

Introductions

- Team
 - Dallas DeLuca
 - Jeff Lovinger
 - Anit Jindal
 - Becca Dodd
- Portland General Electric Company
 - Lisa Kaner, General Counsel
 - David White, Associate General Counsel
 - Doug Tingey, Associate General Counsel
 - Brett Greene, Director of Commercial Transactions
 - Jay Tinker, Director of Regulatory Policy and Affairs

This case is
about just
one
question:

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY,)	
)	
Complainant,)	DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES
)	
v.)	
)	
ALFALFA SOLAR I LLC, et al.)	
)	
Defendants.)	
)	

INTRODUCTION

Pursuant to OAR 860-001-0400, 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, the “NewSun Parties”) respond as follows to the Complaint and Request for Dispute Resolution filed with the Public Utility Commission of Oregon (the “Commission”) by Portland General Electric Company (“PGE”). As stated in PGE’s Complaint and Request for Dispute Resolution, the NewSun Parties and PGE disagree about the proper interpretation of ten power purchase agreements executed during the period January through June 2016 (the “NewSun PPAs”). Specifically, the parties disagree as to whether the 15-year period during which PGE must pay fixed prices for power delivered by the NewSun Parties commences when the relevant NewSun Party begins commercial operation (the “Commercial Operation Date”) or on the date the contract was executed.

This case is about just one question:

Specifically, the parties disagree as to whether the 15-year period during which PGE must pay fixed prices for power delivered by the NewSun Parties commences when the relevant NewSun Party begins commercial operation (the “Commercial Operation Date”) or on the date the contract was executed.

The PPA answers that question:

Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price and will retain all Environmental Attributes generated by the facility for all years up to five in excess of the initial 15.

PPA Exhibit D, then in-effect Schedule 201 at Sheet No. 201-12.

This case is not about:

- Deciding when the parties own the RECs.
- Policy making.
- Ratemaking.
- Re-forming the 10 executed contracts.
- The delays in this issue reaching the Commission.
- What other utilities in Oregon and around the world mean in their contracts, PURPA and non-PURPA.

Resolving the case on Summary Judgment

- This can be decided on Summary Judgment only if the contract is unambiguous or, if ambiguous, there are no disputed issues of fact.
- Unambiguous means only one reasonable interpretation.

The path to interpreting the PPA

- Text: the Contract Price in Schedule 201.
- Context and situation of the parties:
 - Other text in Schedule 201.
 - Contract Price in Sch. 201 for non-renewable PPAs.
 - All 8 PGE PPAs forms approved at the same time.
 - Order No. 05-584.
 - Prior versions of the PGE PPAs.
 - PGE's offer and defendants' acceptance.

Text: the Contract Price is in Schedule 201.

4.1. Commencing on the Effective Date and continuing through the Term of this Agreement, Seller shall sell to PGE the entire Net Output delivered from the Facility at the Point of Delivery.

4.2. PGE shall pay Seller the Contract Price for all delivered Net Output.

1.6. "Contract Price" means the applicable price, including on-peak and off-peak prices, as specified in the Schedule.

Text: Schedule 201 provides for market prices after the initial 15 years of the PPA.

Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price and will retain all Environmental Attributes generated by the facility for all years up to five in excess of the initial 15.

Text: “PPA” means PPAs defendants signed.

Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price and will retain all Environmental Attributes generated by the facility for all years up to five in excess of the initial 15.

The available Standard PPAs are:

- Standard In-System Non-Variable Power Purchase Agreement
- Standard Off-System Non-Variable Power Purchase Agreement
- Standard In-System Variable Power Purchase Agreement
- Standard Off-System Variable Power Purchase Agreement
- Standard Renewable In-System Non-Variable Power Purchase Agreement
- Standard Renewable Off-System Non-Variable Power Purchase Agreement
- Standard Renewable In-System Variable Power Purchase Agreement
- Standard Renewable Off-System Variable Power Purchase Agreement

Text: “PPA” means PPAs defendants signed.

STANDARD RENEWABLE OFF-SYSTEM VARIABLE POWER PURCHASE

AGREEMENT

THIS AGREEMENT, entered into this 26th day, June
2016, is between Alfalfa Solar I LLC ("Seller") and Portland General Electric Company
("PGE") (hereinafter each a "Party" or collectively, "Parties").

Text: The PPAs defendants signed begin at execution.

1.38. "Term" shall mean the period beginning on the Effective Date and ending on the Termination Date.

2.1. This Agreement shall become effective upon execution by both Parties ("Effective Date").

Text: 15 years after execution, the QFs receive Mid-C Index Prices.

Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price and will retain all Environmental Attributes generated by the facility for all years up to five in excess of the initial 15.

The Commission's officially stated position is that
PGE's interpretation is reasonable.

Previously, PGE's standard form contract arguably

allowed for the 15-year fixed-price period to begin on the date that PGE and the

4

QF executed the contract, which may occur up to three years before the QF

begins transmitting power.²

Commission Appellate Brief on appeal of UM 1805 at 3-4.

The Context supports that plain reading of the text.
(i) other provisions of Schedule 201.

SCHEDULE 201 (Continued)

PRICING OPTIONS FOR STANDARD PPA (Continued)

2) Renewable Fixed Price Option

The Renewable Fixed Price Option is based on Renewable Avoided Costs. It is available only to Renewable QFs that generate electricity from a renewable energy source that may be used by the Company to comply with the Oregon Renewable Portfolio Standard as set forth in ORS 469A.005 to 469A.210.

This option is available for a maximum term of 15 years. Prices will be as established at the time the Standard PPA is executed and will be equal to the Renewable Avoided

The Context supports that plain reading of the text.
(i) other provisions of Schedule 201.

PRICING OPTIONS FOR STANDARD PPA (Continued)

2) Renewable Fixed Price Option

This option is available for a maximum term of 15 years.

PRICING OPTIONS FOR STANDARD PPA (Continued)
Renewable Fixed Price Option (Continued)

TABLE 6a												
Renewable Avoided Costs												
Renewable Fixed Price Option for Solar QF												
On-Peak Forecast (\$/MWH)												
Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2015	31.13	25.13	26.13	21.88	22.88	25.13	33.13	34.73	29.63	27.38	28.88	33.13
2016	31.58	30.16	27.08	25.66	24.96	23.21	32.05	36.41	32.37	31.12	32.12	34.58
2017	34.27	32.71	29.35	28.28	27.50	25.55	34.66	39.41	35.01	33.98	35.07	37.78
2018	36.61	34.95	31.34	29.68	28.86	26.82	37.16	42.26	37.53	36.07	37.24	40.12
2019	38.30	36.56	32.79	31.05	30.19	28.05	38.88	44.22	39.27	37.74	38.96	41.97
2020	93.84	93.82	92.92	93.46	97.24	96.18	95.81	95.67	94.15	93.00	93.99	92.79
2021	95.96	96.23	94.46	95.73	99.08	98.19	97.51	98.11	96.33	95.14	96.67	95.11
2022	98.12	97.97	95.73	97.78	101.29	100.08	99.54	99.50	98.20	97.02	98.70	96.99
2023	100.40	99.89	97.56	100.00	102.89	102.03	101.62	101.18	100.19	98.82	100.84	99.54
2024	101.72	101.90	99.59	101.97	105.18	103.98	103.85	103.54	103.32	100.50	101.68	101.84
2025	104.07	104.45	101.87	104.64	108.71	107.32	106.19	106.35	105.38	102.73	104.11	103.69
2026	106.92	106.53	104.81	107.39	112.65	108.54	108.54	109.02	108.68	105.07	107.23	106.12
2027	109.03	108.51	106.56	109.06	116.12	110.69	110.25	111.96	110.59	107.25	108.78	108.22
2028	111.02	109.79	107.40	111.36	117.90	112.17	113.01	113.02	111.99	109.62	110.89	109.97
2029	113.43	113.15	110.01	114.00	125.82	115.72	115.81	115.81	115.86	111.90	112.86	112.73
2030	115.86	115.51	112.82	116.23	129.42	120.01	117.47	117.33	118.96	114.09	114.75	114.81
2031	117.94	117.36	115.44	119.39	131.87	123.82	119.62	120.73	120.98	116.47	117.78	117.26
2032	119.89	119.29	117.34	121.36	134.05	125.87	121.59	122.72	122.98	118.39	119.72	119.20
2033	122.54	121.93	119.93	124.04	137.01	128.65	124.28	125.44	125.70	121.01	122.37	121.83
2034	124.90	124.28	122.25	126.44	139.66	131.13	126.68	127.86	128.12	123.35	124.73	124.18
2035	127.32	126.68	124.61	128.88	142.35	133.66	129.12	130.32	130.59	125.73	127.14	126.58
2036	129.42	128.77	126.67	131.00	144.70	135.87	131.26	132.48	132.75	127.80	129.24	128.67
2037	132.28	131.62	129.46	133.90	147.90	138.87	134.16	135.40	135.68	130.63	132.09	131.51
2038	134.83	134.16	131.96	136.48	150.75	141.55	136.74	138.02	138.30	133.15	134.64	134.05
2039	137.43	136.75	134.51	139.12	153.66	144.28	139.38	140.68	140.97	135.72	137.24	136.64
2040	139.70	139.01	136.73	141.41	156.20	146.67	141.69	143.00	143.30	137.96	139.51	138.89

The Context supports that plain reading of the text.
(ii) other provisions of Schedule 201

Schedule 201 provides, for non-renewable QFs, the same exact words for starting the 15-years at execution, minus the reference to RECs.

1) Standard Fixed Price Option

The Standard Fixed Price Option is based on Standard forecasted natural gas prices. It is available to all QFs.

This option is available for a maximum term of 15 years.

The Context supports that plain reading of the text.
(ii) other provisions of Schedule 201

Schedule 201 provides, for non-renewable QFs, the same exact words for starting the 15-years at execution, minus the reference to RECs.

Standard Fixed Price Option (Continued)

Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price for all years up to five in excess of the initial 15.

The Context supports that plain reading of the text.
(iii) Order No. 05-584 allows “PGE to do what it did.”

PGE

is correct that Order No. 05-584 did not *require* the 15-year period to begin when the QF began delivering power, but neither did the PUC prohibit it. Rather, the PUC permitted PGE to do what it did, just as it permitted Idaho Power and PacifiCorp to take the other approach.

Commission’s Appellate Brief on appeal of UM 1805 at 18.

The Context supports that plain reading of the text.
(iii) Order No. 05-584 allows “PGE to do what it did.”

(Order No. 05-584 at 20). However, that order did not specify when that the 15-year fixed price period had to begin, which resulted in PGE taking a different approach than the other two electric utilities operating in Oregon.

Commission’s Appellate Brief on appeal of UM 1805 at 15.

The Context supports that plain reading of the text.
(iii) Order No. 05-584 allows “PGE to do what it did.”

When we concluded that QFs should receive 15 years of fixed prices under standard contracts in Order No. 05-584, we did not specify the date on which that 15-year term begins.

Docket No. UM 1805, Order No. 17-256 at 3.

The Context supports that plain reading of the text.
(iv) Since 2005, PGE's PPAs started the 15 years at execution.

Just like in the NewSun PPAs, the 2005 PGE Schedule 201 provided for 15 years of fixed prices and market prices after the initial 15 years, as measured from execution.

The Fixed Price Option is based on Avoided Costs including forecasted natural gas prices.

This option is available for a maximum term of 15 years. Sellers with contracts exceeding 15 years will make a one time election at execution to select a market-based option for all years up to five in excess of the initial 15.

PGE Schedule 201, Sheet No. 201-4 (effective August 11, 2005).

The Context supports that plain reading of the text.
(iv) Since 2005, PGE's PPAs started the 15 years at execution.

And the 2005 PGE PPA *forms* also provided for 15 years of fixed prices and market prices after the initial 15 years.

PGE shall pay Seller for the price options 5.1, 5.2, 5.3 or 5.4, as selected below, pursuant to the Tariff. Seller shall indicate which price option it chooses by marking its choice below with an X. **If Seller chooses the option in Section 5.1, it must mark below a single second option from Section 5.2, 5.3, or 5.4 for all Contract Years in excess of 15 until the remainder of the Term.** Except as provided herein, Sellers selection is for the Term and shall not be changed during the Term.

- 5.1 Fixed Price.
- 5.2 Deadband Index Gas Price.
- 5.3 Index Gas Price.
- 5.4 Mid-C Index Rate Price.

The Context supports that plain reading of the text.
(iv) Since 2005, PGE's PPAs started the 15 years at execution.

To be clear, Contract Years in that PPA form started at execution.

1.6. "Contract Year" means each twelve (12)- month period commencing at 00:00 hours on January 1 and ending on 24:00 hours on December 31 falling at least partially in the Term of this Agreement.

SECTION 5: CONTRACT PRICE

If Seller chooses the option in Section 5.1, it must mark below a single second option from Section 5.2, 5.3, or 5.4 for all Contract Years in excess of 15 until the remainder of the Term. Except as provided herein, Sellers selection is for the Term and shall not be changed during the Term.

The Context supports that plain reading of the text.
(iv) Since 2005, PGE's PPAs started the 15 years at execution.

PGE prior Commission-approved PPAs are part of the context under both the statutory/regulatory interpretation method and the contract interpretation method.

Montgomery v. City of Dunes City, 236 Or App 194, 199 (2010) (“Changes in the text of a statute over time are context for interpreting the version at issue in a particular case[.]”)

Defendants, via Jake Stephens and Greg Adams, reviewed multiple prior executed PGE PPAs and knew that two of them had changes from the standard Commission-approved PGE forms.

The Context supports that plain reading of the text.
(v) Offer and acceptance are Step 1 context.

Under the statutes and appellate court precedent for interpreting contracts, pre-execution negotiations are part of the context and situation of the parties at Step 1 in the analysis.

“the parties’ precontract negotiations constitute circumstances underlying the formation of the contract under ORS 42.220[.]”

Batzer Const., Inc. v. Boyer, 204 Or App 309, 320 (2006) (considering prior drafts of the final agreement).

The Context supports that plain reading of the text.
(v) Offer and acceptance are clear.

- Defendants reviewed prior versions of PGE executed PPA forms.
- Defendants identified two that modified from the Commission-approved forms to provide for 15-years from COD.
- Defendants asked PGE to change the NewSun PPAs to also provide for 15 years of fixed prices from COD.
- PGE said “no.”
- Defendants signed the NewSun PPAs anyway.

Any ambiguity concerning REC ownership does not
create an ambiguity as to Contract Price.

- Oregon law provides that if a general provision and a specific provision are inconsistent or in conflict, the specific controls.
- Here, the NewSun PPAs specifically provide that Contract Price is found in Schedule 201, not in section 4.5.
- The PPA and the Schedule 201 have five sentences providing for ownership of RECs.
- Any ambiguity as to REC ownership does not create an ambiguity as to Contract Price.

The NewSun PPAs are unambiguous:

The defendants receive the Mid-C Index Price for any power delivered after the “initial 15” years after execution of the PPA.

Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price and will retain all Environmental Attributes generated by the facility for all years up to five in excess of the initial 15.

PPA Exhibit D, then in-effect Schedule 201 at Sheet No. 201-12.

Thank you.
