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July 13, 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 Response In Opposition To Defendants' Motion for Protective Order Staying Discovery.

Thank you in advance for your assistance.

Sincerely,

David F. White
Associate General Counsel

DFW:jlm

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON**

**UM 1931**

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| PORTLAND GENERAL ELECTRIC COMPANY,<br><br>Complainant,<br><br>vs.<br><br>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,<br><br>Defendants. | **PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY** |

Portland General Electric Company ("PGE") respectfully requests that the Public Utility Commission of Oregon ("Commission") deny Defendants' July 6, 2018 motion for protective order staying *all* discovery pending resolution of Defendants' motion for summary determination. PGE is committed to seeking an expedited resolution of this case, but it does not waive discovery or its other due process rights. To date, it is Defendants' actions that have caused delay in the resolution of this proceeding, including: (1) moving to stay the proceeding on February 2; (2) moving to dismiss the proceeding on February 22; (3) moving to stay proceedings and extend time to answer on May 25; (4) moving for a stay of all discovery on July 6, rather than working with PGE to informally resolve any discovery disputes as required by OAR 860-001-0500(5); and (5) on July 9, objecting to every one of PGE's first data requests rather than working with PGE informally to resolve any discovery disputes.

## I. INTRODUCTION

PGE and Defendants are party to 10 executed standard power purchase agreements (the "NewSun PPAs" or "PPAs") with an aggregate capacity of 100 MW, all of which is located outside PGE's system. PGE has filed a complaint asking the Commission to rule that PGE's obligation to offer fixed prices under the PPAs runs for 15 years measured from contract execution. Defendants argue that the 15-year fixed-price period runs from the commercial operation date, a date that can occur up to four years after contract execution.

PGE served its first set of data requests on Defendants on June 25, 2018. On July 2, 2018, Defendants filed a motion for summary disposition. On July 6, 2018, Defendants, without first explaining to PGE their objections to discovery, filed a motion for a protective order asking the Commission to stay discovery pending resolution of the motion for summary disposition. On July 9, 2018, Defendants, without first conferring with PGE in an attempt to informally resolve any discovery disputes, responded to PGE's first set of data requests by objecting to every request. The Commission should deny the motion for protective order because PGE is entitled to conduct discovery so that it can respond to the motion for summary disposition and because Defendants have failed to meet their burden to support the protective order.

In their motion for summary disposition, Defendants argue that the NewSun PPAs are solely common law contracts. Under Oregon law, to interpret a common law contract the Commission can and should review extrinsic evidence concerning the formation of the contract to determine if the contract is ambiguous. Further, whether a contract should be interpreted in light of industry usage and whether actual industry usage supports

PGE's or NewSun's interpretation are questions of fact that likely cannot be resolved on summary disposition, especially without prior discovery.

Defendants cannot argue both that the PPAs are common law contracts and then avoid providing discovery relevant to the first step of interpreting common law contracts. In addition, Defendants cannot argue both that the Commission should apply industry usage to define terms in the PPAs and also avoid discovery relevant to whether the parties intended to apply industry usage to the terms in the PPA and whether industry usage supports NewSun's interpretation. For these reasons, and the additional reasons explained below, PGE respectfully requests that the Commission deny Defendants' motion for a protective order and allow discovery to proceed in advance of requiring PGE to respond to Defendants' motion for summary disposition.

## II. BACKGROUND

### A. The Critical Issue in this Case—Interpretation of 10 Executed PPAs and One Form PPA—was not Resolved in Docket No. UM 1805.

NewSun's motion relies upon the mistaken assumption, repeated throughout its motion, that the Commission has already interpreted the NewSun PPAs in UM 1805 and that therefore there is no need for discovery. The Commission's orders in Docket No. UM 1805 do not resolve the critical issues in this case, and Defendants are incorrect that the relevant issues have already been litigated.[1] In UM 1805, the Commission clarified its *policy* regarding the 15-year fixed-price period, but the Commission did not interpret any of PGE's executed contracts or standard contract forms.

[1] *See Defendants' Motion for Summary Disposition* at 1-2 ("Given the Commission's unequivocal recent Orders in UM 1805 regarding its fixed-price policy, and the fact that nothing in the NewSun PPAs expressly contradicts the Commission's policy, there is no reason for further, protracted litigation of this matter …") and 5 ("Having already extensively litigated this issue in UM 1805, PGE's insistence on further litigating this matter … demonstrates a continued disregard for the time and resources of other affected parties ….") (July 2, 2018); *see also Defendants' Motion for Protective Order Staying Discovery* at 2 and 12 (July 6, 2018) (same).

UM 1805 involved a complaint filed by three trade associations[2] that argued that PGE's contract forms provide for 15 years of fixed prices following the date the qualifying facility achieves commercial operation.[3] They complained that PGE took the position that its standard contract forms limit the availability of fixed prices to the first 15 years following contract execution, and they asked the Commission to hold that PGE's position violated Order No. 05-584 and the Commission's policy on fixed prices.

The parties filed cross motions for summary judgment. The Commission granted PGE's motion for summary judgment and dismissed the complaint.[4] In its order granting summary judgment (Order No. 17-256) and in two subsequent orders denying reconsideration (Order Nos. 17-465 and 18-079), the Commission announced the following holdings:

***First***, the Commission held that Order No. 05-584 did not specify the date on which the 15-year fixed-price period begins.[5] ***Second***, the Commission acknowledged that it approved PGE standard contract forms that *may* have limited the availability of fixed prices to the first 15 years following contract execution.[6] ***Third***, the Commission held that because it had approved all of PGE's standard contract forms, those forms do not violate Commission orders or policies even if the forms limit the availability of fixed prices to the first 15 years following contract execution.[7] As a result, the Commission

[2] Plaintiffs in Docket No. UM 1805 were Northwestern and Intermountain Power Producers Coalition, Renewable Energy Coalition, and Community Renewable Energy Coalition.
[3] *NIPPC, REC and CREA v. Portland Gen. Elec. Co.*, Docket No. UM 1805, Complaint at 3 (Dec. 6, 2016).
[4] Docket No. UM 1805, Order No. 17-256 at 1 (July 13, 2017).
[5] *Id.* at 3 ("in Order No. 05-584, we did not specify the date on which that 15-year term begins.").
[6] Docket No. UM 1805, Order No. 17-465 at 4 (Nov. 13, 2017) (modifying Order. No. 17-256 to state that "Because we approved PGE's standard contract filings that **may have** limited the availability of fixed prices to the first fifteen years measured from contract execution, PGE cannot be found to have been in violation of our orders." (emphasis in original)).
[7] Order No. 17-256 at 1 ("In this order, we grant the motion for summary judgment of [PGE] and dismiss the complaint of [the trade associations]. We find that PGE has lawfully offered standard contracts to

granted summary judgment and dismissed the trade association complaint.[8] ***Fourth***, the Commission did not interpret any of PGE's contract forms or executed contracts, but stated that it stood ready to do so in future proceedings.[9] ***Fifth***, the Commission took the opportunity to "clarify our policy in Order No. 05-584 to explicitly require standard contracts, on a going-forward basis, to provide for 15 years of fixed prices that commence when the QF transmits power to the utility."[10] ***Finally,*** the Commission required PGE to modify its standard contract forms to offer, *on a going forward basis*, fixed prices for 15 years measured from the date the Seller commences power delivery.[11]

In UM 1805, the Commission made it clear that ***if*** the Commission previously approved PGE form contracts that limited the availability of fixed prices to the first 15 years after contract execution, then this "PGE approach" was consistent with the Commission's orders, even if the approach conflicts with the Commission's 2017 clarification that its policy is to require fixed prices for 15 years measured from commercial operation.[12]

**B. The context of the NewSun PPAs needs to be reviewed to interpret them.**

In the instant case, the Commission will need to review the regulatory context in which the NewSun PPAs arose. This will require review of the standard contract forms approved by the Commission in Order No. 07-065 (the first set of PGE forms approved as fully compliant with Order No. 05-584) and verification that these forms limited fixed

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operators of qualifying facilities … that have 15-year periods of fixed prices that begin on the date of execution, rather than on the date that the QF begins to transmit power.") and 3 (as modified by Order No. 17-465 at 4, stating "Because we approved PGE's standard contract filings that **may have** limited the availability of fixed prices to the first fifteen years measured from contract execution, PGE cannot be found to have been in violation of our orders." (emphasis in original)).

[8] *Id.* at 1.

[9] Order No. 17-465 at 4; Docket No. UM 1805, Order No. 18-079 at 3 (Mar. 5, 2018).

[10] Order No. 17-256 at 4 (footnote omitted).

[11] *Id.*

[12] *Id.* at 3; Order No. 17-465 at 4.

prices to the first 15 years following contract execution.[13] Next, the Commission will need to verify that it did not order PGE to change that term between Order No. 07-065 and Order 15-298 (the order approving the standard contract forms on which the NewSun PPAs are based), and that PGE did not do so. And the Commission will need to confirm that PGE modified its standard contract forms between Order No. 07-065 and Order No. 15-298 in response to Commission directives that were unrelated to the 15-year fixed-price period. This will allow the Commission to interpret the NewSun PPAs in the regulatory context in which they arose.

Additionally, because Defendants insist the NewSun PPAs must be interpreted under common law contract principles, the Commission must also consider the facts surrounding the formation of the NewSun PPAs. These facts include without limitation: (1) that PGE told Defendants in writing and before Defendants executed their PPAs that PGE's standard contract form limits the availability of fixed prices to the first 15 years following contract execution; and (2) that Defendants chose not to contest PGE's position, even though they knew PGE's position before they executed the PPAs.

While PGE has copies of some (but possibly not all) of its communications with Defendants, in order to respond to the motion for summary disposition, PGE seeks Defendants' internal documents and communications with third-parties (e.g. finance companies; owners) at the time of the formation of the contract, including any documents in which Defendants admit or discuss that PGE's interpretation is a reasonable

[13] The standard contract forms approved by *In Re Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 07-065 (Feb. 27, 2017) were the first set of PGE standard contract forms to be approved by the Commission as fully compliant with the requirements of Docket No. UM 1129, Order No. 05-584 (May 13, 2015) and Docket No. UM 1129, Order No. 06-538 (Sep. 20, 2006). The standard contract forms approved by Order No. 07-065 unambiguously limited the availability of fixed prices to the first 15 years following contract execution.

interpretation of the PPAs, or make financial plans based on PGE's interpretation. It is reasonable to expect that Defendants will have documents from that time period on the topic of when the 15-year period starts, because Defendants claim that the 15-year fixed-price period is an important financing issue.

## III. LEGAL STANDARDS

Parties to a contested case proceeding are entitled to conduct discovery as a matter of right and such discovery is governed by the Commission's rules and the ORCP (to the extent the ORCP is consistent with the Commission's rules).[14] Under the ORCP, a party is entitled to discovery of any document or information that is relevant to a claim or defense.[15] The Commission has noted that a "[m]atter is discoverable if it appears reasonably calculated to lead to the discovery of admissible evidence, whether or not it would itself be inadmissible."[16] The party seeking a protective order bears the burden of establishing, with facts and not conjecture, that it is entitled to it.[17]

## IV. ARGUMENT

### A. PGE is entitled to conduct discovery and should be allowed to conduct discovery now so that it can respond to the motion for summary disposition.

Defendants contend that the PPAs are common law contracts,[18] even though they are not.[19] If the Commission interprets them as common law contracts, then Oregon law

[14] *In Re Pacific Power & Light, dba PacifiCorp,* Docket No. UE 177, Order No. 08-003 at 2 (Jan. 4, 2008); *In Re Portland Gen. Elec. Co.*, Docket No. UE 102, Order No. 98-294 at 3 (July 16, 1998) ("[d]iscovery is a right afforded to parties in a legal proceeding by our rules and by the Oregon Rules of Civil Procedure, which we follow except where our rules differ.").
[15] ORCP 36(B) ("… parties may inquire regarding any matter, not privileged, that is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party ….").
[16] Docket No. UE 177, Order No. 08-003 at 2 (quoting *In re Portland EAS*, Order No. 91-958 at 5).
[17] *See Citizens' Util. Bd. of Oregon v. OPUC*, 128 Or. App. 650, 656 (1994) (citing ORCP 36(C)).
[18] *Defendants' Motion for Summary Disposition* at 17 ("The Commission must interpret the executed NewSun PPAs under common law contract principles.").
[19] *See Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 598 (1987) ("[The utilities]'s obligation is not governed by common law concepts of contract law; it is created by statutes, regulations and administrative rules.").

requires that the Commission consider not just the text of the PPAs, but also the context which includes extrinsic evidence regarding the circumstances underlying the formation of the PPAs, in order to determine whether the PPAs are ambiguous. PGE disagrees that the PPAs should be interpreted as common law contracts; instead, they should be interpreted like contracts that incorporate statutes or administrative rules.[20] But, until the Commission rules that the PPAs are not common law contracts, PGE must proceed as if they are and thus is entitled to conduct discovery regarding extrinsic evidence about the formation of the PPAs and should be allowed to do so now before it responds to Defendants' motion for summary disposition.

**1. Under Oregon law, the Commission must consider the facts underlying contract formation when interpreting a contract.**

To interpret a common law contract, a court (and therefore the Commission) engages in Oregon's familiar three-step contract interpretation process prescribed in *Yogman v. Parrot*, 325 Or. 358 (1997):

i. The court examines the text and context of the contract—including extrinsic evidence of the circumstances underlying the formation of the contract—to determine if the disputed term is ambiguous. A term is ambiguous if it is susceptible to more than one reasonable interpretation. If the contract provision is unambiguous, then the court declares the meaning of the provision and applies it to the dispute, and there is no need for the court to proceed to step 2 or 3 of the analysis.

ii. If the disputed provision is ambiguous, then the finder of fact can consider additional extrinsic evidence to determine its meaning.

[20] The NewSun PPAs and PGE's standard contract forms are similar to insurance contracts that contain text mandated by statute or administrative rule, and the PPAs should be interpreted by applying the principles of statutory construction found in *PGE v. BOLI,* 317 Or 606, 610-12 (1993). That is what the Oregon Supreme Court indicates should be done. *See Fox v. Country Mut. Ins. Co.*, 327 Or 500, 506 (1998) (where contract term is required by statute, "we attempt to determine the legislature's intention in enacting that statute rather than the parties' contractual intention in entering into the insurance contract."); *Perez v. State Farm Mut. Auto. Ins. Co.*, 289 Or 295, 297-98 & 299 n.2 (1980) (because insurance contract term at issue was required by statute the court "approach[ed] the issue as a problem of statutory construction."); *see also Emery Air Freight Corp. v. United States*, 499 F2d 1255, 1259-60 (Ct Cl 1974) (court examined the administrative record to interpret the meaning of a term in the tariff-based contract between the parties).

iii. If the disputed provision remains ambiguous after the second step, then the court applies certain appropriate "'maxims of construction' to determine the provision's meaning."[21]

During summary disposition, the Commission engages in only the first step of the *Yogman* analysis. If the Commission determines that the PPAs are ambiguous[22] and that there are disputed issues of material fact, it must deny summary disposition[23] and the parties will proceed to a hearing under the regular Commission dispute resolution process. The fact that both parties may move for summary disposition does not make the contract unambiguous, and the parties cannot stipulate that the contract is unambiguous; the Commission alone makes that decision.[24]

To determine, at the first step, whether a contract term is ambiguous, the court can and must consider the "text and context of the provision."[25] The context includes "'the circumstances underlying the formation of the contract.'"[26] The Oregon Supreme Court has stated 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."[27]

To determine at the first step if there is an ambiguity, courts (and the Commission) consider the "[e]xtrinsic evidence concerning the circumstances of contract

[21] *Nixon v. Cascade Health Service, Inc.*, 205 Or App 232, 238-39 (2006) (citations omitted) (describing the three-step process for contract interpretation under Oregon law).
[22] The basic logical flaw in Defendants' argument is that Defendants assume as a premise that "the contracts are unambiguous," (*Defendants' Motion for Protective Order Staying Discovery* at 10) even though that is a conclusion that the Commission itself must make, and has not yet made, in deciding defendants' motion for summary disposition. Defendants have put the cart far before the horse.
[23] *McKee v. Gilbert*, 62 Or. App. 310, 321 (1983) ("a court is not empowered to render summary judgment where a genuine question of material fact appears.").
[24] *Id.* at 320 (so stating).
[25] *Nixon*, 205 Or App at 238.
[26] *Id.* (citing to *Batzer Constr., Inc. v. Boyer*, 204 Or App 309, 317 (2006)).
[27] *State v. Gaines*, 346 Or 160, 172 n.8 (2009) (citing *Abercrombie v. Hayden Corp.*, 320 Or 279, 292 (1994) for that principle).

formation . . . ."[28] The federal court for the District of Oregon has concluded, after reviewing Oregon precedent, that "this court *must* determine whether the extrinsic evidence proffered by plaintiffs demonstrates an ambiguity in the Release." (emphasis added).[29] In this proceeding, if the Commission is going to interpret the PPAs consistent with Defendants' insistence that they are common law contracts, then the Commission must consider the extrinsic evidence concerning the formation of the contract.[30]

The Commission must examine that extrinsic evidence even if there is an integration clause in the contract, as there is in these PPAs.[31] Defendants misstate Oregon law when they conflate the analysis of integration clauses with the Commission's duty to analyze extrinsic evidence to determine if there is an ambiguity in the contract. The two issues are distinct. An integration clause precludes evidence of additional terms that add to or vary the contract.[32] If a contract is fully integrated, a court examines only *that* contract to determine the meaning of the obligations between the parties. If the contract is not fully integrated, the court examines both that contract and additional agreements (e.g. side agreements; oral agreements made when signing the contract) to determine the meaning of the obligations between the parties.[33] Regardless of whether the contract is

[28] *Manquist v. OMS Nat'l Ins. Co.*, 2011 WL 3298651, *1 (D Or Aug. 1, 2011) (citing, *inter alia*, *State v. Gaines*).
[29] *Id.*
[30] *Id.*; *Gaines*, 346 Or at 172 n.8; ORS 42.220 ("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.").
[31] *See e.g.,* Complaint at Exhibit 1, page 17, section 19.1.
[32] *State for Use & Benefit of Cipriano v. Triad Mech., Inc.*, 144 Or App 106, 117 (1996) ("Evidence of consistent additional terms is only admitted where there is substantial evidence that the parties did not intend that the writing embody the parties' entire agreement." (citation omitted)).
[33] *Id.*

integrated, the court can still examine extrinsic evidence of the formation of the contract (or contract*s*, if not integrated) to determine if there is an ambiguity in the agreement.[34]

The *Wells Fargo* case cited by Defendants[35] is a diversity case decided under New York law, not Oregon law, and is inapposite and does not support Defendants' position. In *Wells Fargo*, the parties did not dispute the meaning of the relevant terms.[36] Instead, the parties disputed the affect that those terms had on defendants' affirmative defenses and counterclaims of fraud in the inducement and plaintiffs' prior breach.[37] The court relied on the integration clause because the terms were not disputed and the meaning of the contracts at issue were unambiguous, and in those circumstances extrinsic evidence is excluded under New York law. Here, in contrast, under Oregon law the courts must examine extrinsic evidence of the formation of a contract to determine in the first instance whether the contract terms *are* unambiguous.[38]

Defendants also cite to Commission Order No. 00-796, from *Fasy v. Citizens Telecommunication*,[39] but that decision is inapposite. In *Fasy*, the Commission decided that the complaint failed to state a claim under ORCP 21 A(8).[40] Under ORCP 21 A(8), the Commission rules only on the pleadings, and must not consider any evidence.[41] The Commission had earlier stayed discovery "as a matter of timing" pending a determination first of whether the defendant had in fact violated its tariffs even assuming that "the statements of Mr. Fasy are, in fact, all true."[42] To make that first determination, Mr. Fasy was given the benefit that all his alleged facts were presumed true and hence no

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[34] ORS 42.220.
[35] *Defendants' Motion for Protective Order Staying Discovery* at 9.
[36] *Wells Fargo Bank Nw., N.A. v. Taca Int'l Airlines, S.A.*, 247 F Supp 2d 352, 360 (S.D.N.Y. 2002) ("the relevant terms of the Leases are not in controversy.").
[37] *Id.* at 359-60.
[38] ORS 42.220; *Gaines*, 346 Or at 172, n.8.
[39] *Theodore Fasy v. Citizens Telecom. Co. of Ore., Inc.*, Docket No. UC 553, Order No. 00-796 (Dec. 20, 2000).
[40] *Id.* at 3, 5.
[41] ORCP 21 A.
[42] Docket No. UC 553, Order No. 00-796 at 3 (quoting ALJ ruling staying discovery).

discovery was needed yet. Here, in contrast, in a motion for summary determination, the parties can introduce facts under ORCP 47.

**2. Under Oregon law, whether the contract should be interpreted in light of industry standards, as Defendants argue, requires a determination of facts, and hence requires discovery.**

ORS 42.250 permits courts to admit evidence of trade usage or industry practice:

> The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is admissible that they have a technical, local, or otherwise peculiar signification and were used and understood in the particular instance, in which case the agreement shall be construed accordingly.

A party seeking to prove a trade usage must show that (1) a custom or usage exists; and (2) the words in the contract were used and understood in that sense.[43] The existence and scope of a usage of trade is a question of fact.[44] A trade usage may not be used to interpret a contract when there is no evidence that the parties would have intended or understood that usage when they entered into their contract.[45]

Defendants contend, in their motion for summary disposition, that trade usage supports their interpretation of the PPAs.[46] This assertion raises questions of fact, including whether there is such a trade usage in this locality,[47] and whether there is "usage evidence . . . to show that the parties bargained with reference to that standard."[48] Whether the PPAs can be interpreted by reference to an alleged customary usage is a

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[43] *Bernard v. First Nat. Bank of Oregon*, 275 Or 145, 155-56 (1976); *Barnard & Bunker v. Houser*, 68 Or 240, 243 (1913).
[44] *May v. Chicago Ins. Co.*, 260 Or 285, 294-95 (1971).
[45] *See VTech Comm'ns, Inc. v. Robert Half, Inc.*, 190 Or App 81, 88 (2003) ("Thus, in order to be relevant, custom and usage evidence would have to show that the parties bargained with reference to that standard; in other words, that each had it in mind in using the relevant term."); *Global Executive Mgmt. Solutions, Inc. v. Int'l Bus. Machines Corp.*, 260 F Supp3d 1345, 1376 (D Or 2017) ("custom and usage evidence would have to show that the parties bargained with reference to that standard").
[46] *Defendants' Motion for Summary Disposition* at 36-43.
[47] A custom or usage exists when "it was universal in the locality where it obtains." *Barnard*, 68 Or at 228.
[48] *Global Executive Mgmt. Solutions*, 260 F Supp3d at 1376.

question of fact to be determined by the trier of fact[49] (*i.e.* not an issue for summary judgment); accordingly, the Commission should ignore Defendants' argument concerning customary usage in the motion for summary disposition.

To the extent that the Commission will consider "customary usage" when deciding that motion, PGE is entitled, now, to discovery of facts about customary usage, including whether "the parties bargained with reference to that standard."[50] Defendants cannot have it both ways. They cannot raise an issue of fact in their motion for summary disposition—whether the parties intended customary industry usage to apply to terms of the PPAs—and then fail to respond to Data Requests concerning those facts.

**3. PGE seeks discovery related to the issues raised in Defendants' motion for summary disposition, not PGE's own subjective intent.**

PGE seeks discovery about the status of the parties at the formation of the PPAs to show the context of the PPAs. Defendants wrongly contend that PGE is seeking inadmissible evidence concerning subjective intent.[51] Further, Defendants' allegations in their complaint and their arguments about "industry usage" in their motion for summary disposition have made Defendants' subjective intent relevant.

Request 1 seeks the identities of Defendants' agents who conducted the contracting process with PGE and requests the documents that those people exchanged with PGE. That has nothing to do with subjective intent, contrary to Defendants' assertion.

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[49] *May*, 260 Or at 294 ("the determination of the existence of a trade custom or usage as one for the trier of fact.").
[50] *Global Executive Mgmt. Solutions*, 260 F Supp3d at 1376.
[51] Defendants also mischaracterize PGE's position and discovery requests as an attempt to "vary the meaning of the standard contract." *Defendants' Motion for Protective Order Staying Discovery* at 12. PGE does not seek to vary the terms, but to show that Defendants agreed that PGE's interpretation of the standard PPA was either the correct interpretation or at least a reasonable interpretation.

Request 2 seeks Defendants' internal documents and communications with third-parties about financing of the project, and documents about the disputed term. To the extent that those documents indicate that Defendants knew of PGE's position and planned for it financially, they show the circumstances of the parties at the time of contract formation and are admissions against interest by Defendants that are admissible.

Requests 3 and 4 ask whether Defendants expect to have the facilities completed timely. Although not germane to step-one under *Yogman*, it is not a burden to answer.

Requests 5 and 7 ask Defendants for information about allegations in their Answer about facts they allege existed at the time the parties signed the contract. Thus, the requests seek evidence of the circumstances of the parties at formation of the contract.

Requests 6, 8, 9 and 10 ask for explanations about allegations in the Answer addressing the meaning of the PPAs, and ask for the documents that Defendants' rely upon to show a "common industry usage and practice."

Defendants' assertion that PGE's Data Requests seek inadmissible subjective intent is incorrect. The requests all seek information and documents relevant under either the first and second steps of the three-step method for interpreting common law contracts. Here, unlike in the cases that Defendants cite, the discovery sought is material to adjudication of this dispute because the requests seek documents that provide the context for the formation of the PPAs, which the Commission can and should consider under Oregon law.

**B. PGE's request for electronic discovery is not unduly burdensome or expensive.**

Defendants argue that responding to PGE's Data Request Nos. 1 through 4 will involve the production of electronically stored information and that electronic discovery

would be unduly burdensome and expensive.[52] Defendants state that they are small and have limited staff,[53] that electronic discovery is too burdensome, and that "PGE's requests are not 'commensurate with the needs of the case, the resources available to the parties, [or] the importance of the issues to which the discovery [sought by PGE] relates."[54]

The Commission should reject this alleged basis for granting a protective order staying discovery because Defendants fail to meet their burden. The party seeking a protective order limiting discovery bears the burden of establishing "good cause."[55] Under this standard, the movant must show that the requested discovery "will work a clearly defined and serious injury."[56] "Broad allegations of harm unsubstantiated by specific examples or articulated reasoning" do not satisfy the good cause requirement.[57] Instead, to limit discovery based on burden, the moving party must present "competent evidence" supporting its allegations of burden and expense.[58] Competent evidence means affidavits or similar evidence revealing the nature of the burden.[59]

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[52] *Defendants' Motion for Protective Order Staying Discovery* at 13-16.
[53] Defendants admitted in their federal complaint that they are indirectly owned by two employee benefit plans, two corporations, two LLCs, and seven individuals. *Alfalfa Solar I LLC, et al. v. Portland Gen. Elec. Co.* USDC, OR District, Portland Division, No. 3:18-cv-00040, Doc. 1 at 3 (Jan. 8, 2018).
[54] *Defendants' Motion for Protective Order Staying Discovery* at 14 (quoting OAR 860-001-0500(1)).
[55] *See Citizens' Util. Bd. of Oregon*, 128 Or App at 656 (citing ORCP 36(C)); *see also* OAR 860-001-0000(1) ("The Oregon Rules of Civil Procedure (ORCP) also apply in contested case and declaratory ruling proceedings unless inconsistent with these rules, a Commission order, or an Administrative Law Judge (ALJ) ruling.").
[56] *See Citizens' Util. Bd. of Oregon*, 128 Or App at 656.
[57] *Id.* at 658 (internal citations omitted); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (same).
[58] *Wilson v. Decibels of Oregon, Inc.*, No. 116CV00855CL, 2017 WL 1943955, at *2 (D Or May 9, 2017) (stating that the moving party bears the "burden of showing the discovery should not be allowed and doing so through clarifying, explaining and supporting its objections with competent evidence" (internal citation omitted)).
[59] *Brown v. China Integrated Energy, Inc.*, No. CV112559BROPLAX, 2014 WL 12577173, at *4, n.6 (CD Cal Aug. 15, 2014) ("For a burdensomeness argument to be sufficiently specific to prevail, it must be based on affidavits or other evidence showing the exact nature of the burden."); *Indep. Living Ctr. of S. California v. City of Los Angeles, Cal.*, 296 FRD 632, 637 (CD Cal 2013) (rejecting burden argument where opponent of discovery "did not submit any declarations under penalty of perjury offering evidence establishing the

Here, Defendants have presented no evidence supporting the alleged burden. Instead, in their motion, Defendants make vague and unsubstantiated assertions that electronic discovery is time-consuming and expensive. But Defendants have not explained and substantiated with affidavits why production of responsive information that has been stored electronically is unduly burdensome or expensive in this case. Defendants' counsel's unsworn assertions are not competent evidence sufficient to carry Defendants' burden of establishing good cause to limit discovery.[60]

In the instructions accompanying its data requests, PGE indicated that if Defendants believe a data request is burdensome, Defendants should contact PGE's counsel to discuss the problem and to determine if the request can be modified to pose less difficulty in responding.[61] In addition, the Commission's rules require parties to "make every effort to engage in cooperative informal discovery and to resolve disputes themselves." [62] Contrary to the Commission's rule requiring that parties work cooperatively to resolve discovery disputes, Defendants have made no effort to communicate with PGE regarding their assertion that electronic discovery is too burdensome or expensive. The limit of Defendants' conferral was to leave a voicemail and send an email approximately two hours before filing their motion for protective order informing PGE that Defendants would file such a motion that day without mentioning Defendants' objection to electronic discovery on the grounds that such discovery is allegedly burdensome.

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nature of the burden"); *see also Citizen's Utility Board of Oregon*, 128 Or App at 658 (citing federal case law interpreting ORCP 36(C)'s federal counterpart to interpret ORCP 36(C)).

[60] *See* citations in footnote 59.

[61] *See PGE's First Set of Data Requests* at page 4, instruction 14.

[62] OAR 860-001-0500(5).

In the *PaTu Wind Farm* case, the Commission allowed electronic discovery in a dispute over the meaning of a single standard PPA involving a 9 MW qualifying facility.[63] The Commission approved a "clawback" supplement to its general protective order designed "to facilitate the production of voluminous amounts of electronically stored information in an expeditious manner without compromising the right of the producing party to assert a privilege or other legal protection for inadvertently produced documents." [64] Defendants have not identified any specific reason why electronic discovery is especially burdensome in this case, and given that electronic discovery was commensurate with the needs of the case and with the resources of the parties in *PaTu Wind Farm*—a case involving one 9 MW standard PPA—it should also be considered to be commensurate with the needs of the case and the resources of the parties in this case, which involves 10 qualifying facilities with an aggregate capacity of 100 MW.

In footnote 1 to their motion for protective order, Defendants cite to the pending complaint proceedings involving the Cypress Creek projects and argue that PGE sought and obtained a suspension of discovery after filing a motion for summary judgment in those cases. But in those cases PGE had already responded to three rounds of data requests and produced documents, and the complainants had already responded to PGE's first set of data requests.[65] In short, discovery was not suspended in the Cypress Creek cases until after several rounds of data requests were completed.

[63] *See PaTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1566, Order No. 13-324 (Sep. 3, 2013).
[64] *Id.* at 1.
[65] *See e.g., Valhalla Solar LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1878, *PGE's Motion to Stay Discovery and Procedural Schedule* at 3 (Jan. 24, 2018) (describing discovery to date in the proceeding).

### C. Defendants should be bound to their assertion that their motion for summary disposition responds to certain data requests.

Defendants assert that PGE has received responses to Data Request Nos. 6, 8, 9, and 10 in Defendants' motion for summary disposition.[66] This contention undercuts any objection based on "burden" or any other grounds that Defendants could have for not responding to these Requests. Defendants are required by the Commission's rules to answer the Data Requests, and can easily do so by copying the relevant text from their motion for summary disposition into a response to the Data Requests and by providing the documents that Defendants reference. PGE should not have to guess which parts of the motion for summary disposition respond to those Requests.

Data Request Nos. 6, 9, and 10 ask Defendants to identify specific provisions of the NewSun PPAs that support certain allegations made by Defendants in their Answer. Data Request No. 8 asks the Defendants to provide all documents and information supporting their assertion that there is an industry standard regarding when a fixed-price period begins, and all information or documents indicating that the Commission was aware of or relied upon such an alleged industry standard when it issued Order No. 05-584. Given that Defendants assert that their motion for summary disposition effectively responds to each of these Data Requests, Defendants should be estopped from making any arguments that rely on information that would have been responsive to Data Request Nos. 6, 8, 9, or 10, but that was not provided by Defendants in that motion. If the Commission grants Defendants' motion concerning Data Requests Nos. 6, 8, 9, and 10, PGE respectfully requests that the Commission expressly hold that Defendants are estopped in that regard.

[66] *Defendants' Motion for Protective Order Staying Discovery* at 16.

**D. The Commission should not stay discovery in this case simply because PGE requested (but did not obtain) interpretation of standard contract forms in UM 1805 without seeking discovery from Complainants NIPPC, REC and CREA.**

UM 1805 and this proceeding address different questions: a general policy question versus specific executed contracts. As the Commission stated in UM 1805, it did not examine, and was not required to examine, any specific executed PPAs to resolve the disputes in that proceeding. In UM 1931, the dispute concerns specific executed PPAs, and hence the discovery needs are different. Thus, PGE's request for discovery in this case is *not* inconsistent with UM 1805 where no discovery was requested by the parties.[67]

Defendants also argue that discovery of the facts underlying the formation of the Defendants' PPAs is inconsistent with PGE's assertion that resolution of this case could impact more than 70 executed PPAs.[68] There is no inconsistency; resolution of UM 1931 will involve interpretation of facts specific to the formation of the NewSun PPAs, but interpretation of the NewSun PPAs may also impact more than 70 executed PPAs because interpretation of the NewSun PPAs will also involve interpretation of standard provisions used in those other PPAs.

**E. Defendants are not prohibited from conducting discovery.**

Defendants contend that if PGE is allowed to proceed with discovery, then they should also be allowed to do so.[69] PGE has not argued that Defendants should be prohibited from conducting discovery.

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[67] *Defendants' Motion for Summary Disposition* at 17.
[68] *Defendants' Motion for Protective Order Staying Discovery* at 18.
[69] *Defendants' Motion for Protective Order Staying Discovery* at 19.

## V. CONCLUSION

For the reasons detailed above, PGE respectfully requests that the Commission deny Defendants' motion for a protective order staying discovery.

DATED this 13th day of July, 2018.

Respectfully submitted,

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