

1 **Q. State your name and business address.**

2 A. Joe Benga, 1414 East Primrose, Suite 100, Springfield, Missouri 65804.

3 **Q. What is your occupation and by whom are you employed?**

4 A. I am Senior Vice President & General Manager of Solar Development at Gardner Capital
5 Solar Development, LLC (“Gardner Solar”).

6 **Q. Please describe Gardner Solar.**

7 A. Gardner Solar is a leading developer of utility-scale solar projects that is currently developing
8 six qualifying facility (“QF”) projects in the state of Oregon. Gardner Solar’s address is 1414
9 East Primrose, Suite 100, Springfield, Missouri 65804. I have been with Gardner Solar for ten
10 months. In my role at Gardner Solar, I am responsible for all national solar development
11 activities.

12 **Q. Please describe your background in the solar industry?**

13 A. Since 2003, I have directed the installation of over 250 megawatts of solar installations,
14 including utility-scale and smaller systems. I have worked on projects for Chevron, Google,
15 Disney Studios, California Institute of Technology, The North Face, and Sony Studios. I also
16 directed the design, costing, and planning for an additional one gigawatt of solar projects.

17 **Q. What is the purpose of this testimony?**

18 A. Gardner Solar wants to provide background from a developer perspective for the Commission
19 regarding the issue of when a “legally enforceable obligation” is created. This was listed as
20 Issue No. 8 in the ALJ’s March 26, 2015 ruling establishing a procedural schedule for the
21 second phase in Commission Docket UM 1610 (“Phase II”).

22 **Q. How is your testimony organized?**

1 A. I first provide some needed background on the legally enforceable obligation issue. I then
2 discuss Gardner Solar's own experience attempting to provide renewable QF solar power to
3 Oregon under existing laws and tariffs. I then provide my recommendation, based on that
4 experience, as to the Commission's determination for when exactly a legally enforceable
5 obligation has been created.

6

7 **Background on Legally Enforceable Obligations**

8 **Q. Are you an attorney?**

9 A. No. And I am not attempting to make legal arguments, but I do need to provide some legal
10 context for our experience under the law surrounding QF development and the Public Utility
11 Regulatory Policies Act of 1978 ("PURPA").

12 **Q. What is your understanding of PURPA?**

13 A. My understanding is that PURPA was adopted to promote an independent power industry and
14 that it has had a significant impact on the growth of renewable energy facilities throughout the
15 country. My understanding is that it was needed in part because of a determination that
16 integrated electric utilities would not create such an industry on their own and would not,
17 unless required by law, provide the type of cooperation that is needed to allow for generators
18 that are not owned by utilities to interconnect with and sell power to utilities.

19 **Q. What is your understanding of PURPA as it applies to the creation of a "legally
20 enforceable obligation"?**

21 A. My understanding is that regulations of the Federal Energy Regulatory Commission
22 ("FERC") provide an opportunity for facilities that qualify under PURPA requirements
23 ("qualifying facilities" or "QFs") to sell their power to utilities under certain circumstances

1 even when the utility has been non-cooperative and even when it has not signed an energy
2 sales agreement with the QF. Specifically, FERC’s regulations, at 18 C.F.R. § 292.304(d)(2),
3 state in part that a QF has the option to “provide energy or capacity pursuant to a legally
4 enforceable obligation for the delivery of energy or capacity over a specified term....”

5 **Q. What is your understanding of what is meant by a “legally enforceable obligation” or**
6 **“LEO”?**

7 A. Again I will leave it to the attorneys during briefing to discuss all the legal decisions that have
8 developed regarding this term. But the crucial thing for a developer of QF generation like
9 Gardner Solar is to know that federal law, with the help of implementation through the states,
10 provides an option for QF power sales even where the utility is non-cooperative. And
11 specifically, as I understand it this means that even where a utility has refused to sign an
12 energy sales agreement, it can nonetheless be required to purchase the output from a QF.

13 **Q. Why are you convinced that a utility can be required to make purchases from a utility**
14 **even where it has not signed a contract to do so?**

15 A. This is obviously more of a legal question that will be discussed during briefing. But I
16 understand that the Idaho Public Utilities Commission (“Idaho Commission”) over the past
17 few years attempted to create a rule requiring that a contract be signed in order for a LEO to
18 be created. After FERC got involved, as part of a settlement of a federal court matter the
19 Idaho Commission entered into a Memorandum of Understanding with FERC stating that
20 “[t]he Idaho PUC acknowledges that a legally enforceable obligation may be incurred prior to
21 the formal memorialization of a contract to writing.” *See* Memorandum of Understanding
22 Between FERC and the Idaho Commission (Dec. 24, 2013), available at
23 <http://www.ferc.gov/legal/mou/mou-idaho-12-2013.pdf>.

1 **Gardner Solar’s Experience with Idaho Power**

2 **Q. Please provide some background as to Gardner Solar’s QF activities in Oregon?**

3 A. Gardner Solar was attracted to develop projects in Oregon because of the favorable conditions
4 for solar generation in parts of the state and its review of the tariffs and standard contracts
5 available to solar developers. We determined that the Commission and the utilities here had
6 created a favorable atmosphere for solar development, provided that we could find appropriate
7 sites for projects. In order to build a project, we would still need to bring together financing,
8 iron out interconnection details, secure equipment, hire contractors and through them
9 construction crews. Risk and capital would be required at every stage.

10 If the process could not occur at a relatively predictable pace, the risks would multiply
11 considerably. A key element that makes these projects economically feasible is the federal
12 investment tax credit, which is set to expire by the end of 2016. In order for our planned
13 renewable projects to be built, we had to meet that deadline.

14 That is partly why Oregon was attractive. By providing for standard contracts at
15 previously determined avoided cost pricing, such as with Idaho Power’s tariff at Schedule 85,
16 the risks for timely and unpredictable negotiations over a contract were significantly reduced
17 if not eliminated.

18 **Q. How did Gardner Solar proceed?**

19 A. We invested considerable time, money and effort in evaluating sites, obtaining site control,
20 researching local requirements and speaking with local landowners and authorities. We
21 submitted interconnection requests for specific projects. Finally on April 7, 2015, we
22 submitted all the paperwork and details required by Schedule 85 and requested that Idaho
23 Power proffer energy sales agreements (“ESAs”) for 5 projects (Olds Ferry Solar, Owyhee

1 Solar, Malheur River Solar, Cooper Solar, and Fourth Ave Solar). Submission for a sixth
2 project (Fairway Solar) was submitted on May 6, 2015.

3 **Q. How did you expect Idaho Power to respond?**

4 A. Because the language of its tariff Schedule 85 was so clear, there was little doubt in our mind.
5 The tariff states that “[i]n order to obtain a project specific draft Energy Sales Agreement” the
6 seller has to provide a detailed list of specific information. *Schedule 85 at Second Revised*
7 *Sheet 85-4 (at 2(b)(ii)).*¹ Once that is done, as it was for our six projects, Idaho Power would
8 be required “[w]ithin 15 business days [to] provide the Seller with a draft Energy Sales
9 Agreement including current standard avoided cost prices and/or other optional pricing
10 mechanisms as approved by the Oregon Public Utility Commission in this Schedule.” Thus
11 we expected to receive draft ESAs for each project within 15 business days.

12 **Q. Did you receive the draft ESAs from Idaho Power as required by Schedule 85?**

13 A. No. Apparently Idaho Power did not want to provide the ESAs. Instead, it informed Gardner
14 Solar by letter that it had decided that it would no longer process Schedule 85 applications. It
15 did not cite any authority for how it could simply and unilaterally stop following the
16 requirements of its Commission-approved tariff.

17 Idaho Power further stated that it was asking the Commission to implement a stay of
18 its obligations under Schedule 85 (“Motion for Stay”) and had filed accompanying

¹ The specific information that must be provided in writing: (a) Date of request (b) Company/Organization that will be the contracting party (c) Contract notification information including name, address and telephone number (d) Verification that the Qualifying Facility meets the “Eligibility for Standard Rates and Contract” criteria (e) Copy of the Qualifying Facility’s QF certificate (f) Copy of the FERC license (applicable to hydro projects only) (g) Location of the proposed project including general area and specific legal property description (h) Description of the proposed project including specific equipment models, types, sizes and configurations (i) Type of project (wind, hydro, geothermal etc.) (j) Nameplate capacity of the proposed project (k) Schedule 85 pricing option selected (l) Desired term of the Energy Sales Agreement (m) Annual net energy amount (n) Maximum capacity of the Qualifying Facility (o) Estimated first energy date (p) Estimated operation date (q) Point of Delivery (r) Status of the Generation Interconnection Process.

1 applications to change most of the rules regarding QFs. Those filings are pending before the
2 Commission in Docket UM 1725.

3 **Q. How did Gardner Solar respond?**

4 A. First we wrote to and attempted to discuss the matter with Idaho Power to come to a
5 reasonable resolution, but it quickly became clear to us that Idaho Power did not want to
6 negotiate. Thus, Gardner Solar intervened in Docket UM 1725, has opposed the Motion for
7 Stay, and has brought its own complaint against Idaho Power for its failure to follow its legal
8 obligations. The complaint proceeding is pending before the Commission in Docket UM
9 1733.

10
11 **Gardner Solar's Recommendation on How to Resolve the Issue as to When a Legally**
12 **Enforceable Obligation is Created**

13 **Q. How is this experience relevant to the determination as to when the Commission should**
14 **consider that a LEO has been created?**

15 A. There really should be no doubt that in circumstances like this, a legally enforceable
16 obligation for Idaho Power to purchase the output of the Gardner Solar projects has already
17 been created. Here are the key circumstances that were met in this case which Gardner Solar
18 recommends that the Commission consider as being appropriate trigger points for the creation
19 of a LEO:

- 20
- The utility has a current avoided cost determination in place as approved by the
21 Commission.
 - The utility has a contract with terms and conditions for QF purchases that has
22 been previously approved by the Commission.
23

- The QF has submitted to the utility a complete application identifying all relevant parameters for the project. Idaho Power's Schedule 85, at Second Revised Sheet 85-4 (at 2(b)(ii)) provides a reasonable such list.

Q. As a matter of policy, why would these three circumstances be appropriate as the prerequisites for the creation of a LEO?

A. These three elements put in the Commission's and the utility's hands the ability to determine on a going forward basis what the opportunities for QF projects will be. Both the determination of avoided costs and the terms and conditions of a standard contract would be determined beforehand. The QF developer community would have, as in fact it has had in Oregon, clear signals as to the economic and legal terms for projects. Developers could then make their own determination as to whether it can bring all the other necessary elements together to build a project under such conditions. And if a developer did spend the time and money necessary to do so, it would know that the utility could not back out at the last second. There is simply no other significant interim step needed, in practical terms, between the submission of the project details and ESA execution, and thus there is no other action which should be deemed a necessary precondition to establishing a LEO.

Q. What about updates to avoided costs, or to the terms and conditions of an ESA, as conditions change?

A. It might be appropriate from time to time to update both avoided cost pricing and ESA terms as conditions change. However, such changes would have to be made on a prospective basis only. It would be unfair to developers and, as I understand it, would violate a number of legal requirements to make such changes on a retroactive basis.

I further understand that using these factors as the prerequisites for creation of a LEO would likely meet the Commission's and the utility's obligations under PURPA provided that

1 the avoided cost pricing and standard terms and conditions are publicly on file and available.
2 If the Commission were to suspend them (which could only properly be done by Commission
3 action and on a prospective basis for later-submitted projects) for an unreasonable length of
4 time, the simple absence of an avenue to create a LEO during that unreasonable length of time
5 could itself become a PURPA violation.

6 **Q. Does this conclude your testimony?**

7 A. Yes.

Dated this 22nd day of May, 2015.

By /s/ Joe Benga
Joe Benga
Senior Vice President & General Manager
of Solar Development
Gardner Capital Solar Development, LLC
(415) 760-3193
jbenga@gardnercapital.com