



Portland General Electric Company
Legal Department
121 SW Salmon Street • Portland, Oregon 97204
503-464-7181 • Facsimile 503-464-2200

David F. White
Associate General Counsel

July 3, 2018

Via Electronic Filing

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

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

Attention Filing Center:

Enclosed for filing in Docket UM 1931 is Portland General Electric Company's Comments Regarding Procedural Schedule.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in blue ink that reads "David F. White". The signature is written in a cursive, flowing style.

David F. White
Associate General Counsel

DFW:jlh

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1931

PORTLAND GENERAL ELECTRIC
COMPANY,

Complainant,

vs.

ALFALFA SOLAR I LLC, DAYTON
SOLAR I LLC, FORT ROCK SOLAR I LLC,
FORT ROCK SOLAR II LLC, FORT ROCK
SOLAR IV LLC, HARNEY SOLAR I LLC,
RILEY SOLAR I LLC, STARVATION
SOLAR I LLC, TYGH VALLEY SOLAR I
LLC, WASCO SOLAR I LLC,

Defendants.

**PORTLAND GENERAL
ELECTRIC COMPANY'S
COMMENTS REGARDING
PROCEDURAL SCHEDULE**

Portland General Electric Company (“PGE”) respectfully submits these comments in advance of the July 3, 2018 pre-hearing conference to set a procedural schedule. PGE seeks the efficient and expedited resolution of this case. To resolve this case, the Commission will need to evaluate a fairly complex set of facts and legal issues behind the evolution of PGE’s standard contract forms from 2005 until 2016. In addition, there are a number of potentially disputed issues of material fact that could mean this case cannot be resolved on summary judgment. PGE served its first set of data requests on Defendants on June 25, 2018, in an effort to resolve some of the factual uncertainty in the case.

As plaintiff, PGE has anticipated pursuing a procedural schedule involving the Commission’s traditional milestones for a contested case proceeding: pre-filed testimony, a hearing, and post-hearing briefs. That process is reflected in the procedural schedule recently agreed by the parties in Docket No. UM 1859 (Falls Creek Hydro Limited v. PGE), another contested case proceeding involving a qualifying facility (“QF”) standard contract. In that case the parties agreed to proceed through the traditional milestones for a contested case

using a schedule that would last about 10 months.¹ In this case, PGE proposes to expedite or compress the timing of the traditional milestones so that the case can be resolved in about 6 months. PGE has proposed to Defendants that the parties agree to the following schedule:

PGE’s Preferred Schedule:

EVENT	DATE
ALJ ruling on procedural schedule	July 3, 2018
Initial Discovery (target to complete)	July 20, 2018 (expedited deadlines if needed)
PGE’s Opening Testimony	August 10, 2018
NewSun’s Response Testimony	August 31, 2018 (expedited discovery deadlines)
PGE’s Reply Testimony	September 14, 2018 (expedited discover deadlines)
Cross-examination statements	September 21, 2018 (1 week after reply testimony)
Hearing	September 28, 2018 (1 week after x-exam)
PGE’s Opening Brief	October 19, 2018 (3 weeks after hearing)
NewSun’s Response Brief	November 9, 2018 (3 weeks after PGE’s brief)
PGE’s Reply Brief	November 27, 2018 (2 weeks after NewSun’s brief)
Commission Decision (target date)	December 27, 2018

PGE has discussed this schedule with Defendants (“NewSun”). NewSun favored an exchange of cross motions for summary judgment. However, PGE is concerned that there may be material issues of disputed fact that prevent resolution of this case through cross-motions for summary judgment.² PGE hopes to complete discovery as quickly as possible so that it can determine whether its case is amenable to resolution through summary judgment. However, PGE is not at present prepared to agree to proceed through cross motions for summary judgment.

On June 26, 2018, NewSun informed PGE that it would not agree to the schedule proposed by PGE. On June 27, 2018, NewSun indicated to PGE that it would seek approval of the following schedule:

NewSun’s Preferred Schedule:

EVENT	DATE
NewSun Motion for Summary Judgment	Immediately (July 2, 2018)
PGE Response	21 days after motion (July 23, 2018)
NewSun Reply	14 days after response (August 6, 2018)
Oral Argument	Within 14 days of reply (August 20, 2018)
Commission Order	Within 45 days of oral argument (Oct. 1, 2018)

¹ *Falls Creek Hydro Limited Partnership v. Portland Gen. Elec. Co.*, Docket No. UM 1859, Telephone Prehearing Conference Report and Ruling at 1 (May 23, 2018).

² Examples of potential factual disputes include: (i) each parties’ knowledge regarding the other parties’ interpretation of the 15-year fixed-price period *before* the PPAs were executed; (ii) any facts associated with Defendant’s allegation that PGE’s interpretation of the 15-year fixed-price period was a tactic intended to delay or discourage QFs from entering into PPAs; (iii) any facts associated with Defendants’ assertion that an “industry standard” exists regarding when a fixed-price period begins to run, or that the Commission made its decisions about the 15-year fixed-price period in reference to such an alleged standard; and (iv) any facts about Defendants’ decision to intentionally forego clarification of the disputed provisions before signing the PPAs.

PGE acknowledges that NewSun has the right to file a motion for summary judgment. In fact, during the preparation of these comments PGE received service of NewSun's motion for summary judgment and an associated motion for oral argument and expedited process. PGE has not had an opportunity to closely review those motions or even to read them in their entirety. Pursuant to OAR 860-001-0420(4), PGE has seven days to respond to NewSun's motion for oral argument and expedited process if the motion is procedural, and 14 days to respond if it is substantive. PGE believes the motion is substantive because it asks the Commission to conclude that this proceeding cannot involve the resolution of any disputed facts.³ PGE respectfully requests that the Administrative Law Judge ("ALJ"): (a) reject NewSun's motion for oral argument and expedited process and adopt one of the schedules proposed by PGE; or (b) defer a decision on the schedule and allow PGE 14 days to respond to NewSun's substantive motion.

Given that NewSun has now filed a motion for summary judgment, PGE proposes as an alternative schedule, that PGE be allowed six weeks to file its response in opposition. Six weeks is an appropriate period of time for PGE's response for the following reasons.

First, this case has a complex factual and legal background that must be briefed in order for the Commission to resolve the issues in dispute and interpret the power purchase agreements in question. NewSun argues that the issues in this case have already been litigated in Docket No. UM 1805,⁴ but this is not correct. In UM 1805, the Commission never considered or interpreted the language of PGE's standard contract forms, and it certainly did not consider the facts underlying the formation of the NewSun PPAs (including the fact that

³ *Portland Gen. Elec. Co. v. Alfalfa Solar I LLC et al*, Docket No. UM 1931, Defendants' Motion for Oral Argument and for Expedited Process on Motion for Summary Judgment at 3 (June 2, 2018) (arguing the District Court order staying NewSun's federal case "counsels against any evaluation of factual circumstances unique to the NewSun PPAs in this proceeding. Accordingly the court has deferred to this Commission to weigh in, on an expedited basis, regarding the meaning of the NewSun PPAs if such meaning can be ascertained without detailed factual inquires.").

⁴ Docket No. UM 1931, Defendants' Motion for Summary Disposition at 5 (July. 2, 2018).

NewSun was well aware of PGE's interpretation of the 15-year fixed-price period *before* NewSun entered into the NewSun PPAs). Second, Defendants propose to resolve this entire case with one brief from PGE and two briefs from Defendants; PGE is skeptical that the case can be resolved on summary judgment, but if it can be then it will require briefs and supporting declarations that are comprehensive, and that requires time. Third, PGE has pending data requests and PGE wants to receive responses and be able to conduct a follow-up round of discovery before PGE's response is due. Again, if one set of briefs on a motion for summary judgment is expected to resolve this case, it is important to provide enough time to first complete any necessary discovery. Fourth, PGE needs time to prepare declarations in support of its response and key PGE declarants have pre-existing vacation plans in July. Finally, both PGE's in-house counsel and its outside counsel have long-standing vacation plans in July. For all of these reasons, PGE believes a six-week response period is appropriate.

Given vacation schedules, a six-week response period will provide PGE with effectively three to four working weeks to prepare its response to NewSun's dispositive motion. In Docket No. UM 1877 (*Bottlenose Solar LLC v. PGE*) and 11 related cases involving QF standard contracts, PGE moved for summary judgment and the plaintiff QFs sought additional time to respond. In that case, PGE proposed a three-week response period and the plaintiff QFs sought additional time because of pre-existing vacation schedules and work capacity constrains. In the *Bottlenose* case, the ALJ ultimately decided to give plaintiff QFs slightly more than six weeks from the date the summary judgment motion was filed to prepare and file their response.⁵

⁵ *Bottlenose Solar LLC et al. v. Portland Gen. Elec. Co.*, Docket Nos. UM 1877-UM 1882, UM 1884-UM 1886, UM 1888-UM 1890, Prehearing Conference Report (Feb. 13, 2018).

PGE respectfully requests that it be allowed six weeks to respond to NewSun’s motion for summary judgment and that NewSun be required to timely respond to PGE’s discovery requests during that time. PGE proposes that NewSun’s reply be due two weeks later (or longer if NewSun wishes). PGE anticipates that after it conducts initial discovery, it will be in a position to determine whether a cross-motion for summary judgment is appropriate. If a cross-motion is appropriate, then PGE proposes to file its cross-motion one-week after NewSun files its reply. PGE proposes that the Commission conduct an oral argument on the motion or motions for summary judgment. If the motion or motions for summary judgment are denied, then PGE proposes that the case proceed through pre-filed testimony, a hearing, and post-hearing briefs.

In sum, if PGE’s preferred schedule is not adopted and the parties are directed to first file and brief a summary judgment motion or cross-motions, then PGE proposes the following alternative schedule:

PGE’s Proposed Alternative Schedule:

EVENT	DATE
NewSun Motion for Summary Judgment	July 2, 2018
PGE Response	August 13, 2018
NewSun Reply	August 27, 2018
PGE Cross-Motion For Summary Judgment	September 3, 2018 (if at all)
NewSun Response	September 24, 2018 (if needed)
PGE Reply	October 8, 2018 (if needed)
Oral Argument (within 14 days of file briefing on motion or motions for summary judgment)	September 10, 2018 (if no cross-motion) or October 22, 2018 (if there is a cross-motion)
Commission Decision (target date)	45 days after oral argument
Prehearing conference (if sum. judgment denied)	TBD
PGE Opening Testimony	TBD
NewSun Response Testimony	TBD
PGE Reply Testimony	TBD
Cross-examination Statements	TBD
Hearing	TBD
PGE Opening Brief	TBD
NewSun Response Brief	TBD
PGE Reply Brief	TBD
Commission Decision	TBD

In conclusion, PGE supports an efficient and expedited schedule. PGE's preferred schedule includes traditional Commission milestones and would proceed on an expedited basis. If PGE's preferred schedule is not adopted, PGE proposes that a summary judgment motion or cross-motions be briefed and argued on the alternative schedule PGE has proposed above.

DATED this 3rd day of July, 2018.

Respectfully submitted,



David White, OSB #011382
Associate General Counsel
Portland General Electric Company
121 SW Salmon Street, 1WTC13
Portland, OR 97204
Tel: (503) 464-7701
Fax: (503) 464-2200
Email: david.white@pgn.com



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