

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1931**

PORTLAND GENERAL ELECTRIC	)	
COMPANY,	)	
	)	<b>DEFENDANTS’ REPLY IN SUPPORT OF</b>
Complainant,	)	<b>MOTION FOR PROTECTIVE ORDER</b>
	)	<b>STAYING DISCOVERY</b>
v.	)	
	)	
ALFALFA SOLAR I LLC, et al.	)	
	)	
Defendants.	)	

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**INTRODUCTION AND SUMMARY OF REPLY**

Pursuant to OAR 860-001-0420, defendants Alfalfa Solar I LLC (“Alfalfa”), Dayton Solar I LLC (“Dayton”), Fort Rock Solar I LLC (“Fort Rock I”), Fort Rock Solar II LLC (Fort Rock II”), Fort Rock Solar IV LLC (“Fort Rock IV”), Harney Solar I LLC (“Harney”), Riley Solar I LLC (“Riley”), Starvation Solar I LLC (“Starvation”), Tygh Valley Solar I LLC (“Tygh Valley”), and Wasco Solar I LLC (“Wasco”) (collectively, the “NewSun Parties”), hereby submit this reply in support of their motion requesting that the Oregon Public Utility Commission (“Commission” or “OPUC”) stay discovery pending resolution of the NewSun

Parties' Motion for Summary Disposition.<sup>1</sup>

The Commission should reject the incorrect and contradictory arguments made in Portland General Electric Company's ("PGE") response to the NewSun Parties' Motion for Protective Order. After convincing the Commission and the United States District Court that this dispute required this Commission's uniform resolution of the meaning of same contract form executed by 72 different parties, PGE incorrectly interprets Oregon law to entitle it to engage in time-consuming and expensive discovery into irrelevant matters extrinsic to the narrow question of contract interpretation over which this Commission has asserted jurisdiction. Oregon law does not require production of voluminous electronic communications between the contracting parties, and especially not communications with their respective third-party financing entities, to ascertain whether the form contracts at issue are ambiguous. Any amount of discovery into such irrelevant matters will unnecessarily delay resolution of the NewSun Parties' Motion for Summary Disposition and therefore advantage PGE. Moreover, in asserting it is entitled to investigate the circumstances from which the contracts arose, PGE overlooks that the only relevant circumstances at issue are the regulatory background that created the standard contracts – contracts that this Commission has ordered are not subject to individual modifications of a substantive nature.

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<sup>1</sup> The NewSun Parties' Motion for Protective Order addresses procedural and substantive issues, and PGE's response even more directly puts substantive evidentiary issues in dispute, in particular whether the Commission should look to extrinsic evidence exchanged between the parties to determine if the standard contracts at issue are ambiguous. The NewSun Parties therefore interpret the Commission's procedural rules to allow a reply to PGE's response. OAR 860-001-420(5). This reply will ensure that the somewhat novel arguments introduced by PGE are addressed by the NewSun Parties before the Commission rules on the important substantive issues at stake in the Motion for Protective Order.

In short, PGE proposes to put the cart before the horse by subjecting the NewSun Parties to time-consuming and burdensome discovery before the Commission even determines if the contracts, as interpreted in the context from which they arose, are unambiguous. PGE's position also contradicts its commitment to agree to expedited resolution before the Commission in this matter, which the United States District Court found essential because the NewSun Parties have rapidly approaching contractual deadlines to achieve commercial operation which make time of the essence. Discovery should be stayed and PGE should be directed to promptly respond to the NewSun Parties' Motion for Summary Disposition.

### **ARGUMENT**

#### **1. Oregon Law Focuses on the Objective Meaning of the Text and Context of the Contracts in the First Step of Contract Interpretation at Issue Here**

The Oregon Supreme Court's rules of contract interpretation are well settled.<sup>2</sup> First, the court must attempt to ascertain the contract's meaning from its text considered as a whole with emphasis on the provision or provisions in question and the context of those provisions within the contract. *See Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997). Second, “[i]f a contract is ambiguous, the trier of fact will ascertain the intent of the parties and construe the contract consistent with the intent of the parties” by reviewing extrinsic evidence of such intent. *Id.* at 363 (internal quotation omitted, emphasis added). Third, if extrinsic evidence does not resolve the dispute, “the court relies on appropriate maxims of construction.” *Id.* at 364.

The NewSun Parties' Motion for Summary Disposition argues that this case is resolved

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<sup>2</sup> While PGE criticizes the NewSun Parties for applying common law contract interpretation rules, PGE fails to note that the United States District Court already held that this case is controlled by common law contract interpretation rules. *Alfalfa Solar I LLC v. Portland Gen. Elec. Co.*, No 3:18-CV-40-SI, 2018 WL 2452947, at \*6 (D Or May 31, 2018).

under step one of the *Yogman* test, and therefore extrinsic evidence and subjective understandings are simply not relevant. *See id.* at 361. This basic contract interpretation rule defeats PGE’s demand for discovery into extrinsic communications and documents in the possession of the NewSun Parties before resolution of the Motion for Summary Disposition. Likewise, PGE’s allegations that statements it made prior to execution of the NewSun PPAs somehow varied the terms of these fully integrated agreements are not relevant. *See PGE’s Complaint* at ¶ 24. Discovery into the topic is wholly unnecessary to resolve the Motion for Summary Disposition.

## **2. Extrinsic Evidence Is Not Relevant to Step One of *Yogman v. Parrot***

PGE’s primary legal argument incorrectly assumes that PGE has a right to engage in time-consuming discovery to attempt to find extrinsic evidence in the possession of the NewSun Parties that will somehow create an ambiguity in the standard contract that PGE drafted and this Commission approved. PGE points to ORS 42.220, which states, “In construing an instrument, the circumstances under which it was made, including the situation of the subject and the parties, may be shown so that the judge is placed in the position of those whose language the judge is interpreting.” Likewise, PGE cites *Abercrombie v. Hayden Corp.*, 320 Or 279, 883 P2d 845 (1994), and related precedent to support its claim that “in deciding whether an ambiguity exists, the court is not limited to mere text and context, but may consider parol and other evidence extrinsic to the contract.” *PGE’s Response to Motion for Protective Order* at 9. According to PGE, discovery of extrinsic evidence exchanged between the parties and even the NewSun Parties’ internal documents might reveal the NewSun Parties’ subjective understandings of the

standard contracts and thus impact the interpretation of the standard contracts. PGE is wrong for several reasons.

*First*, and most importantly, the “the circumstances under which”<sup>3</sup> the standard contracts were formed in this case have nothing to do with extrinsic communications between the parties or the NewSun Parties’ internal documents because the parties simply completed form agreements by filling in the blanks. Because the agreements at issue are form agreements, pre-approved by the Commission, the “exchange of draft revised standard contracts between a small QF and a utility to particularize a standard contract . . . is intended to address administrative *not substantive individualization of the contract.*” *PaTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, OPUC Docket No. UM 1566, OPUC Order 12-316, 4-5 (Aug. 21, 2012) (emphasis added). PGE fails to rebut that the “circumstances” at issue are that the form agreements were not substantively modified by the parties, and thus considering documents in the NewSun Parties’ possession would not place “the judge . . . in the position of those whose language the judge is interpreting.” ORS 42.220. None of the cases PGE cites in support of its argument involve standard form agreements that were approved by a regulatory body and not subject to negotiation. Instead, each case PGE cites addressed a contract that was substantively negotiated between the parties. In such cases, it is hypothetically possible that correspondence exchanged by the parties before execution could have assisted the judge in understanding the position of the

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<sup>3</sup> ORS 42.220.

parties.<sup>4</sup>

*Second*, although PGE cites a small handful of Oregon Court of Appeals decisions that look to extrinsic evidence of individually *negotiated* agreements to understand the circumstances of the parties, numerous other decisions contradict PGE’s argument. As the Ninth Circuit has explained, “the consensus among Oregon courts is that they are opposed to considering extrinsic evidence to determine the parties’ intent unless an ambiguity is apparent from the four corners of the document.” *Webb v. Nat’l Union Fire Ins. Co.*, 207 F3d 579, 582 (9th Cir 2000). Indeed the Oregon Court of Appeals has held, “[i]n determining whether an agreement is ambiguous, we are limited to the four corners of the document.” *Edwards v. Times Mirror Co.*, 102 Or App 440, 445, 795 P2d 564 (1990) (quoting *Jarrett v. U.S. National Bank*, 81 Or App 242, 246-47, 725 P2d 384 (1986), *rev den* 302 Or 476 (1987)). In *Jarrett*, the court explored the topic at length and held that “ORS 42.220 and ORS 41.740 permit a court to consider the circumstances surrounding the execution of an agreement *only* when the agreement is ambiguous on its face or is not fully integrated.” 81 Or App at 246-47 (citing *Bonded Credit Co. v. Hendrix*, 282 Or 35, 576 P2d 795 (1978); *Webster v. Harris*, 189 Or 671, 677-78, 222 P2d 644 (1950)) (emphasis in

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<sup>4</sup> See *PGE’s Response to Motion for Protective Order* at 9-10, citing *State v. Gaines*, 346 Or 160, 172 n 8, 206 P3d 1042 (2009) (addressing statutory construction, not interpretation of a contract); *Abercrombie*, 320 Or at 289-93 (holding oral statements did not create an ambiguity in quitclaim deed conveying commercial properties); *Nixon v. Cascade Health Service, Inc.*, 205 Or App 232, 238-39, 134 P3d 1027 (2006) (finding that even if extrinsic evidence of negotiations of the parties could be “circumstances” of contract formation under ORS 42.220, the extrinsic evidence did not create an ambiguity in the individually negotiated settlement release at issue); *Batzer Constr., Inc. v. Boyer*, 204 Or App 309, 319-25, 129 P3d 773 (2006) (holding that extrinsic evidence of negotiations and initial drafts of individually negotiated agreement dividing the assets of a joint business venture did not create an ambiguity in step one of the *Yogman* test); *Malmquist v. OMS Nat’l Ins. Co.*, 2011 WL 3298651, \*1 (D Or Aug. 1, 2011) (looking to extrinsic evidence of negotiations of parties to an individually negotiated settlement release).

*Jarrett*). Therefore, “[r]esort to extrinsic evidence to make an unambiguous document ambiguous is not permissible . . .” *Id.*

*Third*, the Ninth Circuit Court of Appeals has held that, in *Yogman*, the Oregon Supreme Court rejected the use of extrinsic evidence to determine if a contract is ambiguous. PGE relies on *Abercrombie*, 320 Or 292, and related precedent. However, as the Ninth Circuit explained, “*Yogman*, which was decided after *Abercrombie*, concluded that the parol evidence rule prohibits the admission of extrinsic evidence in a case in which a contract is unambiguous.” *Webb*, 207 F3d at 582 (citing *Yogman*, 325 Or at 361). Ninth Circuit caselaw applies here because this case was referred to the Commission under primary jurisdiction from federal court, and “[f]ederal district courts are bound by the Ninth Circuit's interpretation of Oregon law on extrinsic evidence until the Oregon Supreme Court decides the issue.” *Fogg v. Wart*, No. CV-06-160-ST, 2006 US Dist LEXIS 90583, at \*18 (D Or Dec 14, 2006). Therefore, “courts interpreting contracts under Oregon law in the Ninth Circuit cannot use extrinsic evidence to determine—at the first step of the analysis—whether a particular term or provision in a contract is ambiguous.” *Ness & Campbell Crane, Inc. v. Kleppe*, No. 3:17-cv-01865-HZ, 2018 US Dist LEXIS 58823, at \*11 n 2 (D Or Apr 5, 2018).

*Fourth*, even in the case of individually negotiated agreements where courts have considered extrinsic evidence to consider the “circumstances” of contract formation, such evidence is limited to correspondence and prior drafts exchanged between the parties, *not* one party’s internal correspondence, documents, or discussions with its financiers. *Fogg*, 2006 US Dist LEXIS 90583, at \*\*26-30. In analyzing a contract provision under step one of the *Yogman* test, one party’s “subjective intent and state of mind at the time they signed” a contract “are not

admissible extrinsic evidence to determine ambiguity of a contract.” *Id.* at \* 27. Thus, PGE’s request in its Data Request No. 2 for extensive internal correspondence and financing models is not permissible in any case.<sup>5</sup>

Therefore, even if the contracts were not form agreements, PGE’s reliance on ORS 42.220 could only support, *at most*, discovery regarding correspondence between the parties *before execution of the contracts*, and not discovery regarding any internal documents or correspondence the NewSun Parties may possess.

Further, PGE provides no explanation for why communications and correspondence between the NewSun Parties and PGE prior to execution of the contracts are not already equally available to PGE without discovery. Therefore, PGE’s demand that Defendants reproduce material PGE already possesses through burdensome electronic discovery—which must first be collected and sorted for responsiveness and privilege before producing to PGE—will only serve to delay resolution of the NewSun Parties’ Motion for Summary Disposition and the expedited resolution of this dispute.

### **3. PGE’s Response Overlooks Important Facts**

PGE makes a number of factual assertions in its response that are incomplete and present alleged precedents out of context.

First, PGE asserts that the NewSun Parties “responded to PGE’s first set of data requests by objecting to every request.” *PGE’s Response to Motion for Protective Order* at 2. While the NewSun Parties did indeed object to each of PGE’s burdensome and unnecessary discovery

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<sup>5</sup> As noted in the Motion for Protective Order, the NewSun Parties have raised a number of additional objections to many of PGE’s requests, especially its Data Request No. 2, and reserve the right to brief those additional objections should PGE file a motion to compel discovery.



requests, the NewSun Parties also responded over objection to five of the ten data requests PGE lodged.<sup>6</sup> That’s exactly how the NewSun Parties would have responded even without a pending motion for protective order to stay discovery. The responses are attached hereto for reference.

Next, PGE points to a “clawback agreement” that it entered into in *PaTu Wind Farm, LLC v. Portland General Electric Co.*, Docket No. UM 1566, and appears to argue that the NewSun Parties should also be required to enter into a clawback agreement to facilitate the voluminous electronic discovery PGE requests here. *PGE’s Response to Motion for Protective Order* at 17. However, the *PaTu Wind Farm* case involved much more than a simple contract interpretation issue that one party moved to resolve under step one of the *Yogman* test; it involved contract performance, which implicated the parties’ course of performance, and also included allegations of prevention of performance and breach of good faith and fair dealing. *See PaTu Wind Farm LLC v. Portland General Elec. Co.*, OPUC Docket No. UM 1566, Order No. 14-287, 5-12 (April 13, 2014). Thus, the issues and claims in the *PaTu Wind Farm* dispute made extrinsic evidence beyond the four corners of the agreement relevant, and thus apparently led the parties there to agree that the expense and delay associated with electronic discovery and clawback agreements was justified.

In any event, the *PaTu Wind Farm* case contains no order compelling either party to engage in voluminous electronic discovery, and the fact that the parties voluntarily entered into a clawback agreement serves as no precedent here. PGE cites no precedent establishing that a party can be compelled to enter into a clawback agreement, which necessarily assumes a certain

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<sup>6</sup> The NewSun Parties responded to PGE’s Data Request Nos. 6, 7, 8, 9, and 10, while preserving objections to the admissibility of the responses.

amount of attorney-client privileged material will be disclosed to the receiving party.

Rather, PGE's argument merely demonstrates the burden of its proposed discovery approach in this case. In fact, in *PaTu Wind Farm*, PGE took several months to produce electronic discovery and it did so only after a protracted discovery dispute that went unresolved for sixteen months. See *PaTu Wind Farm LLC's Motion to Compel Discovery*, OPUC Docket No. UM 1566, at 3, 11 (July 22, 2013).<sup>7</sup> The *PaTu Wind Farm* example confirms the NewSun Parties' contention that discovery is likely to be time consuming and lead to disputes and that the Commission therefore should address the Motion for Summary Disposition first to determine if discovery is necessary. Indeed, PGE's first set of data requests has already led to an ongoing discovery dispute between the parties during the pendency of the Motion for Protective Order.

PGE also incorrectly asserts that it is not "seeking inadmissible evidence concerning subjective intent." *PGE's Response to Motion for Protective Order* at 13. The NewSun Parties certainly agree that evidence of subjective understanding and intent is inadmissible, but there is no question that is exactly what PGE seeks with its burdensome discovery. PGE itself explains that PGE's discovery seeks "to show that Defendants agreed that PGE's interpretation of the standard PPA was either the correct interpretation or at least a reasonable interpretation." *Id.* at 13 n. 51. PGE seeks communications with third parties about financing to ascertain if "Defendants knew of PGE's position and planned for it financially." *Id.* at 14. That is evidence of subjective understanding of the agreements, which is irrelevant and inadmissible under Oregon's objective theory of contract interpretation.

The entire premise of PGE's demand for financing models is meritless. If PGE's theory

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<sup>7</sup> Available at <https://edocs.puc.state.or.us/efdocs/HAO/um1566hao151424.pdf>.

of the relevance of the NewSun Parties' financing models is correct, then the NewSun Parties also would be entitled to demand that PGE produce its own financial and planning models so that the NewSun Parties may likewise argue that any modeling of the costs to PGE under NewSun Parties' interpretation of the agreements is evidence that PGE agrees with the NewSun Parties' interpretation. Indeed, PGE's complaint already appears to allege PGE has modeled the cost of the NewSun Parties' interpretation of the agreements as imposing millions of extra dollars of costs on PGE. *See PGE's Complaint* at ¶ 20. Under PGE's theory of contract construction, PGE's act of modeling those costs would mean PGE agrees the NewSun Parties' interpretation is reasonable. PGE's argument is contradictory and undermines its own position.

**4. PGE's Remaining Arguments Do Not Demonstrate a Need for Discovery Before Ruling on the Motion for Summary Disposition**

PGE's Response contains a number of other incorrect arguments and assertions that misread the applicable caselaw. However, because these additional points have already been addressed in the NewSun Parties' Motion for Protective Order Staying Discovery or the Motion for Summary Disposition, and the NewSun Parties rely on their prior filings for issues not included in this Reply, without burdening the record with further briefing on those points.

**CONCLUSION**

The NewSun Parties respectfully request that the Commission grant a protective order and stay discovery unless and until the Commission determines that the NewSun PPAs are ambiguous and that there are disputed issues of material fact, ascertainable through discovery, that must be resolved to interpret the NewSun PPAs.

DATED this 27th day of July 2018.

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UM 1931

DEFENDANTS' REPLY IN SUPORT OF MOTION  
FOR PROTECTIVE ORDER STAYING DISCOVERY

ATTACHMENT 1

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1931**

PORTLAND GENERAL ELECTRIC COMPANY,	)	
	)	
Complainant,	)	<b>DEFENDANTS' RESPONSES TO</b>
	)	<b>PORTLAND GENERAL ELECTRIC</b>
v.	)	<b>COMPANY'S FIRST SET OF DATA</b>
	)	<b>REQUESTS</b>
	)	
ALFALFA SOLAR I LLC, et al.	)	
	)	
Defendants.	)	

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Defendants Alfalfa Solar I LLC (“Alfalfa”), Dayton Solar I LLC (“Dayton”), Fort Rock Solar I LLC (“Fort Rock I”), Fort Rock Solar II LLC (Fort Rock II”), Fort Rock Solar IV LLC (“Fort Rock IV”), Harney Solar I LLC (“Harney”), Riley Solar I LLC (“Riley”), Starvation Solar I LLC (“Starvation”), Tygh Valley Solar I LLC (“Tygh Valley”), and Wasco Solar I LLC (“Wasco”) (collectively, the “NewSun Parties” or “Defendants”), respond as follows to Plaintiff’s First Set of Data Requests:

**GENERAL OBJECTIONS**

1. Defendants’ responses are made to the best of their knowledge, information, and belief. Defendants’ responses are at all times subject to such additional discovery or investigation that further discovery or investigation may disclose and are subject to such refreshing of recollection, and such additional knowledge of facts, as may result from further discovery or investigation.

2. By stating in these responses that Defendants will produce documents, Defendants do not represent that any documents actually exist, but rather that in good faith

Defendants will search and attempt to ascertain whether such documents do, in fact, exist.

3. Defendants object to Plaintiff's requests to the extent those requests seek documents that are subject to the attorney-client privilege, the work product doctrine, or any other applicable privilege on the ground that such documents are exempt from discovery.

4. Defendants object to all definitions, instructions, and document requests to the extent Plaintiff seeks documents not currently in Defendants' possession, custody, or control, or refer to persons, entities or events not known to Defendants, on the grounds that such definitions or requests seek to require more of Defendants than any obligation imposed by law, would subject Defendants to unreasonable and undue annoyance, oppression, burden, and expense, and would seek to impose on Defendants an obligation to investigate or discover information or materials from third parties or sources that are equally accessible to Plaintiff.

5. Defendants reserve all objections or other questions as to the competency, authenticity, relevance, materiality, privilege, or admissibility as evidence in any subsequent proceeding in, or trial of, this or any other action for any purpose whatsoever of this response and any document or thing produced in response to Plaintiff's requests.

6. Defendants object to Plaintiff's requests to the extent they seek to impose obligations on Defendants not authorized by Public Utility Commission of Oregon rules or the Oregon Rules of Civil Procedure.

7. Defendants object to Plaintiff's requests to the extent they are vague, ambiguous, unintelligible, overly broad as to time and subject matter, seek irrelevant and/or immaterial information, and are not reasonably calculated to lead to the discovery of admissible evidence. Further, Defendants object to Plaintiff's requests to the extent they cause undue burden, harassment, or annoyance.

8. Each of these general objections is incorporated into each of Defendants' specific responses as if set forth in full below.



## RESPONSES TO INDIVIDUAL REQUESTS

### Portland General Electric Company Data Request No. 1:

For each NewSun QF, please provide a separate response to this Data Request 1 and each of its subparts

- (A) Please identify each and every individual that represented each NewSun QF in the contracting process or in otherwise requesting, obtaining, interpreting, negotiating, or implementing the NewSun PPA for the NewSun QF in question.
- (B) Please describe the role played by each representative identified in response to Data Request 1(A).
- (C) For each representative identified in response to Data Request 1(A), please identify all contacts or communications that representative has had with PGE regarding the NewSun QF in question, including the date and subject matter of each contact or communication.
- (D) For each communication identified in response to Data Request 1(C), please produce each and every document representing the communication, attached to the communication, or associated with the communication.

### Response to Portland General Electric Company Data Request No. 1:

(A)-(D) In addition to the general objections stated above, Defendants object to this request on the grounds that the request is unreasonably burdensome, overly broad, vague, and irrelevant to the issues in dispute. Defendants further object to this request to the extent that it seeks documents or information that are subject to the attorney client privilege or the attorney work product doctrine.

Defendants object to this request to the extent it seeks documents or information equally within Plaintiff's possession or control. In particular, as the recipient of all the contacts and communications that are the subject of this request, Plaintiff Portland General Electric Company ("PGE") already possesses the requested documents and information. Finally, Defendants object to this request for the reasons set forth in Defendants' Motion for Protective Order Staying Discovery.

## **Portland General Electric Company Data Request No. 2:**

For each NewSun QF and the NewSun PPA associated with that NewSun QF (please provide a separate response to this Data Request 2 for each NewSun QF):

- (A) Please produce all documents about pricing or revenue expected to be received for the contract term, including financial models and financial projections.
- (B) Please produce all communications or documents exchanged with third-parties concerning financing based on the pricing or revenue referred to in Data Request 2(A).
- (C) Please provide all internal documents about interpreting the disputed PPA terms or that analyze how long the fixed prices last and when they start.

## **Response to Portland General Electric Company Data Request No. 2:**

(A)-(C) In addition to the general objections stated above, Defendants object to this request on the grounds that the request is unreasonably burdensome, overly broad, vague, and irrelevant to the issues in dispute. Defendants further object to this request to the extent that it seeks documents or information that are subject to the attorney client privilege or the attorney work product doctrine, as well as documents that are subject to protection as commercially sensitive material. Defendants further object to this request on the ground that Section 210(e) and 18 CFR § 292.602 bar inquiries into the financing and utility-type ratemaking inquiries of the qualifying facilities under development in this state regulatory commission proceeding. Finally, Defendants object to this request for the reasons set forth in Defendants' Motion for Protective Order Staying Discovery.

In addition to these objections, Defendants note that responding to this request would require collection and review of extensive electronic information and would take months to complete. Defendants are unable to fully evaluate the scope and cost of such a production due to the vagueness and overbreadth of the request.

**Portland General Electric Company Data Request No. 3:**

For each NewSun PPA, please indicate whether Defendants expect to have completed all requirements under Section 1.5 and to have established the Commercial Operation Date by the deadline established in Section 2.2.2.

**Response to Portland General Electric Company Data Request No. 3:**

In addition to the general objections stated above, Defendants object to this request on the grounds that the request is unreasonably burdensome, overly broad, vague, and irrelevant to the issues in dispute. Defendants further object to this request for the reasons set forth in Defendants' Motion for Protective Order Staying Discovery.

**Portland General Electric Company Data Request No. 4:**

For each NewSun PPA, if the answer to Data Request 3 is no, please indicate whether Defendants expect to have completed all requirements under Section 1.5 and to have established the Commercial Operation Date within 12 months of the deadline established in Section 2.2.2.

**Response to Portland General Electric Company Data Request No. 4:**

In addition to the general objections stated above, Defendants object to this request on the grounds that the request is unreasonably burdensome, overly broad, vague, and irrelevant to the issues in dispute. Defendants further object to this request for the reasons set forth in Defendants' Motion for Protective Order Staying Discovery.

### **Portland General Electric Company Data Request No. 5:**

Please refer to Defendant's Answer at pages 3 and 4 where Defendants state: "PGE was aware ... that the NewSun Parties disagreed with PGE's interpretation and that the NewSun Parties understood PGE's standard form contracts at issue here to require PGE to pay fixed prices for 15 years from the Commercial Operation Date." Please also refer to Defendant's Answer at Paragraph 22 where Defendants state: "PGE was aware before execution of the NewSun PPAs that the NewSun Parties disagreed with PGE's interpretation and that the NewSun Parties understood PGE's standard form contracts to require PGE to pay fixed prices for 15 years from the Commercial Operation Date."

(A) Please provide all documents reflecting or otherwise showing that PGE was "aware" of the facts that Defendants allege PGE was aware of in the allegations referred to above.

(B) Did Defendants ever inform PGE or any Person employed by PGE or representing PGE "that the NewSun Parties disagreed with PGE's interpretation and that the NewSun Parties understood PGE's standard form contracts at issue here to require PGE to pay fixed prices for 15 years from the Commercial Operation Date"?

(C) If the answer to Data Request 5(B) is yes, please identify each and every Person employed by PGE or representing PGE that Defendants so informed and the date or dates of each time the Defendants so informed each such Person, and the identity of the Person that so informed PGE.

### **Response to Portland General Electric Company Data Request No. 5:**

(A)-(C) In addition to the general objections stated above, Defendants object to this request on the grounds that the request is unreasonably burdensome, overly broad, vague, and irrelevant to the issues in dispute. Defendants further object to this request to the extent it seeks documents or information equally within Plaintiff's possession or control. In particular, as the recipient of all the contacts and communications that are the subject of this request, PGE already possesses the requested documents and information. Defendants further object to this request for the reasons set forth in Defendants' Motion for Protective Order Staying Discovery.

### **Portland General Electric Company Data Request No. 6:**

Please refer to Defendants' Answer at Page 4 where the Defendants assert that "the provisions of [PGE's standard contract forms at issue in this case] all make sense only if the fixed price period begins at commercial operation ...." Please identify every provision of the standard contract form at issue in this proceeding that allegedly does not make sense if the fixed price period begins at contract execution.

### **Response to Portland General Electric Company Data Request No. 6:**

In addition to the general objections stated above, Defendants object to this request on the ground that it seeks a legal conclusion. Defendants further object to this request to the extent that it seeks documents or information that are subject to the attorney client privilege or the attorney work product doctrine. Defendants further object to this request for the reasons set forth in Defendants' Motion for Protective Order Staying Discovery.

Subject to and without waiving these objections, and without waiving the right to supply additional argument or evidence on this topic in this proceeding or any other proceeding, Defendants refer PGE to Defendants' Motion for Summary Disposition.

### **Portland General Electric Company Data Request No. 7:**

Please refer to Page 4 of the Answer where Defendants assert that their understanding of the 15-year fixed-price period under the NewSun PPAs “was informed by ... the NewSun Parties’ reasonable understanding of the policy articulated in the Commission’s Order No. 05-584, which Order No. 17-256 and Order No. 18-079 confirmed was correct ...” Please state Defendants’ understanding, as of the time that Defendants signed the NewSun PPAs, of the referenced Commission policy.

### **Response to Portland General Electric Company Data Request No. 7:**

In addition to the general objections stated above, Defendants object to this request on the grounds that the request is unreasonably burdensome, overly broad, vague, and irrelevant to the issues in dispute. Defendants further object to this request to the extent that it seeks documents or information that are subject to the attorney client privilege or the attorney work product doctrine. Finally, Defendants object to this request for the reasons set forth in Defendants’ Motion for Protective Order Staying Discovery.

Subject to and without waiving these objections, the Defendants’ authorized representative at the time each of the NewSun PPAs was executed was Jacob Stephens. At the time of contract execution, Mr. Stephens’ understanding was the same as that articulated by the Public Utility Commission of Oregon in Order No. 18-079.

### **Portland General Electric Company Data Request No. 8:**

Please refer to Page 4 of the Answer where Defendants refer to “the common industry practice and understanding that a term of years of fixed prices in power purchase agreements (‘PPAs’) for new power generation facilities typically runs from the time the seller becomes operational and begins transmitting power to the buyer, not from the date—generally years earlier—on which the seller executes the agreement ....”

- (A) Please provide all documents on which Defendants rely to support their assertion of the existence of the “common industry practice and understanding” alleged and referenced on page 4 of the Answer.
- (B) For each document provided in response to Data Request 8(A), please explain how the document evidences a “common industry practice and understanding that a term of years of fixed prices in power purchase agreements ... runs from the time the seller becomes operational and begins transmitting power to the buyer ....”
- (C) Has the Public Utility Commission of Oregon (“Commission”) indicated that it relied on the “common industry practice and understanding” referenced above in requiring the 15-year fixed-price period? If so, please identify each instance in which the Commission has so indicated and provide any documents in which the Commission has so indicated.

### **Response to Portland General Electric Company Data Request No. 8:**

(A)-(C) In addition to the general objections stated above, Defendants object to this request on the ground that it seeks a legal conclusion. Defendants further object to this request to the extent that it seeks documents or information that are subject to the attorney client privilege or the attorney work product doctrine. Defendants further object to this request for the reasons set forth in Defendants’ Motion for Protective Order Staying Discovery.

Subject to and without waiving these objections, and without waiving the right to supply additional argument or evidence on this topic in this proceeding or any other proceeding, Defendants refer PGE to Defendants’ Motion for Summary Disposition, including the declarations and exhibits submitted in support of Defendants’ motion.



**Portland General Electric Company Data Request No. 9:**

Please refer to Page 4 of the Answer where Defendants state: "... the NewSun Parties understood PGE's standard form contracts at issue here to require PGE to pay fixed prices for 15 years from the Commercial Operation Date." Please identify all of the express language in the standard form contracts at issue in this case that requires PGE to pay fixed prices for 15 years measured from the Commercial Operation Date.

**Response to Portland General Electric Company Data Request No. 9:**

In addition to the general objections stated above, Defendants object to this request on the grounds that it seeks legal conclusions and argument. Defendants further object to this request to the extent that it seeks documents or information that are subject to the attorney client privilege or the attorney work product doctrine. Defendants further object to this request for the reasons set forth in Defendants' Motion for Protective Order Staying Discovery.

Subject to and without waiving these objections, and without waiving the right to supply additional argument or evidence on this topic in this proceeding or any other proceeding, Defendants refer PGE to Defendants' Motion for Summary Disposition.

**Portland General Electric Company Data Request No. 10:**

Please refer to Page 4 of the Answer where the Defendants state: “if the NewSun PPAs were interpreted such that the 15-year fixed-price option begins on the date the contract is executed, the NewSun PPAs would contain inconsistent and contradictory terms regarding whether the applicable NewSun Party or PGE owns the Environmental Attributes of the facility in certain years of the contract.” Please identify all language contained in the NewSun PPAs that would be inconsistent or contradictory regarding whether Defendants or PGE owned Environmental Attributes if the NewSun PPAs are interpreted such that the 15-year fixed-price period begins on the date the contract is executed.

**Response to Portland General Electric Company Data Request No. 10:**

In addition to the general objections stated above, Defendants object to this request on the grounds that it seeks legal conclusions and argument. Defendants further object to this request to the extent that it seeks documents or information that are subject to the attorney client privilege or the attorney work product doctrine. Defendants further object to this request for the reasons set forth in Defendants’ Motion for Protective Order Staying Discovery.

Subject to and without waiving these objections, and without waiving the right to supply additional argument or evidence on this topic in this proceeding or any other proceeding, Defendants refer PGE to Defendants’ Motion for Summary Disposition.

DATED this 9th day of July 2018.

By: /s/ Gregory M. Adams \_\_\_\_\_  
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