnormal circumstances).
[15] *Id*. at 15 (emphasis added).

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there was no need to consider Section 2.3 of the standard contract *forms* (and defendants themselves state that the Commission did not need to consider Section 2.3 at all),[16] and the Commission did not do so. There was no error of fact because the Commission stated it was quoting the text of Section 2.3 from the *executed* NewSun PPAs (not the *form* PPAs).[17]

D. DEFENDANTS CONCEDED THAT THE PPAS DO NOT DIRECTLY SUPPORT THEIR POSITION, AND PGE NEVER MADE ANY SUCH CONCESSION.

In its response, PGE noted in passing in a footnote that defendants admitted at oral argument that the PPAs do not state, anywhere, that the 15-years of fixed prices commence at the Commercial Operation Date ("COD").[18] PGE observed that defendants "essentially conceded that the NewSun PPAs cannot be construed in their favor unambiguously because, at the hearing when asked 'is there any language in the PPA that says fixed price starts at COD?' defendants answered, 'No, there's nothing in the PPA that specifically says that.'"[19] Defendants devote an entire section of their reply to this footnote but cannot point to any similar concession by PGE and instead merely re-state the undisputed law concerning contract interpretation and note that defendants disagreed with PGE at oral argument about the PPA. The Commission, though, agreed with PGE that the PPA, through Schedule 201 which is incorporated by reference in the PPA, unambiguously states fixed pricing begins at execution: the Commission concluded that the PPA "commences upon execution by both parties. In Schedule 201, 15 years of fixed pricing are available for the 'initial 15' years of the term."[20] There is only one reasonable interpretation of the PPA as a whole, given that the section of the PPA concerning prices states that fixed pricing begins at execution.[21]

[16] Defendants state that "Section 2.3 and the overall term of effectiveness of the PPAs is not relevant to the issue of when the period of fixed pricing begins." Defs. Reply at 5 (citation omitted).
[17] Order No. 19-255 at 10.
[18] PGE's Resp. at 18 n.71.
[19] *Id*.
[20] Order No. 19-255 at 15 (quoting Schedule 201).
[21] *Id*. (stating Section 4.5 does not address pricing and "controlling fixed price terms are found in Schedule 201").

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E. THE SECOND AND THIRD STEPS OF *YOGMAN* ARE UNNECESSARY BUT NEVERTHELESS THEY FAVOR PGE'S INTERPRETATION.

If it were necessary for the Commission to move to the second and third steps under *Yogman*[22] (it is not), those steps favor PGE's interpretation of the agreements and affirmation of summary judgment in PGE's favor. The analysis under the second and third steps of *Yogman* is detailed in PGE's summary judgment briefing and summarized in PGE's response opposing reconsideration.[23] In their reply, defendants' rejoinder is that the third step favors them because federal law establishes that a fixed price period exists to provide a sufficient period of predictable revenue to support QF financing and therefore is solely provided to benefit QFs.[24]

Defendants' argument once again ignores that the Commission, in Order No. 05-584, explicitly stated it was engaged, as allowed under PURPA, in balancing the interests of facilitating appropriate financing for a QF project and of mitigating against substantially inaccurate pricing QF power.[25] To facilitate financing, the Commission allowed QFs to opt for up to a 20-year term.[26] To accurately price power, the Commission limited fixed prices to "the *first* 15 years."[27] The Commission stated that "divergence between forecasted and actual avoided costs must be expected over a period of 20 years [and] [g]iven our desire to calculate avoided costs as accurately as possible … we are persuaded that standard contract prices should be fixed for *only the first* 15 years of the 20-year term."[28] Because the 15-year fixed price period was intended to mitigate the risk of substantially inaccurate prices, it protects utility customers. If there were an ambiguity in

[22] *Yogman v. Parrott*, 325 Or 358 (1997).
[23] PGE's Resp. at 18-19.
[24] Defs.' Reply at 7.
[25] *In the Matter of Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from QFs*, Docket No. UM 1129, Order No. 05-584 at 18 (May 13, 2005) ("[A] term of fifteen years represents an appropriate balance between attracting QF financing and limiting the risks that accompany long range power price forecasting.").
[26] *Id.* at 20.
[27] *Id.* (emphasis added).
[28] *Id.* (emphasis added).

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the NewSun PPAs (there is not), then the contracts (drafted at the direction of the Commission, with input from stakeholders including QF stakeholders, and subject to Commission review and approval) must be construed in favor of PGE's customers.

III. CONCLUSION

For the reasons stated in PGE's response opposing reconsideration and stated in this sur-reply, PGE requests that the Commission deny defendants' and Intervenors' applications for reconsideration of Order No. 19-255.

DATED this 4th day of November, 2019.

Respectfully submitted,

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