

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1931

PORTLAND GENERAL ELECTRIC)	
COMPANY,)	
)	DEFENDANTS' MOTION FOR
Complainant,)	CLARIFIATION OR, IN THE
)	ALTERNATIVE, REQUEST FOR
v.)	CERTIFICATION FOR THE
)	COMMISSION'S CONSIDERATION
ALFALFA SOLAR I LLC, et al.)	
)	
Defendants.)	

INTRODUCTION AND SUMMARY OF MOTION

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 request clarification of the Ruling issued by Administrative Law Judge (“ALJ”) Allan J. Arlow on August 23, 2018 (the “Ruling”). Specifically, the NewSun Parties request clarification that the parties may file or renew motions for summary disposition after the conclusion of the initial discovery process and that the Ruling does not constitute a final determination that the contracts at issue are ambiguous. Alternatively, if the Ruling is intended to foreclose the parties from seeking summary disposition at any point in this proceeding and/or to conclusively establish that the NewSun PPAs are ambiguous on the matter in dispute, the NewSun Parties respectfully

request pursuant to OAR 860-001-0110 that the ALJ certify the portions of the Ruling finding the NewSun PPAs ambiguous and denying the NewSun Parties' motion for summary disposition for consideration and disposition of those issues by the Public Utility Commission of Oregon (the "Commission" or the "OPUC").

The NewSun Parties understand that the ALJ has denied their motion for summary disposition and ordered the parties to engage in discovery regarding the formation of the NewSun PPAs, including discovery regarding the parties' state of mind at the time they entered into these contracts. While the NewSun Parties stand by the arguments they made in briefing the motions that are the subject of the Ruling, this motion for clarification or certification is not intended to challenge the portion of the ALJ's ruling directing the parties to engage in limited discovery, and the NewSun Parties are engaging in the such discovery pending the outcome of this motion.

The NewSun Parties further understand that the ALJ declined to adopt their proposed schedule for resolving their motion for summary disposition but reiterate their request that whatever process is used to resolve this dispute be conducted as expeditiously as possible. Throughout their dispute with PGE, the NewSun Parties have pursued the course of action they believed from existing Commission orders was most likely to lead to an expeditious and efficient resolution of that dispute.¹ In light of the ALJ's determination that discovery is necessary, the

¹ At the time the NewSun Parties filed their complaint in federal court, the only final order issued by the Commission addressing the subject of jurisdiction over contract disputes adopted the Commission's staff's position that the Commission lacks such jurisdiction. *Re Central Irrigation District*, OPUC Docket No. DR 45, Order No. 10-495, at App. A, pp. 4-5 (Dec. 10, 2010). Given that precedent, it was not unreasonable to proceed directly to court, which would be the most efficient option to obtain final resolution in light of the Commission's own order

NewSun Parties will work as quickly as possible to produce the materials that the ALJ has ruled are discoverable and will confer with PGE in an effort to agree to a schedule that will lead to a prompt and efficient resolution of the parties' dispute. The NewSun Parties continue to believe that summary disposition may ultimately prove to be the most efficient means of resolving this dispute, and therefore make this motion to preserve that option.

MOTION FOR CLARIFICATION

It is not clear to the NewSun Parties whether the Ruling is intended to foreclose the parties from seeking summary disposition after the conclusion of the initial discovery process. It also is not clear to the NewSun Parties whether the Ruling is intended to be a final determination that the contracts at issue are ambiguous as to the period of fixed pricing. The NewSun Parties therefore request that the ALJ clarify the Ruling with respect to these issues.

Summary disposition is appropriate where “the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law.” ORCP 47C; *see also Portland General Elec. Co. v. Oregon Energy Co., LLC et al.*, OPUC Docket No UC 315, Order No 98-238, at 1-2 (June 12, 1998) (“If there are no genuine issues of material fact, no hearing need be held. That is the principle on which summary disposition is posited.”). “No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion” ORCP 47C.

questioning the “legal significance of a [Commission] order based solely upon the application of contract law to interpret a contract.” *Id.*

Notable, Oregon courts have “recognize[d] at least two circumstances” in which summary judgment may be appropriate even where a contract is found to be ambiguous in step one of the interpretation methodology set forth in *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997). See *Dial Temp. Help Serv. v. DLF Int’l Seeds, Inc.*, 255 Or App 609, 612, 298 P 3d 1234 (2013). First, summary judgment is appropriate where the extrinsic evidence of the parties’ intent is “sketchy” and does not resolve the contract’s meaning. *Id.* Second, summary judgment is appropriate where the party with the burden of presenting evidence to establish a disputed issue of fact as to the parties’ intended meaning fails to meet its burden at summary judgment. *Id.* at 612-13.² Indeed, in *Yogman* itself, the Oregon Supreme Court granted summary judgment regarding the meaning of an ambiguous contract, construing it against its drafter after concluding that the extrinsic evidence of the parties’ intent was “sketchy” and failed to establish any common subjective intent. *Id.* at 612 (quoting *Yogman*, 325 Or at 363-64).

So far, no party to this proceeding has identified any disputed fact material to interpreting the NewSun PPAs. Indeed, the parties are only now beginning to engage in discovery of material that may be relevant to the parties’ subjective understanding of the contracts’ intended meaning. Accordingly, it is premature to determine whether a genuine issue exists as to any material fact.

² As the NewSun Parties have argued, summary judgment also is appropriate where, as here, the contracts at issue are based on a form agreement which is not subject to substantive negotiation and where the regulated utility, accordingly, should not be allowed to change the meaning of the Commission-approved form by making statements to individual qualifying facilities. At a minimum, this is a question that ultimately should be resolved by the Commission itself, further supporting the need for clarification or certification.

The NewSun Parties therefore submit that it is appropriate to allow the parties to renew or file motions for summary disposition after the conclusion of the initial discovery process.

With respect to the issue of ambiguity in the NewSun PPAs, the Ruling states: “In the presence of ambiguity ... summary disposition ceases to be an available procedural option.” *Ruling* at 7.³ It does not appear, however, that the Ruling is intended to be a final determination that the contracts are ambiguous. Among other things, the Ruling: (a) does not discuss the text or context of the NewSun PPAs or explain why the contracts’ terms are ambiguous; and (b) does not address the contention in the NewSun Parties’ motion that PGE’s favored interpretation of the contracts gives rise to an unreconcilable conflict between certain of the contracts’ terms. *See NewSun Parties’ Motion for Summary Disposition* at 27-35. In addition, PGE has not argued that the NewSun PPAs are ambiguous. A final determination that the contracts are ambiguous therefore would adopt a position no party has taken. Finally, while the Ruling refers to arguments that may have been made in the UM 1805 complaint,⁴ the NewSun Parties did not

³ This statement is technically correct. It is possible that no genuine issue as to a material fact may exist even if an agreement is ambiguous. *Dial Temp. Help Serv.*, 255 Or App at 612. Put differently, the language of an agreement may be susceptible to more than one reasonable interpretation, but the factual issues material to resolving the ambiguity may be undisputed. In such circumstances, summary disposition is an appropriate means of resolving the ambiguity.

⁴ The Ruling states that the UM 1805 complaint “criticized PGE’s standard contract as not being clear” *Ruling* at 7. The UM 1805 complaint, however, regarded the version of PGE’s standard contract that was in effect at the time the UM 1805 complaint was filed, not the previously effective contract forms executed by the NewSun Parties and at issue in this case. The forms in effect at the time of the UM 1805 complaint did not contain the same terms regarding the change in ownership of environmental attributes and renewable fixed pricing that occurs fifteen contract years after the commercial operation date as exist in the NewSun PPAs. The inconsistency that exists in the forms executed by the NewSun Parties, but not the forms offered at the time of the UM 1805 complaint, was a substantial basis of the NewSun Parties’ argument that the NewSun PPAs are not ambiguous in their motion for summary disposition. *See NewSun Parties’ Motion for Summary Disposition* at 27-35.

make (and have not adopted) any such arguments. In any event, neither the contracts at issue here nor the form agreement on which those contracts are based were part of the record in UM 1805.

For these reasons, the NewSun parties request that the ALJ clarify that the Ruling is not intended to be a final determination that the contracts at issue are ambiguous. Absent such clarification, the Ruling will create an unclear record if the Commission later addresses the issue of ambiguity itself.

REQUEST, IN THE ALTERNATIVE, FOR CERTIFICATION

If the Ruling is intended to foreclose the parties from renewing or filing motions for summary disposition at any point during this proceeding and/or to conclusively establish that the contracts at issue are ambiguous, the NewSun Parties request that the ALJ certify the Ruling as to the NewSun Parties' motion for summary disposition for consideration and disposition by the Commission.

The Commission's administrative rules provide that "[a] party may request that the ALJ certify an ALJ's written or oral ruling for the Commission's consideration." OAR 860-001-0110(1). The administrative rules further provide:

The ALJ must certify the ruling to the Commission under OAR

860-001-0090 if the ALJ finds that:

- (a) The ruling may result in substantial detriment to the public interest or undue prejudice to a party;
- (b) The ruling denies or terminates a person's participation; or
- (c) Good cause exists for certification.

OAR 860-001-0110(2).

Here, a ruling that prevents the parties from renewing or filing motions for summary disposition after the conclusion of the initial discovery process would unduly prejudice the NewSun Parties by foreclosing a potentially efficient and effective method of resolving the parties' dispute before it even is clear whether a genuine issue exists as to any material fact. Requiring the parties to proceed to an evidentiary hearing before the Commission on the meaning of the Commission-approved form contracts, even if there is no genuine issue as to any material fact, would subject the parties to unnecessary and avoidable cost and delay.

Similarly, a final ruling at this stage of the proceeding that the contracts at issue are ambiguous also would unduly prejudice the NewSun Parties. Among other things, it is not clear from the Commission's rules whether such a ruling by an ALJ precludes the Commission from revisiting (or prejudices the Commission's ability to revisit) that conclusion when considering subsequent dispositive motions or after a hearing on the merits. *See, e.g.*, OAR 860-001-0090 (not listing resolution of substantive motions as a task delegated to ALJ or describing whether any such ruling would bind the parties or the Commission). Accordingly, the Ruling prejudices the NewSun Parties to the extent that it precludes or limits the NewSun Parties' ability to seek review by the Commission of the determination that the contracts at issue are ambiguous. Indeed, the Ruling also may prejudice PGE to the extent PGE may argue the contracts are unambiguous in PGE's favor. For these reasons, Commission itself should be afforded an opportunity to determine if the contracts at issue are ambiguous after fully considering the arguments made in the NewSun Parties' motion for summary disposition.

CONCLUSION

For the reasons set forth above, the NewSun Parties respectfully request that the ALJ clarify whether, pursuant to the Ruling, the parties may file motions for summary disposition after the conclusion of the initial discovery process and whether the Ruling is intended to be a final determination that the contracts at issue are ambiguous. If the Ruling is intended to foreclose the parties from seeking summary disposition at any point in this proceeding and/or if the Ruling is intended to establish conclusively that the contracts at issue are ambiguous, the NewSun Parties respectfully request that the ALJ certify this portion of the Ruling for consideration and disposition by the Public Utility Commission of Oregon (the “Commission” or the “OPUC”).

DATED this 31st day of August 2018.

By: /s/ Keil M. Mueller

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