BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	)	**DEFENDANTS' REQUEST FOR LEAVE TO REPLY AND REPLY IN SUPPORT OF APPLICATION FOR RECONSIDERATION**

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, "Defendants" or the "NewSun Parties") hereby respectfully request leave to reply and submit their proposed reply to Portland General Electric Company's ("PGE") response to Defendants and Intervenors' applications for reconsideration of the Public Utility Commission of Oregon ("OPUC" or "Commission") Order No. 19-255 (the "Order").

REQUEST FOR LEAVE TO FILE A REPLY

Although OAR 860-001-0720(4) does not provide for a reply to a response to an application for reconsideration unless requested by the Administrative Law Judge ("ALJ"), the NewSun Parties respectfully request that the Commission accept this reply to ensure the record is complete and the arguments on reconsideration are joined.

The rule generally barring replies on reconsideration exists to allow the Commission to rule within the statutory sixty-day deadline, but the Commission has explained: "[i]f an applicant feels that its position has been wrongly construed by the reply [to the reconsideration application], it may move for leave to file another brief." *Re United States Cellular Corp.*, Docket No. UM 1084, Order No 04-599 (Oct. 18, 2004). Such a "motion will be considered in light of the time constraints on the Commission." *Id.* Thus, the Commission has accepted such replies when promptly filed and appropriately limited in scope. *See Re PacifiCorp: dba Pacific Power, Transition Adjustment, Five-Year Cost of Service Opt-Out*, Docket No UE 267, Order No 15-195, at 1 n 2 (June 16, 2015) (accepting reply filed seven days after response); *PaTu Wind Farm, LLC v. Portland General Elec. Co.*, Docket No UM 1566, Order No 14-425, at 1 & n 1 (Dec. 8, 2014) (accepting reply filed three days after response).

The NewSun Parties' reply should be accepted and considered by the Commission because it is promptly filed within seven days of PGE's response, and it is limited to discrete issues that were not directly addressed in the applications for reconsideration. As explained below, PGE has made arguments that have wrongly construed the NewSun Parties' position. Additionally, without accepting and considering this limited reply, the record will contain no argument from the NewSun Parties in response to the points addressed by the NewSun Parties in this reply.

To expedite the ALJ's consideration of whether the reply should be allowed, the NewSun Parties have included the proposed reply with this request for leave to file the reply.

The NewSun Parties have contacted PGE to determine if agreement could be reached on the procedural question of whether a reply should be allowed in this case. PGE has communicated that it does not agree that a reply should be allowed and reserves the right to file

an objection. Intervenors Community Renewable Energy Association, Renewable Energy Coalition and the Northwest and Intermountain Power Producers Coalition support this request for leave to reply.

REPLY ARGUMENT

I. The NewSun Parties' Application Is Not Simply a Restatement of Prior Arguments.

PGE's primary argument—that the NewSun Parties' application for reconsideration should be rejected out of hand because it fails to identify errors essential to the Commission's decision and instead simply restates prior arguments—is incorrect. The NewSun Parties' application first identifies an error of fact regarding Section 2.3 of the NewSun power purchase agreements ("PPAs"). *NewSun Parties' Reconsideration Application* at 4-8. The NewSun Parties' plainly could not have anticipated, much less responded to, an error of fact in Order No. 19-255 until the Order was issued. As demonstrated in the NewSun Parties' application, this error of fact was essential to the Commission's decision and, accordingly, reconsideration is appropriate, especially in light of the other errors the NewSun Parties identified.

Similarly, each of the other sections of the NewSun Parties' application directly responds to specific errors in the legal reasoning set out in the Order. Again, the NewSun Parties could not previously have addressed these errors of law because they did not exist until the Order was issued. The Order's legal errors appropriately raised included: the Order's erroneous insertion of the defined and capitalized word "Term" in the NewSun PPAs—which is a period of years longer than fifteen years—into Schedule 201's phrase "maximum term of 15 years[,]" *see id.* at 8-12; the Order's erroneous conclusion that unrebutted evidence of industry usage has no relevance in interpreting the contracts, *id.* at 12-16; the Order's erroneous legal conclusion that Oregon law allows for adoption of an interpretation that creates unnecessary inconsistencies with

respect to ownership of RPS Attributes, *id.* at 16-20; and the Order's failure to interpret the NewSun PPAs consistent with the Commission's policy giving rise to the contracts as expressed in the Commission's orders in UM 1805, *id.* at 20-22.

These errors of fact and law are individually and collectively essential to the decision reached in the Order. Raising these errors through an application for reconsideration is entirely appropriate as it provides the Commission an opportunity to reconsider its decision and correct the errors in its legal reasoning.

II. The "Invited Error" Doctrine Does Not Apply to a Motion for Reconsideration and, In Any Event, the NewSun Parties Did Not Invite Any Error.

PGE's contention that the NewSun Parties invited the Commission's error of fact with respect to Section 2.3 is irrelevant and wrong. It is irrelevant because Oregon courts apply the invited error doctrine when a decision is on appeal. *See, e.g., State v. Brown*, 272 Or App 321, 324, 355 P3d 129 (2015); *State v. Kammeyer*, 226 Or App 210, 214, 203 P3d 274 (2009). Indeed, in both *Brown* and *Kammeyer*, the Oregon Court of Appeals quoted the Oregon Supreme Court's justification of the doctrine in *Anderson v. Oregon Railroad Co.*, 45 Or 211, 77 P 119 (1904)—namely, that a "case ought not *be reversed* because of" an error the party seeking reversal "was actively instrumental in bringing about." 45 Or at 216-17 (emphasis added). The *Brown* court further stated that "[t]he purpose of the doctrine is to ensure 'that parties do not "blame the court" for their intentional or strategic trial choices that later prove unwise and then, to the trial court's surprise, use the error that they invited to obtain a new trial.'" 272 Or App at 324 (*quoting State v. Ferguson*, 201 Or App 261, 270, 119 P3d 794 (2005), *rev den*, 340 Or 34 (2006)).

Here, far from surprising the Commission by seeking to have its decision overturned as a result of an error the NewSun Parties brought about, the NewSun Parties' application for

reconsideration gives the Commission an opportunity to correct errors of fact and law *before* any appeal of the Order. The invited error doctrine does not apply in these circumstances.

Even if the invited error doctrine did apply, the NewSun Parties did not invite the error in question. To the contrary, the NewSun Parties contended (and still contend) 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. *See NewSun Parties' Summary Judgment Response* at 30 (arguing, "Unlike the overall contract length which is controlled by how the blank space in Section 2.3 is completed for the Termination Date, the fifteen-year fixed-price term is not controlled by completion of any blank spaces on the form"); *see also id.* at 6-7, 19.

The Order, however, erroneously concludes that the overall term of effectiveness and the fixed-price period are somehow linked and thus that the fixed-price period necessarily must begin at the same time as the overall term of effectiveness, which begins at contract execution.[1] In fact, as discussed in the NewSun Parties' application for reconsideration, Section 2.3 allows the seller to select the termination date, thereby allowing any number of possible terms of effectiveness. Correcting the error the NewSun Parties have identified undermines the link drawn in the Order between the overall term of effectiveness and the fixed-price period. The question of when the period of fixed pricing begins for the *template* PPA should not and cannot depend on the termination date a particular seller selects.

The NewSun Parties' did not invite the Commission's error and have every right to bring

[1] This aspect of the Order's reasoning rests on the factually erroneous premise that Section 2.3 of PGE's standard contract template itself *inherently* and entirely limits the maximum contract term of *all* agreements based on the template PPA to twenty years (for any PGE counterparty seller, not just NewSun Parties), along with the fact that Schedule 201 describes an initial fifteen-year period of fixed pricing followed by up to five additional years of market-rate pricing (*i.e.*, a maximum of twenty years of power sales).

the error to the Commission's attention in their application for reconsideration.

III. The Agreements Can and Should Be Interpreted Unambiguously In Favor of the NewSun Parties' Position.

PGE erroneously contends for the first time in its response that the NewSun Parties somehow conceded at oral argument that the PPAs do not unambiguously provide for a fifteen-year period of fixed pricing commencing on the commercial operation date. *PGE's Reconsideration Response* at 18, n 71. The NewSun Parties made no such concession. While the NewSun Parties' counsel acknowledged that the words "fixed price starts at COD" do not appear in the PPAs or Schedule 201, he stated in response to the Commission's very next question that the PPAs likewise do not state that the fixed price period begins at the execution of the PPA.[2]

Not only does PGE's contention fail to provide even the most basic context for the statement on which PGE relies, it also misconstrues the test for whether a contract is unambiguous. A contract is unambiguous if there is only one reasonable interpretation of the contract *as a whole*. *Hoffman Constr. Co. v. Fred S. James & Co.*, 313 Or 464, 470-73, 836 P2d 703 (1992). There need not be a direct statement in the contract foreclosing any doubt whatsoever about its meaning on the point in question for a contract to be found unambiguous. If that were the law, then the contract could not be found unambiguous in PGE's favor either.

IV. The Second and Third Steps of the *Yogman* Analysis Favor the NewSun Parties' Interpretation of the Agreements.

Despite the fact the NewSun Parties' application for reconsideration, and indeed the

[2] When asked whether "Schedule 201 state[s] that the fixed price period begins at the execution of the PPA, and the [sic] not the COD?" the NewSun Parties' counsel responded, "It does not." (Decl. of Rebecca K. Dodd in Supp. of PGE's Resp. to Defs.' and Intervenors' Applications for Reconsideration, Ex. 1 at 4, Hearing Tr. 35:15-20.)

Order itself, does not address steps two and three of the *Yogman* analysis, PGE contends that, if the Commission reconsiders the Order and determines that the PPAs are ambiguous, PGE should prevail. PGE is wrong. For all of the reasons discussed in the NewSun Parties' briefing of the cross-motions for summary judgment, should the Commission reach steps two and three on reconsideration, the Commission should conclude that the fifteen-year period of fixed pricing begins at commercial operation. *See NewSun Parties' Summary Judgment Motion* at 52-60 (explaining that, under step two of *Yogman*, the NewSun Parties rejected PGE's misinterpretation of the agreements prior to execution, and other unrebutted extrinsic evidence demonstrated that PGE acceded in OPUC Staff's rejection of PGE's attempt to include language in the contract form and Schedule 201 stating the fixed-price period ends fifteen years immediately following the effective date); *id.* at 61-63 (explaining under step three of *Yogman*, any ambiguities in the fixed-price term should be construed both: (i) in favor of the QFs for whom the fixed-price term benefits and (ii) against PGE as drafter of any ambiguous provisions).

Contrary to PGE's assertions regarding Order No. 05-584, applicable federal law firmly establishes that the fixed-price period exists to provide a sufficient period of predictable revenue to support QF financing and therefore is solely provided to benefit QFs, which is consistent with the overall statutory purpose to "encourage" QF development. *See id.* at 6-7, 61-63; 16 USC § 824a-3(a). Any ambiguities with respect to the fixed-price term arising from the PGE-drafted contract template must therefore be construed in favor of the QFs.

CONCLUSION

For the reasons stated above and in the application for reconsideration, the NewSun Parties respectfully request that the Commission reconsider Order No. 19-255 and enter a new order finding that the fifteen-year period of fixed pricing provided for in the PPAs and Schedule

201 begins on the commercial operation date.

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