IN THE COURT OF APPEALS OF THE STATE OF OREGON

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,
Petitioners,

v.

PORTLAND GENERAL ELECTRIC COMPANY and OREGON PUBLIC UTILITY COMMISSION,
Respondents.

Public Utility Commission of Oregon
UM 1931

A173197

BRIEF OF AMICI CURIAE COMMUNITY RENEWABLE ENERGY ASSOCIATION, NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, AND RENEWABLE ENERGY COALITION IN SUPPORT OF PETITIONERS AND APPENDIX

Judicial Review of the Public Utility Commission of Oregon's Order No. 19-394, dated November 14, 2019; Order No. 19-255, dated August 2, 2019; and Order No. 18-174, dated May 23, 2018.

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December 2020

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BRIEF OF AMICI CURIAE

INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici Curiae Community Renewable Energy Association ("CREA"), Northwest & Intermountain Power Producers Coalition ("NIPPC"), and Renewable Energy Coalition ("REC") (collectively the "QF Amici") each advocate for viable rights of developers and owners of qualifying facilities ("QF") to use the mandatory purchase provisions of Section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA") in the Northwest and Intermountain states, including Oregon. 16 USC § 824a-3; ORS 758.505-758.555. Collectively, the QF Amici's members have developed dozens of QFs.

Amicus curiae CREA is an Oregon-based intergovernmental association, formed under Oregon Revised Statutes Sections 190.003 to 190.120. CREA consists of local governments, including several Oregon counties, working with CREA's member organizations, which include irrigation districts, businesses, individuals and non-profit organizations. CREA advocates for policies that will promote successful development and operation of renewable energy facilities in Oregon's rural counties, especially policies encouraging development of community-scale renewable energy facilities.

Amicus curiae NIPPC is a Washington-based trade association. Organized as a nonprofit corporation, NIPPC's members include independent power

producers who develop and operate power plants, as well as power marketers and independent transmission companies. NIPPC's members have collectively invested billions of dollars in existing generation resources in the United States and also have renewable and thermal projects in advanced development in the Northwest, some of which are in Oregon.

Amicus Curiae REC is an unincorporated trade association that is comprised of nearly 40 members who own and operate nearly 50 qualifying facilities or are attempting to develop new qualifying facilities under PURPA in Oregon, Idaho, Washington, Utah, Montana, and Wyoming. REC's members include irrigation districts, water and waste management districts, corporations, small utilities, and individuals with an interest in selling renewable energy to utilities – who, absent PURPA, may have no viable mechanism to develop and sell the output of renewable energy projects.

Since its enactment in 1978, PURPA has been credited with a "tremendous – and unanticipated – spur to technological innovation on numerous non-traditional technologies for producing electricity."[1] PURPA remains critically important to independent (i.e., non-utility) power producers who develop and operate cogeneration and renewable energy facilities in Oregon, including many members

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[1] Richard F. Hirsh, *The Public Utility Regulatory Policies Act*, The Smithsonian Inst., https://americanhistory.si.edu/powering/past/history4.htm (accessed Dec 21, 2020) [hereinafter Hirsh, *PURPA,* The Smithsonian Inst.].

of NIPPC, CREA, and REC. The law has directly resulted in substantial renewable energy development in the state. While this case presents only a narrow contractual interpretation issue on its surface, the QF Amici stress the importance of the jurisdictional issue in this case. PURPA guarantees QFs a market for their power, subject to avoided cost pricing and such other terms as states are permitted to implement under the law, and the Public Utility Commission of Oregon ("PUC") has responsibility for ensuring utilities enter into contracts to purchase that power, subject to those terms.

However, the PUC's authority to mandate certain contract terms ends after contract execution. In this case, for only the second time[2] in PURPA's 40-year history, the PUC has determined that it retains authority to *interpret* executed PURPA contracts. This is a troubling development and invites forum-shopping, because the PUC, by its statutory mandate, cannot serve as a neutral arbiter. This Court should correct this result and find that courts retain exclusive jurisdiction. The Legislature explicitly authorized the PUC to participate in disputes before other tribunals, and it will remain free to do so in disputes such as this one. If, instead, the result below stands, the inability to obtain access to the courts will

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[2] The prior instance in 2018 was not appealed to a final decision, making this an issue of first impression for this court. *See* PUC Docket No UM 1894, Order No 18-025 (Jan 25, 2018). PUC orders are available at https://apps.puc.state.or.us/orders/disclaim.htm.

undermine the right to sell under PURPA, ultimately discouraging investment in Oregon QFs.

The QF Amici respectfully request that the Court hold that the PUC did not have jurisdiction over this dispute. Alternatively, if the Court finds jurisdiction, the QF Amici respectfully request that the Court reverse the PUC's decision on the merits.

STATEMENT OF THE CASE

The QF Amici concur with and adopt the Statement of the Case of Petitioners 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").

ASSIGNMENTS OF ERROR

The QF Amici concur with and adopt the Assignments of Error of the NewSun Parties.

ARGUMENT

The QF Amici concur with and adopt the Argument of the NewSun Parties. Consistent with ORAP 5.77(1), this brief does not repeat the NewSun Parties' arguments but provides additional context to assist the Court in understanding the significance of the errors in the PUC's reasoning. For the reasons explained

below, the Court should set aside all three orders on review for lack of jurisdiction or, alternatively, if the court finds jurisdiction, it should reverse the PUC's decision on the merits.

A. The regulatory context is relevant to understand the PUC's overreach.

The PUC overstepped its authority and misapplied Oregon contract law. Both errors are best understood by considering the regulatory context.

For much of their history, electric utilities have existed as monopolies.[3] Dissatisfied consumers could not buy from a different seller, who could not compete with the utility. The economic theory that emerged in the early 1900s was that this structure was "efficient" because utilities were "natural monopolies."[4] In other words, most economists historically believed that the elimination of competitors was both expected and—in their eyes—acceptable. While many other "natural monopoly" industries have since been restructured, the electricity sector today remains—in some states—dominated by monopoly-like utilities, wherein successful competitors are exceptional rather than ordinary.[5]

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[3] *See generally* Hirsh, *PURPA,* The Smithsonian Inst.; Richard F. Hirsh, *Emergence of Electrical Utilities in America*, The Smithsonian Inst., https://americanhistory.si.edu/powering/past/history1.htm (accessed Dec 21, 2020) [hereinafter Hirsh, *Emergence,* The Smithsonian Inst.]

[4] *See* Hirsh, *Emergence,* The Smithsonian Inst.

[5] For a discussion of restructured industries, see generally Richard F. Hirsh, *Market Economics: The Push for Deregulation,* The Smithsonian Inst.,

The Legislature created the PUC to protect Oregon ratepayers and the public generally from potential monopoly abuses, like excessive pricing and inadequate service. The Legislature "confer[red] upon the commission the power to regulate [utilities] so that a safe and adequate service may be rendered to the public at reasonable and sufficient rates." *Woodburn v. Pub. Serv. Comm'n*, 82 Or 114, 118, 161 P 391 (1916). Further, Oregon courts have recognized that "the right to regulate rates by changing them from time to time as the welfare of the public may require is essentially a police power." *Id.* at 123. In essence, the PUC is an economic regulator, created to police the regulated utilities. However, the PUC cannot impose confiscatory rates, thus the Legislature charged the PUC with "balanc[ing] the interests of the utility investor and the consumer" when setting rates. ORS 756.040(1). Yet this too, theoretically, benefits customers, as maintaining the utility's financial health ensures continued operations and thus the availability of service to meet future needs. In sum, the PUC has the difficult task of balancing competing utility and customer interests.

While regulation helps protect ratepayers and utilities, utilities remain profit-maximizing businesses. Portland General Electric Company ("PGE"), for instance, profits from owning electric generation facilities but not from buying

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https://americanhistory.si.edu/powering/past/history5.htm (accessed Dec 21, 2020).

energy from third parties. The PUC has explained this dynamic as follows: "[U]nder cost of service regulation, a utility's 'profit' is the opportunity to earn a return on the rate base and by purchasing a [power purchase agreement ('PPA')] in lieu of building a power plant, it is foregoing the potential to earn some amount of profit." PUC Docket No UM 1276, Order No 11-001 at 5 (Jan 3, 2011) (internal citations omitted). In short, buying power from QFs is, in the eyes of the utility, a lost opportunity to profit. As a consequence, even though *ratepayers* may benefit from lower-cost non-utility owned generation, that generation is not always procured, because of the utility's economic self-interest. Ultimately, the absence of competition harms ratepayers but benefits utilities.

More than 60 years after the PUC's creation, the federal and Oregon legislatures enacted PURPA. Congress recognized that "traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities" (essentially any *non*-utility-owned generator). *FERC v. Miss.,* 456 US 742, 750, 102 S Ct 2126 (1982). Further, Congress recognized this reluctance hindered the development of market competitors, including cogeneration and small power production facilities (i.e., QFs). *Id*.

PURPA promotes competition by obligating utilities to enter into PPAs under certain terms and conditions. The federal PURPA directs the Federal Energy Regulatory Commission ("FERC") to "promulgate 'such rules as it determines

necessary to encourage cogeneration and small power production,' including rules requiring utilities to offer to sell electricity to, and purchase electricity from," such facilities. *FERC v. Miss.,* 456 US at 751 (quoting 16 USC § 824a-3(a)). Oregon's PURPA directs the PUC similarly. ORS 758.535; *see generally* ORS 758.505-758.555.

The PUC's responsibility to implement the federal and state PURPA flows naturally from its requirement to police regulated utilities like PGE. PGE, by law, must offer to purchase electricity from QFs like the NewSun Parties. This obligation must be enforced, because PURPA, like regulation, does not eliminate the utility's reluctance and disincentive to contract with QFs. By contrast, QFs are not statutorily obligated to contract. The PUC has responsibility for enforcing the utility's statutory obligation, but it has no authority to dictate a QF's actions. Thus, the PUC's authority under PURPA is to further QF contracting, not to interpret or enforce such contracts.

Neither the federal nor Oregon PURPA, nor any other Oregon law, confer authority upon the PUC to address contractual disputes over executed PPAs between a QF and utility. PGE's statutory obligation is met when the PPA is signed; any disputes after contract execution are *contract* disputes, not statutory or regulatory disputes. For this reason, courts have jurisdiction, not economic-regulator agencies like the PUC.

The QF Amici believe the PUC asserted jurisdiction in this dispute due to a misplaced desire to protect ratepayers and the public generally from what the utility asserted was substantial harm. *See* Rec 9, Complaint at 9 (describing the dispute as "a multi-million dollar question that will have a significant impact on PGE's customers"); *see also* ER 4, Order No 18-174 at 4 (asserting that "the risk that a judicial decision could adversely impact the performance of our regulatory duties and responsibilities, [i.e., protecting ratepayers] further supports" finding jurisdiction); *see also* PUC Docket No UM 1894, Order No 18-025 at 7 ("The interpretation of PURPA contracts is critical to the discharge of our regulatory responsibilities. As we have stated, one critical feature of our implementation of PURPA… is the need to ensure that ratepayers remain financially indifferent to QF development."). While laudable in a different circumstance, the PUC's intentions are insufficient legal authority.

Arguably worse, the PUC asserted jurisdiction here in a way that undermines its own authority to regulate effectively. The NewSun Parties ask for an interpretation of the contracts that will do nothing more than effect the PUC's own policy, adopted in 2005 and recently reaffirmed. By allowing the utility to argue against the enforcement of that policy, the PUC invites all regulated entities to escape the PUC's supervision by claiming ignorance of a policy. *See generally*

Rec 4369-71, Intervenors' Application for Reconsideration at 1-3 (Oct 1, 2019) (discussing this issue).

The QF Amici assert that the PUC's lack of jurisdiction and improper contractual interpretation is clear, as argued below. Whether the court agrees or not, the QF Amici encourage the court to consider this dispute within the broader context of over 100 years of efforts to prevent monopoly power abuses in the power sector through regulation and laws like PURPA. It remains an ongoing struggle to establish competition in the sector, and ratepayers and the public generally are those that suffer in its absence.

B. The PUC Does Not Have Subject Matter Jurisdiction Over this Contractual Dispute.

It is a well-settled principle of administrative law that an agency's jurisdiction is strictly limited to those authorities expressly delegated to it by statute. *E.g.*, *SAIF Corp. v. Shipley*, 326 Or 557, 561, 955 P2d 244 (1998). As the NewSun Parties' opening brief demonstrates, the PUC's authorizing statutes do not enable the PUC to interpret nor enforce the contractual rights of a public utility and a QF under a fully executed, long-term PPA.

1. ORS 756.500 does not confer jurisdiction over non-regulated contractual disputes.

The QF Amici adopt the NewSun Parties' argument that ORS 756.500 does not confer jurisdiction on the PUC over this dispute without repeating it. However,

the QF Amici provide further argument rebutting the PUC's assertion of jurisdiction under ORS 756.500(5).

To determine if ORS 756.500(5) provides the PUC jurisdiction, Oregon courts do not defer to the PUC's interpretation but instead interpret the statute directly. *Roats Water Sys. v. Golfside Invs.*, 225 Or App 618, 622-623, 202 P3d 199 (2009). In doing so, "the court's task is to discern the intent of the legislature…" *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 610, 869 P2d 1143 (1993), *modified by State v. Gaines*, 346 Or 160, 167-171, 206 P3d 1042 (2009). The court's methodology is as follows: 1) examine the text and context, "which includes other provisions of the same statute and other related statutes"; 2) examine the legislative history; and, if the intent remains unclear, 3) consider general maxims of statutory construction. *Id.* at 611.

The Court has not previously addressed the extent of the PUC's affecting-rates jurisdiction under ORS 756.500(5), despite the provision's long history. In doing so now, the Court should find that the PUC's extraordinary assertion of jurisdiction is neither necessitated nor clearly supported by the plain text. Further, when viewed within the statutory context, the PUC's expansive interpretation becomes implausible and would render at least one other provision impermissibly superfluous. The legislative history similarly lacks any support for the PUC's interpretation; instead, it supports a narrower and more reasonable interpretation—

which would also be consistent with the findings of other courts interpreting similar provisions in analogous contexts under federal law.

a. The statutory text does not support the PUC's expansive interpretation.

The plain text of ORS 756.500(5) does not grant jurisdiction to the PUC over this dispute. The provision states that "any public utility … may make complaint as to any matter affecting its own rates or service with like effect as though made by any other person, by filing an application, petition or complaint with the commission." ORS 756.500(5). Thus, the plain text limits any utility complaint to "matter[s] affecting [the utility's] own rates or service." *Id.* This dispute is outside of that limitation.

The PUC determined that a utility's contractual costs with non-regulated suppliers, like the NewSun Parties, may *indirectly* affect rates charged to the PGE's customers,[6] therefore it found it had jurisdiction over the matter. ER 4-5, Order No 18-174 at 4-5 (affirming PUC Docket No UM 1894, Order No 18-025);

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[6] The Legislature defined "rates" to mean the prices a utility charges its customers, not the prices a utility pays third-party suppliers, like the NewSun Parties. *See* ORS 756.010(7) (defining "rate"). The PPA rates paid to QFs (i.e., contractual pricing) are distinguishable from a utility's rates charged to customers. Indeed, the PUC has distinguished between the rates a utility charges its customers and the avoided cost rates a utility pays QFs. PUC Docket No UM 1442, Order No 09-427 at 3 (Oct 28, 2009).

see also PUC Docket No UM 1894, Order No 18-025 at 4-5.[7] This interpretation is overly broad.

By contrast, the text readily supports a narrower and more reasonable interpretation. It is undisputed that the PUC has jurisdiction over utility complaints against retail customers for non-payment of the utility's rates. *See Roats*, 225 Or App at 622 (affirming the PUC's jurisdiction over such a matter); *see also id.* at 629 n. 7 (noting the PUC had previously exercised such jurisdiction). The QF Amici assert that *Roats* reflects the intended scope of ORS 756.500(5). The text, by itself, does not support the PUC's expansive interpretation.

b. The statutory context does not support the PUC's expansive interpretation.

The statute's context demonstrates that the PUC's interpretation would be overly broad for at least four reasons. First, the PUC's enabling statutes limit its power to utility-customer interactions, as the PUC's own prior precedent confirms. Second, the PUC's enabling statutes clarify the PUC's authority over the rates charged to customers does not encompass authority to manage a utility's costs. Third, the PUC's enabling statutes authorize the PUC to *participate* in proceedings

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[7] Order No 18-174 cites page 6 of the earlier order, but that page only discusses primary jurisdiction, which is irrelevant here. The QF Amici believe the PUC was affirming its assertion of jurisdiction under ORS 756.500(5), although the only discussion of ORS 756.500(5) in Order No 18-025 relates to personal jurisdiction, not subject matter jurisdiction.

like a court case regarding executed QF PPAs. Fourth, the PUC's declaratory ruling statute would be impermissibly superfluous if the PUC's interpretation of ORS 756.500 were correct. In sum, this statutory context shows that the Legislature did not intend the PUC to adjudicate a utility complaint involving a post-execution contract dispute between a utility and its supplier, nor to respond to such complaint by issuing a declaratory ruling.

First, as the NewSun Parties' Opening Brief explains, the PUC's authorizing statutes limit the PUC's authority to utility-customer interactions. Petitioners' Opening Brief at 19; *see generally* ORS 756.040. Indeed, the PUC has dismissed ORS 756.500(1) non-customer complaints against utilities for lack of jurisdiction, without regard to potential rate impacts. *E.g.,* PUC Docket No UCR 98, Order No 08-112 at 2 (Jan 31, 2008) (App 21) (dismissing a complaint regarding a utility's failure to comply with a settlement agreement about trespassing equipment); PUC Docket No UC 255, Order No 95-288, 1995 Or PUC LEXIS 43, at *3-42 (Or PUC, Mar 17, 1995) (dismissing complaint by utility's competitor seeking order to abrogate utility contract with customer). In dismissing such claims, the PUC has explained that it "does not have jurisdiction over each and every activity of a utility, its employees, or its agents" and that "[t]he Legislature has not authorized the Commission to resolve disputes based on the fact that a utility company is involved." PUC Docket No UCR 98, Order No 08-112 at 2; PUC Docket No UC

255, Order No 95-288, 1995 Or PUC LEXIS at *3-4; *accord Perla Dev. Co. v. PacifiCorp*, 82 Or App 50, 53-54, 727 P2d 149 (1986), *rev den,* 303 Or 74 (1987) (affirming court's jurisdiction over contract disputes over the utility's objection that PUC had jurisdiction). In the PUC's words, its "jurisdiction is limited to garden-variety utility-customer relationships." PUC Docket DR 28, Order No. 02-317 at 4 (May 7, 2002).

Second, the PUC's authorizing statutes distinguish the PUC's authority over rates charged to the utility's customers from a utility's right to manage its own costs. ORS 756.040 requires the PUC to set "fair and reasonable rates" that, among other things, "provide adequate revenue both for operating expenses of the public utility … and for capital costs of the utility." ORS 756.040(1). It is beyond dispute that the PUC may disallow imprudently incurred costs from a utility's rates. However, this does not extend to allowing the PUC to *manage* a utility's costs, like contracts with third parties. The Oregon Supreme Court articulated this distinction as early as 1950, in a case regarding a utility's costs under a contract with a utility affiliate. *See Pac. Tel. & Tel. Co. v. Flagg*, 189 Or 370, 220 P2d 522 (1950). There, the Oregon Supreme Court ruled that the authority to disallow costs did not extend authority to regulate costs directly. *Id.* at 396. This Court should reaffirm that principle.

Third, the PUC's authorizing statutes recognize that disputes *not* arbitrated by the PUC may be of interest to ratepayers and thereby the PUC. Such disputes would logically include contractual disputes between a utility and non-regulated third party, like this proceeding. While the PUC may have a role to play in these sorts of disputes, that role is as an *intervenor,* not as an *arbiter* of complaints. The law states:

> The commission may *participate* in any proceeding … for the purpose of representing the public generally and the customers of the services of any public utility … operating or providing service to or within this state.

ORS 756.040(3) (emphasis added). Thus, the legislature charged the PUC with representing customer interests in any disputes indirectly affecting a utility's rates, and it clarified the PUC would not arbitrate all such disputes.

In addition, it is notable that *by law* the PUC *cannot* act as a neutral arbiter of disputes, because the PUC *must* represent customer and utility shareholder interests. ORS 756.040(1). Indeed, the statutes bely any intent that the PUC would be the *neutral* arbiter of contract disputes between regulated utilities and non-regulated third parties. The legislature charged the PUC with the obligation to protect the public utility, its customers, and its shareholders – but *not* third parties. Under Oregon law, "the [PUC] shall make use of the jurisdiction and powers of the office to protect such customers [of the utility], … from … unreasonable exactions and … to obtain for them adequate service at fair and reasonable rates." ORS

756.040(1). Additionally, the PUC must exercise such jurisdiction to ensure that the "return to the equity holder [of the utility] … is … [c]ommensurate with the return on investments in other enterprises having corresponding risks" and "[s]ufficient to ensure confidence in the financial integrity of the utility." ORS 756.040(1)(a)-(b).

By contrast, courts do not have any statutory directives that might conflict with correctly and impartially applying contract law to resolve a contractual dispute. Courts adjudicate contractual disputes by applying contract law, without considering customer or utility shareholder interests, as should any agency with jurisdiction. Further, PURPA does not change this result, as courts have uniformly determined that "the rights of the parties [to a PURPA contract] … are to be determined by applying normal principles of contract interpretation to their agreement." *Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc.*, 159 F3d 129, 139 (3rd Cir 1998); *see also* Petitioners' Opening Brief at 16.

It is within this context that the QF Amici express their alarm that the PUC considered evidence of costs to ratepayers subsequent to QF contract execution and subsequent to the PUC itself establishing the applicable avoided costs guaranteed in those contracts. *See* Rec 3631, Ruling at 5 (Jan 15, 2019) (denying the NewSun Parties' Motion to Strike PGE/300, Khandoker); Rec 3881, PGE Motion for Summary Judgment at 3 ("The Commission's ruling in this matter will settle this

dispute not just for these 10 PPAs with 100 MW of capacity, but potentially also for the 52 other similar vintage PPAs that may, if NewSun prevails, increase the cost paid by PGE's customers by an estimated $200 million.") (citing PGE/300, Khandoker). Ultimately, the *legislature* mandated that utilities enter PURPA contracts and pay avoided cost rates, and neither PGE nor the PUC can avoid that mandate, even if actual costs diverge from the forecasted costs in a contract. *Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Util.'s Comm'n*, 36 F3d 848, 858 (9th Cir 1994) ("While the actual avoided cost might vary over time, under current law the QF remains entitled to receive the avoided cost rate specified in its contract."). The PUC has no more power to change utilities' statutory and contractual obligations to pay QFs for PURPA-mandated purchases, subject to the limiting terms that the PUC is in fact empowered to set, than the PUC has power to change the utilities' other supplier contracts. A ratemaking proceeding, not a contractual dispute, would be the appropriate forum for the PUC to evaluate such costs from a ratepayer perspective.

If, however, the Court finds that the PUC has jurisdiction, it bears noting that the most likely consequence will be some form of forum-shopping. QFs will seek the impartiality of the courts, while utilities will seek the cost-sensitive analysis of the PUC. This should weigh against a finding of jurisdiction, as courts

assume the Legislature did not intend to encourage forum shopping. *See, e.g., Class v. Carter*, 293 Or 147, 155, 645 P2d 536 (1982).

Fourth, the PUC's interpretation of ORS 756.500 would impermissibly render the PUC's declaratory ruling statute, ORS 756.450, superfluous. *See Gaucin v. Farmers Ins. Co.*, 209 Or App 99, 105-106, 146 P3d 370 (2006) (rejecting the interpretation of one statutory provision as authorizing certain action because doing so "would impermissibly render the various authorization avenues described in [other ORS provisions] mere surplusage" and holding that the provision instead acts "as a limitation, rather than an authorization"); *see also* ORS 174.010 ("[W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."). The PUC's declaratory ruling statute, ORS 756.450, limits the agency's authority to issue such abstract rulings to the interpretation of PUC statutes or administrative rules, not contracts. PUC Docket No UM 1805, Ruling at 3 (Jan 19, 2017). That section only authorizes issuance of a "declaratory ruling with respect to the applicability … *any rule or statute* enforceable by the commission." ORS 756.450 (emphasis added).[8] Even then, such a declaratory ruling is only "binding between the commission and the petitioner on the state of facts alleged[.]" *Id.* This Court held that nearly identical

[8] By contrast, trial courts have jurisdiction to provide a declaratory judgment construing a contract "either before or after there has been a breach thereof." ORS 28.030; *accord* 28 USC § 2201 *et seq*.

language in Oregon's Administrative Procedures Act "does not authorize [the Public Employee Relations Board] to make declaratory rulings on questions based *solely* on a collective bargaining agreement, as distinguished from questions based on statutes or rules" because the statute only provides for rulings as to the applicability of "'any rule or statute.'" *Or. State Emp.'s Ass'n v. State*, 21 Or App 567, 570, 535 P2d 1385 (1975) (quoting ORS 183.410) (emphasis in original).

Here, the PUC issued a declaratory ruling on a contract, alleging jurisdiction under ORS 756.500. However, there would be no need for ORS 756.450 to authorize the PUC to issue *some* declaratory rulings if ORS 756.500 already authorized the Commission to do so in *all* cases, as the PUC apparently claims. ORS 756.450 provides narrow authority to the PUC to issue declaratory rulings interpreting statutes and rules with the ruling binding only as between the plaintiff and PUC. By contrast, the PUC's interpretation of ORS 756.500 would allow it to issue declaratory rulings on contracts as well, plus the ruling would be binding on any other person named as defendant. Because the PUC's interpretation of ORS 756.500 would render ORS 756.450 impermissibly superfluous, the PUC's interpretation must be rejected.

In sum, the Court should reject the PUC's attempt to convert ORS 756.500 into a statute conferring jurisdiction to issue binding declaratory judgments on any matter related to a public utility. Such an expansive reading is unsupported by

either the plain text or the context of Oregon's statutes.

c. The PUC's interpretation is implausibly overbroad.

In addition to lacking support for the PUC's expansive reading, the context demonstrates that the PUC's reading of its affecting-rates jurisdiction under ORS 756.500(5) would be implausibly overbroad. *See State v. Johnson*, 339 Or 69, 94, 116 P3d 879 (2005) ("[The] state's interpretation of the statute, although plausible on a purely textual level, becomes implausible when viewed in the context of this court's case law and the general assumption that statutes are rational.").

The QF Amici assert that the PUC's complaint statute does not authorize the PUC to arbitrate *all* disputes over a utility's costs, obligations, and liabilities to third parties that may affect the PUC-approved rates for provision of regulated services. To read the statute otherwise would give the PUC jurisdiction over a multitude of complaints, the subject matter of which it would otherwise have no jurisdiction over (e.g., supplier contracts for copper wiring, legal services, or even toilet paper). Such an outcome would be implausible.

Multiple federal Circuit Courts have rejected similarly overbroad and implausible interpretations of FERC's authority as a federal utility regulator under analogous statutory provisions conferring FERC jurisdiction over matters affecting rates.

First, regarding the Natural Gas Act's grant of authority to FERC over "contract[s] affecting … rate[s]," the DC Circuit rejected the argument that FERC necessarily had jurisdiction over *every* gas contract, even ones otherwise beyond FERC's purview. *Am. Gas Ass'n v. FERC*, 912 F2d 1496, 1505-07 (DC Cir 1990). The DC Circuit upheld FERC's reading, that "'contract[s] affecting such rate[s]'" were "limited to contracts in which a 'natural gas company' … *acts as seller* and which directly governs the rate in a jurisdictional sale …." *Id.* at 1506 (quoting 15 USC § 717d(a)) (emphasis added). A contrary determination would result in "an oxymoron – [FERC] jurisdiction over nonjurisdictional contracts." *Id.* Further, the Court noted that the argument FERC had affecting-rates jurisdiction because of the potential "impact on the pipelines' selling prices" of the nonjurisdictional contracts "ha[d] no conceptual core." *Id.* at 1507. The DC Circuit recognized that finding affecting-rates jurisdiction based on a price impact would be "awkward and implausible as a jurisdictional boundary" because it would reach "contracts for every other possible factor of production – even legal services." *Id.* In short, "the potential impact of nonjurisdictional contracts' prices on the justness and reasonableness of jurisdictional rates provides no license for the Commission to monkey with the former." *Id.*

Similarly, regarding the Federal Power Act's grant of authority to FERC to examine the reasonableness of utility practices "affecting … rate[s]," the DC

Circuit rejected FERC's expansive reading that the language authorized FERC to modify any utility practice, including how a utility chooses its board members. *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F3d 395, 401 (DC Cir 2004). FERC cited an earlier case out of context to argue that its jurisdiction must be broad because "there is an infinitude of practices affecting rates and service." *Id.* The DC Circuit noted such a reading would give FERC "the authority to regulate *anything* done by or connected with a regulated utility, as any act or aspect of such an entity's corporate existence could affect, in some sense, the rates." *Id.* (emphasis added). The DC Circuit rejected such a "breathtaking scope" of agency jurisdiction. *Id.*

Finally, at least two other circuit courts have reached the same conclusion as the DC Circuit regarding FERC's jurisdiction under the Natural Gas Act. In 1981, the Fifth Circuit held that affecting-rates jurisdiction does not confer jurisdiction to "interpret contracts concerning gas not within FERC's [Natural Gas Act] jurisdiction" and "[w]hether such a contract authorizes escalation to . . . prices is for state or federal courts to decide." *Pennzoil Co. v. FERC*, 645 F2d 360, 381 (5th Cir 1981). More recently, in 2013, the Ninth Circuit held that regulatory jurisdiction over natural gas companies "*and their practices which affect jurisdictional rates*" did not include jurisdiction over price manipulation associated

with nonjurisdictional sales. *Learjet, Inc. v. Oneok, Inc.*, 715 F3d 716, 731-735 (9th Cir 2013) (emphasis in original).

This Court should similarly construe the PUC's authority in a narrower and more plausible fashion to effectuate the legislature's goal of creating an agency with special expertise in ratemaking, not contract law.

d. The legislative history does not support the PUC's expansive reading.

The "court may limit its consideration of legislative history to the information" provided, therefore the QF Amici provide the following. *See Gaines*, 346 Or at 165 (quoting ORS 174.020(1)(b)(3)) (emphasis removed).

A review of the legislative history demonstrates that the PUC has overstepped its authority and ventured beyond the legislature's intent. A reasonable person would expect to find some discussion of the PUC's allegedly expansive jurisdiction in reviewing the history of ORS 756.500, but there is none. On the contrary, the only applicable discussion reveals that ORS 756.500 is merely a procedural statute that does *not* confer additional authority upon the PUC through use of its affecting-rates provision. Further, prior statutory language demonstrates that the legislature intended the PUC to have narrow authority to adjudicate complaints and the legislature did not envision the PUC adjudicating contractual utility-supplier disputes like the present one.

First, the legislative history demonstrates that ORS 756.500 is merely a procedural statute that does not, by itself, confer jurisdiction on the PUC. *McPherson v. Pac. Power & Light Co.*, 207 Or 433, 451-453, 296 P2d 932 (1956) ("To determine the jurisdiction of the [PUC] over a particular business, one must refer to the *substantive* statutes" (emphasis added)). A legislative committee has explicitly stated that the complaint provisions are procedural. In 1971, an advisory committee tasked with reworking Oregon's utility laws, both procedural and substantive, noted the following of the Commission's complaint provisions:

> ORS 757.505 to 757.550, 757.560 to 757.585, 757.595 (Complaints, investigations, hearings and orders)
>
> This group of *procedural* sections has been replaced by *procedural* sections consolidated in ORS chapter 756 (§§ 37-62) [ORS 756.500 to 756.610].

See Cascade Nat. Gas Corp. v. Davis, 28 Or App 621, 624, 560 P.2d 301 (1977) (quoting the committee's written report) (emphasis added); SJR 7 (1969) (creating the advisory committee).

Further, at a Senate Judiciary Committee Meeting on April 21, 1971, the relevant advisory subcommittee chairman, Norman Stoll, explained:

> The way the law presently stands, there are *administrative procedures* scattered all the way through these chapters. … What we did generally was this: we went through the whole body of the law to take out those provisions that we thought either had, or should have, some general applicability … and tried to consolidate them into one uniform procedure that would be applicable to everything …, eliminating any duplicating or somewhat conflicting provisions.

Tape Recording, Senate Committee on Judiciary, HB 1100, Apr 21, 1971, Tape 9, Side 2 at 41:08 to 42:41 (statement of Advisory Subcommittee Chairman Norman Stoll) (emphasis added). Meanwhile, during that massive reworking of utility laws in 1971, there was no discussion of these procedural provisions having any bearing on the PUC's jurisdiction.

Second, the legislative history demonstrates the PUC has acted beyond the narrow authority granted to investigate complaints. The historical antecedent of ORS 756.500(5) was enacted alongside provisions explicitly describing the PUC's authority over complaints as involving end use customer rates, not supplier costs. Those historical provisions stated:

> Section 41. *Complaint Against Utility by Patrons, Etc.*-
>
> Upon a complaint … [1] that any or all of the rates … are in any respect unreasonable or unjustly discriminatory, or [2] that any regulation, measurement, practice or act whatsoever affecting or relating to … service … is in any respect unreasonable, insufficient or unjustly discriminatory, or [3] that any service rendered by any public utility is inadequate or is not afforded, *the Commission shall proceed, with or without notice, to make such investigation as it may deem necessary or convenient*.
>
> Section 43. *Commission to Prescribe Reasonable Rates and Regulations*.-If, upon such investigation [of a complaint], any rates… shall be found to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of this Act, *the Commission shall have power to fix and order substituted therefor such rate or rates… as shall be just and reasonable*. If upon such investigation it shall be found that any regulation, measurement, practice, act, or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory

> or otherwise in violation of any of the provisions of this Act, or if it be found that any service is unsafe or inadequate or that any reasonable service cannot be obtained or is not afforded, *the Commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts and to make such order respecting, and such changes in such regulations, measurements, practices, service or acts as shall be just and reasonable*.

Or Laws 1911, ch 279, §§ 41 and 43 (emphasis added); *see also Roats*, 225 Or App at 626 (explaining the legislature's intent for the PUC to undertake the "same investigatory procedure" for complaints filed by and against utilities). Sections 41 and 43 were both codified in 1953 and repealed in 1971, during the reorganization discussed previously. *See* ORS 1953 Ed Prior Legislative History; Or Laws 1971, ch 655, § 250. Notably absent from this language is *any* authority for the PUC to issue orders interpreting utility-supplier contracts, as the PUC has attempted to do in the present dispute.

Finally, the legislative history of the PUC's declaratory ruling statute, ORS 756.450, confirms the PUC's interpretation of ORS 756.500 is overly broad. As noted previously, the Court's interpretation of ORS 756.500 should give full effect to ORS 756.450, including ORS 756.450's limiting language as to the PUC's authority to issue such abstract rulings. Further supporting that argument is the later and separate enactment of ORS 756.450. The Legislature enacted ORS 756.450 in 1971, sixty years *after* enacting the historical antecedent of the complaint statute. Or Laws 1971, ch 655, § 36. This confirms that the Legislature

did not understand ORS 756.500 to authorize the PUC to issue declaratory rulings over utility-supplier contracts, as the PUC did here.

As this legislative history makes clear, the PUC has limited jurisdiction to hear complaints. Specifically, the PUC may hear complaints addressing questions as to whether rates charged to customers for regulated service are just and reasonable and whether such service is adequate, but other matters are left to the courts. *See, e.g., McPherson,* 207 Or at 451-453 (finding PUC lacks jurisdiction over a ratepayer complaint when there is no dispute that the schedule is just and reasonable); *Or.-Wash. R.R. & Navigation Co. v. McColloch*, 153 Or 32, 52, 55 P2d 1133 (1936) (noting PUC's jurisdiction "is limited to those instances in which some administrative function or discretion is involved, and does not include cases in which the court has jurisdiction without prior finding or order by the commissioner as to the reasonableness of any rate, rule or regulation"). Therefore, this Court should hold that ORS 756.500 does not grant the PUC jurisdiction over the present dispute.

2. PURPA does not confer jurisdiction over post-execution contract disputes

The QF Amici adopt NewSun Parties' argument that the federal and state PURPA do not confer jurisdiction on the PUC and instead would preempt any post-execution change to the contracted-for rates without repeating it. Here, the QF Amici provide additional historical context, as it had been well-established

until the PUC unlawfully asserted jurisdiction that Oregon's courts have exclusive jurisdiction over post-contractual PURPA disputes.

As explained in the NewSun Parties' Opening Brief, PURPA expressly prohibits post-execution changes to the forecasted avoided cost rates, even if a utility's actual avoided costs are different. Petitioners' Opening Brief at 15-16. This prohibition is an essential aspect of the law, as it secures contractual certainty for QFs to attract financing. FERC explained this as follows:

> [I]n order to be able to evaluate the financial feasibility of a … [QF], an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility. This return will be determined in part by the price at which the QF can sell its electric output.

FERC Order 69, 45 Fed Reg 12,218.

Consistent with this, courts and FERC have consistently overruled regulators that violated PURPA's prohibition against post-contractual rate changes. *See Freehold Cogeneration Assocs., L.P. v. Board of Reg. Comm'rs of State of N.J.*, 44 F3d 1178, 1194 (3rd Cir 1995) (rejecting attempt to direct parties to renegotiate an executed PPA); *Indep. Energy Producers*, 36 F3d at 858 (holding that "the fact that the prices for fuel, and therefore the Utilities' avoided costs, are lower than estimated [at the time of contract execution], does not give the state and the Utilities the right unilaterally to modify the terms of the standard offer contract"); *Idaho Wind Partners 1, LLC*, 140 FERC ¶ 61,219, at PP 40-41 & n 42 (Sept 20,

2012) (ruling Idaho PUC could not implement an extra-contractual curtailment procedure on wind QFs with long-term PURPA contracts that provided no such curtailment right).

Thus, as noted by the NewSun Parties, any post-executed PURPA contract dispute must be resolved solely upon the application of contractual principles. Petitioners' Opening Brief at 16.

Within this context, the PUC has historically—as was, and remains, appropriate—abstained from asserting jurisdiction over executed PURPA contracts. As early as 1986, the PUC's formal practice was to avoid "interfering in settled contracts," stating, PURPA "[c]ontracts determined either through negotiation or order of the Commissioner should be considered final." PUC Docket No AR 116, Order No 86-488 at 4 (May 12, 1986) (App 4).[9] The PUC recognized the need "to rely on the terms of the contract for planning, budgeting, and other business purposes." *Id.*

More recently, the PUC declined to substantively consider a QF's petition for a declaratory ruling on the interpretation of its PURPA contract. *See* PUC

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[9] Although Order No 86-488 mentions the PUC's interest in PPAs as protecting ratepayers, this reference should be understood within its historical context. In the 1980s, it had not yet been resolved whether the PUC had authority to modify PURPA contract prices, as the courts settled that question later. *See generally Or. Trail Elec. Consumers Coop. v. Co-Gen Co.,* 168 Or App 466, 480-481, 7 P3d 594 (2000) (discussing this context in regard to a 1984 PURPA contact).

Docket No DR 45, Order No 10-495 at 1-2 (Dec 27, 2010). There, the QF and utility disputed who owned the non-energy commodity known as renewable energy certificates, which are generated with each unit of the QF's electric energy. *Id.* at 1. The PUC declined to address the dispute, pursuant to a Staff recommendation that is apt here. *See id.* Staff noted it was "a matter of strict contract interpretation" and "the [PUC] does not have any particular special expertise in interpreting contracts," including QF contracts. *Id.* at App A at 4.[10] Further, "staff's legal counsel advise[d] that the legal significance of a Commission order based solely upon the application of contract law to interpret a contract is unclear. Presumably, the party who was dissatisfied with the Commission's decision could still take the matter to court." *Id.* at 5.

Another reason the PUC has historically declined to exercise jurisdiction over contract disputes, whether PURPA-related or not, is its lack of authority to award damages. *See* PUC Docket No UM 1670, Ruling at 5 & n 13 (Apr 28, 2014) (collecting decisions where PUC found it lacked jurisdiction). The PUC's inability to afford complete relief in contractual disputes further undermines the notion that the PUC is the preferred forum for contractual disputes.

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[10] The PUC has recognized that "courts of general jurisdiction are far more familiar with the law surrounding contracts than we are." PUC Docket No WA 36, Order No. 02-573 at 11 (Aug 21, 2002).

Finally, it is unclear how complainants could exercise their constitutional right to a jury trial if the PUC may assert jurisdiction over contractual disputes between utilities and non-regulated suppliers, like the NewSun Parties. *See* Or Const, Art VII, (Amended) § 3. The PUC's interpretation could violate this constitutional right, which could not have been the legislature's intent in creating the PUC or granting authority over certain utility complaints. *See Rachel M. Weldon, LPC v. Bd. of Licensed Prof'l Counselors & Therapists*, 353 Or 85, 101, 293 P3d 1023 (2012) (adopting an interpretation of a statute that made it unnecessary to address whether the legislature unconstitutionally encroached on the powers of the judicial branch).

Thus, Oregon trial courts, not the PUC, traditionally adjudicate PURPA contract disputes with utilities. *See, e.g., Water Power Co. v. PacifiCorp*, 99 Or App 125, 781 P2d 860 (1989) (exercising jurisdiction over PURPA contract); *PacifiCorp v. Lakeview Power Co.*, 131 Or App 301, 884 P2d 897 (1993) (same); *Or. Trail Elec.*, 168 Or App at 473-474 (same).

Here, the PUC attempts to overturn this precedent. The PUC asserted jurisdiction on the basis of PURPA. ER 3, Order No 18-174 at 3 ("The instant proceeding is not a common law contract dispute, but rather one that relates to matters that have specifically been delegated to us under federal and state law."). This was incorrect, as the PUC's authority under PURPA ends at contract

execution, as the PUC arguably recognized in its final order. ER 80, Order No. 19-255 at 13 ("To resolve the disputed contract interpretation, the parties agree that we must apply the analysis in *Yogman*.") (referring to *Yogman v. Parrott,* 325 Or 358, 937 P2d 1019 (1997)).

The discrepancy between the PUC's decision on the NewSun Parties' Motion to Dismiss and the PUC's decision on the merits is concerning.

In reasoning that it had jurisdiction, the PUC's order denying the Motion to Dismiss ruled, in effect, that an executed standard contract under PURPA is not really a contract that must be interpreted and enforced under contract law. Instead, consistent with the PUC's statutory directive to protect the utility, the PUC appeared to suggest it would interpret the agreements with an intent to limit the utility's costs. Although the PUC ultimately examined the disputed contract language under a (misapplied) contract law approach, the PUC did so only *after* noting the *parties* agreed to that approach. ER 80, Order No 19-255 at 13. Thus, it remains unclear whether the PUC thinks it could take a different approach and consider ordinarily irrelevant issues such as the cost impact on PGE and its retail ratepayers. Such a result would completely undermine the purpose of long-term PPAs and the need of QFs and their investors to *rely* on the rates and terms in those agreements once *executed* even if the economics of the transaction turn out to be adverse to PGE.

The Court should not entertain such misguidance. The PUC's assertion of jurisdiction in this case opens the door for the PUC to do indirectly, through contract interpretation, what PURPA expressly forbids it from doing directly. Far from providing the PUC jurisdiction, PURPA demonstrates that the PUC's reasoning underlying its assertion of jurisdiction was unlawful.

Precedent from other states also confirms that the PURPA regulatory scheme does not confer contract interpretive jurisdiction on state regulatory authorities after the PPA is executed. In a recent decision applying Montana law, a United States District Court acknowledged that the Montana commission may "'play the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilities[,]'" but it held that authority does not extend to adjudicating disputes over executed contracts. *Pac. Nw. Solar, LLC v. Nw. Corp.*, No CV-16-114-H-SHE-JTJ, 2018 US Dist LEXIS 141922, at *4-5 (D Mont, Aug. 21, 2018) (quoting *Indep. Energy Producers* 36 F3d at 856). The Idaho Supreme Court has similarly explained that "[w]hile there is no dispute concerning [the Idaho commission]'s authority to approve PURPA contracts, the subsequent interpretation and enforcement of contracts does not generally fall

within its powers." *Idaho Power Co. v. Cogeneration, Inc.*, 129 Idaho 46, 49, 921 P2d 746 (1996).[11]

3. The Contracts do not—and cannot—confer jurisdiction

Third, the PUC incorrectly suggested that the PPAs conferred subject matter jurisdiction on the PUC because each PPA states it "is subject to the jurisdiction of those *governmental agencies* having control over either party or this Agreement." ER 4, Order No. 18-174 at 4 n 7 (quoting Section 17 of PPAs) (emphasis in the original). The QF Amici adopt without repeating the NewSun Parties' argument that contractual language cannot confer subject matter jurisdiction on an agency. Here, the QF Amici provide additional historical context for this contract language.

As the NewSun Parties' Opening Brief notes, the PUC's administrative rules mandate the inclusion of the jurisdiction reference. OAR 860-029-0020(2)(a). The Commission adopted this rule language in 1985 and has made no substantive edits since that time. *Compare* OAR 860-029-0020(2)(a), *with* PUC Docket No AR 114, Order No 85-099, 1985 Or PUC LEXIS 2, at *4 (Or PUC, Feb 12, 1985). In adopting the rule language, the Commissioner explained:

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[11] *See also Kleen Energy Sys., LLC v. Comm'r of Energy & Envtl. Prot*., 319 Conn 367, 388, 125 A3d 905 (2015) (in similar context, rejecting the argument that the state's utility regulator "has broad authority to issue declaratory rulings . . . whenever it is asked to interpret a contract that it was involved in drafting").

> The Commissioner includes this language with the understanding that if a governmental agency or a court orders the QF to halt generation, the utility is no longer obligated to purchase power under the contract.

Thus, the original intent was to clarify that a utility is not obligated to purchase *unlawfully* produced power.

The PUC's new interpretation that the contract language, and thus the administrative rule, provides a new jurisdictional basis is unlawful, as the NewSun Parties explain. Petitioners' Opening Brief at 21-22. An agency cannot expand its jurisdiction through an administrative rulemaking. *See Diack v. City of Portland*, 306 Or 287, 293, 759 P2d 1070 (1988).

C. Even if it had jurisdiction, the PUC misinterpreted the contracts

Assuming, *arguendo*, the PUC had jurisdiction, the PUC erred in its decision on the merits. The PUC conflated agency precedent with trade usage, and it dismissed undisputed evidence of trade usage after misapplying Oregon contract law. Had the PUC followed Oregon contract law and considered the trade usage, it would have determined that the NewSun Parties' contract interpretation is correct.

The QF Amici adopt the NewSun Parties' arguments without repeating them. Instead, the QF Amici here provide additional explanation of trade usage and the PUC's errors regarding it.

1. The PUC misunderstood Oregon contract law and ignored relevant trade usage.

Oregon courts have adopted a three-step process for interpreting contracts. *Yogman,* 325 Or at 361-362. The first step is to analyze the text of the document, including any applicable trade usage. *Id.*; *Peace River Seed Coop. Ltd. v. Proseeds Mktg.,* 355 Or 44, 67-68, 322 P3d 531 (2014); *see also Dorsey v. Or. Motor Stages*, 183 Or 494, 513, 194 P2d 967, 975 (1948) ("Courts infer that members of a vocation employ its trade terms in their technical sense whenever they use them."). If the document is ambiguous, courts proceed to examine extrinsic evidence of the parties' intent. *Yogman*, 325 Or at 363. If the document remains ambiguous, courts apply appropriate maxims of construction. *Id.* at 364.

The PUC discussed trade usage in Order No 19-255 as follows, in full:

> The NewSun QFs and Intervenors argue that we should favor industry trade usage over a holistic reading of the entire agreement. We have approved other utilities' standard QF contracts with terms that begin at COD. However, approval of other utilities' contracts does not override the definition of "term" in PGE's PPA that unambiguously begins on the date of execution by both parties, and not COD.

ER 82, Order No. 19-255 at 15. This discussion reveals at least two problems, in addition to misstating the NewSun Parties' argument in its brief. Petitioners' Opening Brief at 37.

First, the PUC incorrectly equated agency precedent with trade usage. Trade usage can, and typically does, exist independently from any government

agency's view or action. The PUC's focus on its prior actions instead of the industry's common understanding demonstrates a crucial misunderstanding of trade usage and contract interpretation.

Second, the PUC incorrectly dismissed trade usage evidence because it determined the contract was not ambiguous. In effect, the PUC determined trade usage is only relevant *after* the first step of *Yogman*, but this is incorrect. *Peace River,* 355 Or at 67 ("[I]t is appropriate to consider any applicable trade usage at the first level of analysis under Yogman…").

The PUC's misapplication of Oregon contract law is concerning, not least because the errors contributed to an incorrect interpretation of the contracts at issue.

2. The undisputed trade usage demonstrates that the PUC's interpretation of the contracts is incorrect.

The PUC conflated the PPAs' purchase term[12] and contract's term of effectiveness, finding that the definition for "Term" (i.e., the contract's term of

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[12] The PUC adopted "Purchase Term" in its regulations after the contracts at issue were executed. OAR 860-029-0010(26) (effective Nov 2, 2018) ("'Purchase term' means the period of a power purchase agreement during which the qualifying facility is selling its output to the public utility."). The QF Amici adopt the Commission's phrase to minimize confusion between industry jargon and legal jargon. *Compare, e.g., Definition of Delivery Term*, Law Insider, https://www.lawinsider.com/dictionary/delivery-term (accessed Dec 14, 2020) ("Delivery Term means the period of Contract Years set forth on the Cover Sheet beginning on the Commercial Operation Date, unless terminated earlier …"), *with, e.g.,* ORS 72.3190 (noting F.O.B. and F.A.S. are each "a delivery term").

effectiveness) necessarily governed the undefined word "term" in PGE's Schedule 201 (i.e., the purchase term). Had the PUC considered trade usage, it would have realized that the two are distinct concepts, and it would have found that the purchase term commenced *later* than the contract's term of effectiveness. Additionally, had the PUC considered trade usage, then it would have found the contract aligned with the PUC's recently reaffirmed policy that the purchase term must necessarily begin when the QF begins selling power, which is often *years* after the PPA is executed and the contract's term of effectiveness began. PUC Docket No UM 1805, Order No 17-256 at 4 (July 13, 2017) ("[T]he 15-year [purchase] term must commence on the date of power delivery"); OAR 860-029-0120(4)(a) ("A [QF] may specify a scheduled commercial on-line date … [a]nytime within three years from the date of agreement execution").

Before explaining the specific trade usage, the QF Amici note that ultimately the PPAs are like many contracts signed in advance of some obligation. Just as no respectable wedding venue would encourage engaged couples to book day-of, no utility should incentivize day-of contracting. In both circumstances, the logistics involved would make such an approach enormously impractical.

The QF Amici provide the following summary of trade usage on the record. Notably, although PGE argued its own understanding differed, PGE did not

counter the evidence offered on trade usage. Therefore, as a matter of law, the evidence on trade usage should be accepted as undisputed fact.

The primary evidence on trade usage comes from the testimony of two expert witnesses, Mr. John Lowe and Mr. Thomas Harnsberger. Both agreed that the word "term," as used in PGE's avoided cost pricing schedule (Schedule 201), is commonly used in the industry in documents like PGE's pricing schedule to describe the period of time during which a facility is operating, even if the PPA would be effective before that time. ER 49-50, CREA-NIPPC-REC/100, Lowe/5-6; ER 64, NewSun Parties/200, Harnsberger/3. Both experts also agreed that this contracting approach is necessary and practical due to the nature of the industry and of the PPAs themselves. That is, PPAs are commonly executed years prior to the expected start of power deliveries because those years are necessary to finance and construct, upgrade, or otherwise make arrangements for the generation and delivery to occur. ER 48, CREA-NIPPC-REC/100, Lowe/4; ER 64, 67, NewSun Parties/200, Harnsberger/3, 6. Due to this common understanding and practical realities, both expert witnesses also agreed that a typical developer would have understood the word "term" in PGE's avoided cost pricing schedule (Schedule 201) to describe a period of time commencing upon the start of deliveries (i.e., the purchase term) and not upon the execution of the PPA. ER 49-51, CREA-NIPPC-REC/100, Lowe/5-7; ER 66, NewSun Parties/200, Harnsberger/5. Finally, both

expert witnesses forcefully rejected PGE's atypical interpretation as "[a]bsolutely not" consistent with common usage and "illogical" in light of the practical realities of the industry. ER 51, CREA-NIPPC-REC/100, Lowe/7:24-25; ER 66, NewSun Parties/200, Harnsberger/5:13-16.

The expert witness Mr. Lowe relied not only upon his understanding of non-regulated entities but also addressed how the other regulated electric utilities in Oregon, Idaho Power and PacifiCorp, use the trade usage in their PURPA contracts. ER 52-58, CREA-NIPPC-REC/100, Lowe/8-14.

To the extent of the QF Amici's knowledge, Idaho Power and PacifiCorp have always implemented Order No. 05-584 to offer a 15-year fixed-price period and a maximum 20-year purchase term, both of which commence based on the QF's start of operations date, not years earlier when the contract is executed. Yet both Idaho Power and PacifiCorp refer to the "term" of the fixed-price period (i.e., the purchase term) and the overall contract term of effectiveness in ways strikingly similar to the language in the version of PGE's Schedule 201 at issue here.

PacifiCorp's initial pricing schedule, Schedule 37, provided, in pertinent part:

> Fixed Avoided Cost Prices are available for a *contract term of up to 15 years* and prices under a *longer term contract (up to 20 years)* will thereafter be under either Banded Gas Market Indexed Avoided Cost Prices or Gas Market Indexed Avoided Cost Prices.

See ER 52-53, CREA-NIPPC-REC/100, Lowe/8-9 (emphasis in original).

Nowhere in PacifiCorp's pricing schedule does it state that either the "contract term of up to 15 years" for Fixed Avoided Cost Prices or the "longer term contract (up to 20 years)" commences when a QF begins delivering energy. Nonetheless, any industry participant would understand that to be the intended meaning of the pricing schedule, and it cannot be disputed that PacifiCorp also interprets the language in its schedule that way. Indeed, PacifiCorp's standard contracts offered under this version of Schedule 37 unambiguously provided that the fifteen-year fixed-price period begins from the "Scheduled Initial Delivery" date. *See* ER 55, CREA-NIPPC-REC/100, Lowe/11.

The version of PacifiCorp's Schedule 37 in effect when the NewSun PPAs were executed contained similar language. As to the renewable pricing, it provided:

> Renewable Fixed Avoided Cost Prices are available for *a contract term of up to 15 years* and prices under *a longer term contract (up to 20 years)* will thereafter be under the Firm Market Indexed Avoided Cost Price… A Renewable Qualifying Facility choosing the Renewable Fixed Avoided Cost pricing option must cede all Green Tags …, except that a *Renewable Qualifying Facility retains ownership of all Environmental Attributes* generated by the facility… *during any period after the first 15 years of a longer term contract (up to 20 years)*.

ER 54, CREA-NIPPC-REC/100, Lowe/10 (emphasis in original).

This language is substantively identical to the language in PGE's Schedule 201 interpreted by the PUC below, but PacifiCorp interprets this generalized language in its pricing schedule as providing a fifteen-year fixed-price period that commences at the time of "Scheduled Initial Delivery," *not* the date of contract execution. *See* ER 55, CREA-NIPPC-REC/100, Lowe/11.

Idaho Power's Oregon PURPA pricing schedule also contains similar language with respect to the term of negotiated or "nonstandard" contracts. The Idaho Power Schedule 85 in effect during the relevant time stated: "QFs have the unilateral right to select a contract length of up to 20 years for a PURPA contract." *See* ER 56, CREA-NIPPC-REC/100, Lowe/12:9-10.

Again, this language is substantively identical to the language in PGE's Schedule 201. And, again, it cannot be disputed that the Idaho Power's pricing schedule uses this language to describe a period of twenty years commencing on the operation date, as Idaho Power's standard contract confirms. *Id.*

PGE did not dispute this evidence of trade usage. Instead, PGE claimed to have an understanding different from the industry. However, as the NewSun Parties note, PGE itself applies this *same* trade usage in other settings. Petitioners' Opening Brief at 37.

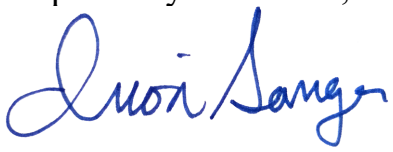
The Court should recognize the existence of trade usage and, applying it, reverse the PUC's incorrect analysis of contract law.

CONCLUSION

The QF Amici respectfully request that the Court hold that the PUC did not have jurisdiction over this dispute or, alternatively, if the Court finds jurisdiction, that the Court reverse the PUC's decision on the merits.

Dated this 22nd day of December 2020.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 10,000.

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes.

DATED this 22nd day of December 2020.

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 22, 2020, I filed the original of BRIEF OF AMICI CURIAE COMMUNITY RENEWABLE ENERGY ASSOCIATION, NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, AND RENEWABLE ENERGY COALITION IN SUPPORT OF PETITIONERS AND APPENDIX with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Dallas S. DeLuca, Anna M. Joyce, Anit K. Jindal and David White, attorneys for Respondent Portland General Electric Company; Jordan R. Silk, attorney for Respondent Oregon Public Utility Commission; and, Steven C. Berman, Keil Mueller, and Gregory M. Adams, attorneys for Petitioners 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, using the court's electronic filing system.

I further certify that on December 22, 2020, I directed the BRIEF OF AMICI CURIAE COMMUNITY RENEWABLE ENERGY ASSOCIATION, NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, AND RENEWABLE ENERGY COALITION IN SUPPORT OF PETITIONERS AND APPENDIX to be served upon Jeffrey S. Lovinger, attorney for Respondent

Portland General Electric Company, by mailing a Copy, with postage prepaid, in an envelope addressed to:

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DATED this 22nd day of December 2020.

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CERTIFICATE OF FILING AND SERVICE

INDEX TO APPENDIX

ORDER NO. 86-488

ENTERED MAY 12 1986

BEFORE THE PUBLIC UTILITY COMMISSIONER

OF OREGON

AR 116

In the Matter of the Proposed Rules Relating to Cogeneration and Small Power Production.) ORDER

On January 21, 1985, the Oregon Public Utility Commissioner (Commissioner) issued a notice of intent to change administrative rules governing the prices and conditions relating to contracts under which utilities must pay for power produced by cogenerators and small power producers (qualifying facilities). The proposed rules were based on the Commissioner's investigation into cost-effective fuel use and resource development. Order No. 85-010 (AR 112) January 8, 1985. The notice of intent to adopt rules describes those proposed rules. The final rules are attached as the Appendix to this order.

A hearing was held in this matter on February 19, 1985, in Salem, Oregon. Oral and written comments were submitted by Pacific Power & Light (Pacific), the Oregon Committee for Equitable Utility Rates and the Oregon Committee for Fair Utility Rates (OCEUR/OCFUR), Austin Collins, and Harley Brown, Portland, Oregon, Portland General Electric (PGE), Idaho Power Company (Idaho Power), and Coos County.

This order addresses the comments of the participants. Except as mentioned in this order, the proposed rules are adopted.

Standard for Negotiated Power Purchase Agreements with a Qualifying Facility (Rule 860-29-005(2))

The current rule provides the utility and the qualifying facility may enter into a power purchase agreement outside the requirements of the Commissioner's administrative rules as long as the rates or terms "do not burden the ratepayers of the utility." The proposed rule would have required the negotiated price to be "just and reasonable to the ratepayers of the public utility, the qualifying facility, and in the public interest."

PGE noted the change would require that the Commissioner determine what is "just and reasonable" to each participant to the transaction. PGE's comment is well taken. The Commissioner's concern is only with the well-being of the ratepayers. If the qualifying facility or the utility enter into an improvident agreement, the Commissioner will not intervene unless the ratepayers are adversely affected. There is no need to alter the rule.

Informational Documents (Rule 29-005(3))

PGE proposed eliminating the requirement that the Commissioner approve the utility's informational documents. PGE suggested the utility be required to provide a PUC prepared statement setting forth the rights and obligations of the qualifying facility and the utility and the availability of dispute resolution procedures from the Commissioner and his staff during contract development. The utility would then provide additional information which may vary with the type of facility inquiring about power sales.

The Commissioner's rules require approval of utility informational documents to insure minimum standards of completeness and accuracy are met. Utilities should provide additional information where appropriate. Submission of the informational documentation is not burdensome and provides assurance that qualifying facilities are familiar with the Commissioner's policies on power purchases from qualifying facilities.

Standard Contracts (Rule 29-005(3)(b))

PGE and Pacific suggested the Commissioner impose requirements on the form of contract for sales by qualifying facilities. PGE stated that since its initial contract offering will cover most situations, the Commissioner's rules should require that negotiations cover only "unique attributes of the qualifying facility." Pacific argues the importance of uniformity for contract administration. It is attempting to standardize contract terms to keep interpretations uniform and to keep administrative costs down.

The Commissioner will not require standard form contracts. Both utilities assume the contract language in their standard form contracts should be acceptable to the qualifying facilities. In effect, they are asking the Commissioner to approve contract terms on behalf of future qualifying facilities. The Commissioner cannot anticipate

how a particular contract term will impact a future negotiation. If uniformity is important, the utility should be able to persuade the qualifying facility that it will not be adversely affected by signing the utility form contract. The parties should be free to negotiate whatever contract terms are appropriate.

Requests for Dispute Resolution (Proposed Rule 29-005(3)(c))

At PGE's request, the final rule explicitly states both the utility and the qualifying facility may request limited dispute resolution procedures from the Commissioner. Parties may request informal assistance for resolving disputes. The only formal dispute procedure is a petition requesting the Commissioner to set the terms of the contract.

Requests for Levelization (Rules 29-005(3)(c)(B) and (e), (4)(b), and 29-040(7)(a))

Idaho Power suggested that the Commissioner limit the scope of a qualifying facility's request for a form of levelization other than the form approved by the Commissioner. Idaho Power would require that all such requests comply with the requirement adopted in this rule for the time levelization may begin. Rule 29-040(7)(b) and (c). Idaho Power's proposal is adopted.

Recalculation of Avoided Cost to be Paid by the Utility (Rule 29-005(3)(f))

Under this rule which did not appear in the proposed rules, a utility must notify qualifying facilities that the approved avoided cost is based on assumptions concerning the quality and quantity of power to be sold by the qualifying facility. For example, if a qualifying facility cannot deliver firm power or if the amount of power it intends to deliver is greater than the assumed decrement in the avoided cost calculation, the utility may recalculate the avoided cost. The decrement is the assumed amount of power from qualifying facilities which the Commissioner anticipates will come on line during the fiscal year. The recalculation is performed by a computer program which is reviewed by the Commissioner's staff. Disagreements between the qualifying facility and the utility over the recalculated avoided cost can be resolved by the Commissioner.

This change codifies the Commissioner's existing policy. The Commissioner's rules list the factors the Commissioner considers when evaluating a facility's ability to avoid costs. OAR 860-29-040(6). If the amount of energy or capacity which a qualifying facility offers is greater than the amount assumed in the utility's annual filing, the avoided cost for the facility may be considered separately.

Modification of Existing Contracts (Rule 29-005(4))

Both Coos County and Idaho Power Company suggested the Commissioner should anticipate intervening during the term of the power purchase agreement. Coos County suggests the Commissioner mediate negotiations and require good faith bargaining over the terms of an existing power purchase contract. Idaho Power suggests the Commissioner require all qualifying facility contracts to set out the Commissioner's continuing authority to review and modify contract rates, terms and conditions and to establish the right of each party to invoke the Commissioner's authority during the term of the agreement.

Contracts determined either through negotiation or order of the Commissioner should be considered final. Parties should be able to rely on the terms of the contract for planning, budgeting, and other business purposes. As a general policy, the Commissioner's interest in a contract between a qualifying facility and a utility is to avoid substantial adverse impact on the ratepayers. Unless a party can show a substantial adverse effect on the ratepayers, or the contract names the Commissioner as an authority to resolve disputes in a specific area, the Commissioner will avoid intervening in settled contracts.

Responses to Petitions to Set the Terms of a Contract (Rule 29-005(4)(d))

PGE requested the Commissioner extend the period for responding to a petition to set the terms of a contract from the proposed 10 days to 20 days. PGE is correct that the 10-day period is an extremely short period of time in which to frame a detailed response to a complex contract proposal. However, the period of time was set at 10 days to enable the Commissioner to process the petition rapidly. If the utility can show that additional time is required to respond to the petition, an extension can be granted under OAR 860-12-035.

Finding that a Qualifying Facility is Unlikely to Perform under the Terms of the Contract (Rule OAR 860-29-005(4)(e))

This rule, which did not appear in the proposed rules, states that the Commissioner may reject a petition to set the terms of a contract between a qualifying facility and a utility upon finding that the qualifying facility is unlikely to perform under the terms of the contract. This change merely codifies existing policy.

Time the Obligation is Incurred (Rule 860-29-010(29)(b))

At OCEUR/OCFUR's request, the proposed definition of "the time the obligation is incurred" has been modified to reflect current negotiating practice. The Committees requested the definition be broadened to allow the parties to agree to the date the obligation is incurred for the purpose of calculating the applicable rate.

Definition of Lead Time (Rule 29-040(7)(b)(B))

OCEUR/OCFUR requested that the Commissioner expand the definition of lead time in proposed rule 29-040(7)(b)(B) to include power purchases. Pacific has indicated that it intends to rely on power purchases from the Bonneville Power Administration rather than construct resources for its future power needs. OCEUR/OCFUR's point is well taken. Proposed rule 29-040(7)(b)(B) is modified to include the notice period necessary for firm purchases of power under a power sales contract.

ORDER

IT IS THEREFORE ORDERED that the rules attached as the Appendix to this order are adopted.

Made, entered, and effective May 12, 1986.

PUBLIC UTILITY COMMISSIONER OF OREGON

GENE MAUDLIN
Public Utility Commissioner

tb/0515A

ORDER NO. 86-488

APPENDIX

ADMINISTRATIVE RULES

AR 116

Rule OAR 860-29-005 is amended to read:

[(4)] (3) Within 30 days following the initial contact between a prospective qualifying facility and a public utility, the utility [must inform the qualifying facility, in writing] shall submit informational documents, approved by the Commissioner, to the qualifying facility which state:

(a) [Of] The public utility's internal procedural [/] requirements and information needs.

(b) That any contract offered by the public utility is [a "first offer"] subject to negotiation, and

(c) That the [Commissioner offers informal and formal, binding and nonbinding, dispute resolution services] utility or qualifying facility:

(A) May request the Commissioner to provide informal assistance in resolving disputes between the parties, or

(B) May file a formal petition requesting the Commissioner to set the terms of the contract, including a determination of the costs that should be levelized or the time period over which levelization should occur, as long as that time period conforms with OAR 860-29-040(7).

(d) [The informational documents must have been approved by the Commissioner.] That avoided costs are subject to change each year on July 1, pursuant to OAR 860-29-080(3).

(e) That a qualifying facility may request from the public utility a method of levelization other than the method shown in the utility's avoided cost filing. The request for levelization shall be consistent with rule 29-040(7)(b) and (c).

(f) That the avoided cost actually paid to a qualifying facility will depend on the quality and quantity of power to be delivered to the utility. The avoided cost may be recalculated to reflect streamflows, generating unit availability, loads, seasons, or other conditions.

[(3)] (4)(a) [In the event of an impasse in] At any time during the negotiations between a public utility and a qualifying facility, either party may [request a determination by the Commissioner of the matter at issue] request informal dispute resolution or petition the Commissioner to set the terms of a contract between the parties.

(b) The petition shall include a proposed contract, which is acceptable to the petitioner and which is complete in all its terms, for the purchase of the capacity, energy or energy and capacity, including the costs that should be levelized or the time frame over which levelization should occur. The request for levelization shall be consistent with rule 29-040(7)(b) and (c).

(c) If the petition is filed by April 1, the petition may include a request for a decision prior to July 1 of the year in which the petition is filed.

(d) Within 10 days of service of the petition, the respondent public utility shall file an answer setting forth the provisions of the contract proposed by the petitioner which are unacceptable along with the reasons for the objections. The objections and the reasons for the objections shall be stated in sufficient detail to enable the Commissioner to frame the issues to be disposed of during the proceeding. In a final order, the Commissioner shall specify a date by which the qualifying facility shall accept or reject the contract terms approved in the order.

(e) If the Commissioner finds the qualifying facility is not likely to perform pursuant to the terms of the contract, the Commissioner may deny the petition or a request for levelization included in a petition.

(f) If the qualifying facility rejects the contract terms approved in the order, the public utility shall bear no further obligation to purchase the energy capacity, or energy and capacity pursuant to the order. If the qualifying facility accepts the contract terms approved in the order, the public utility shall purchase the energy capacity, or energy and capacity pursuant to the unobjectionable contract terms contained in the petition, as well as those contract terms approved by the Commissioner. The legal obligation to purchase is incurred as of the effective date of the Commissioner's order.

Rule 860-29-010(29) is amended to read:

(29) "Time the obligation to purchase the energy capacity, or energy and capacity is incurred" means the earlier of:

(a) The date on which a binding, written obligation [first exists] is entered into between a qualifying facility and a public utility to deliver energy, capacity or [firm] energy and capacity; or

(b) The date agreed to, in writing, by the qualifying facility and the utility as the date the obligation is incurred for the purposes of calculating the applicable rate; or

(c) The effective date of the Commissioner's order determining the terms of a contract between a qualifying facility and a public utility pursuant to OAR 860-29-005.

Rule OAR 860-29-040(7) is amended to read:

(7) (a) At the option of the qualifying facility, a contract between a public utility and a qualifying facility may provide for levelized payments for firm energy delivered under paragraph (4)(b)[A] of this rule when time of delivery is as defined by OAR 860-29-010(28)(b)[(A)], or for capacity delivered. [The levelized payments shall not commence until deliveries begin under the contract.] A qualifying facility may request from the public utility a form of levelization other than the form shown in the utility's avoided cost filing. The request for levelization shall be consistent with rule 29-040(7)(b) and (c).

(b) Levelized payments shall not begin until:

(A) The time of delivery, as defined in Rule 860-29-010(28)(b)(A); and

(B) The beginning of the lead time for the particular resource upon which the public utility has based its avoided costs. As used in this subparagraph, "lead time" means the time necessary to site, license, design and construct a resource or the notice period required for a contract to purchase firm energy, capacity, or energy and capacity from the Bonneville Power Administration or any other wholesale supplier, if the public utility intends to rely on that supplier for its capacity, energy or capacity and energy needs.

(c) A qualifying facility may obtain a waiver from the requirement of subparagraph (B) of paragraph (b) of this subsection, if it can show:

(A) The generating facility is included in a new, modified or expanded industrial or other plant; and

(B) The facility would not be built or could only be built at a much higher cost, if construction does not occur during the plant's initial construction, modernization or expansion.

(d) If a public utility has reason to believe that it is not in the public interest to levelize payments associated with a particular project or that the risk of non-performance by the qualifying facility is substantial, the utility may apply to the Commissioner for relief from the obligation to levelize payments under the contract.

ORDER NO. 86-488

APPENDIX

ADMINISTRATIVE RULES

AR 116

Rule OAR 860-29-005 is amended to read:

Applicability of Rules

860-29-005 (1) Except as otherwise provided, these rules shall apply to all interconnection arrangements between a public utility as defined by ORS 758.505 and facilities which are qualifying facilities as defined herein. Provisions of these rules shall not supersede contracts existing prior to the effective date of this rule. At the expiration of such an existing contract between a public utility and a cogenerator or small power producer, any contract extension or new contract shall comply with these rules.

(2) Nothing in these rules limits the authority of a public utility or a qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be provided by these rules, provided such rates or terms do not burden ratepayers of the utility.

[(4)] (3) Within 30 days following the initial contact between a prospective qualifying facility and a public utility, the utility [must inform the qualifying facility, in writing] shall submit informational documents, approved by the Commissioner, to the qualifying facility which state:

(a) [Of] The public utility's internal procedural [/] requirements and information needs.

(b) That any contract offered by the public utility is [a "first offer"] subject to negotiation, and

(c) That the [Commissioner offers informal and formal, binding and nonbinding, dispute resolution services] utility or qualifying facility:

(A) May request the Commissioner to provide informal assistance in resolving disputes between the parties, or

(B) May file a formal petition requesting the Commissioner to set the terms of the contract, including a determination of the costs that should be levelized or the time period over which levelization should occur, as long as that time period conforms with OAR 860-29-040(7).

(d) [The informational documents must have been approved by the Commissioner.] That avoided costs are subject to change each year on July 1, pursuant to OAR 860-29-080(3).

(e) That a qualifying facility may request from the public utility a method of levelization other than the method shown in the utility's avoided cost filing. The request for levelization shall be consistent with rule 29-040(7)(b) and (c).

(f) That the avoided cost actually paid to a qualifying facility will depend on the quality and quantity of power to be delivered to the utility. The avoided cost may be recalculated to reflect streamflows, generating unit availability, loads, seasons, or other conditions.

[(3)] (4)(a) [In the event of an impasse in] At any time during the negotiations between a public utility and a qualifying facility, either party may [request a determination by the Commissioner of the matter at issue] request informal dispute resolution or petition the Commissioner to set the terms of a contract between the parties.

(b) The petition shall include a proposed contract, which is acceptable to the petitioner and which is complete in all its terms, for the purchase of the capacity, energy or energy and capacity, including the costs that should be levelized or the time frame over which levelization should occur. The request for levelization shall be consistent with rule 29-040(7)(b) and (c).

(c) If the petition is filed by April 1, the petition may include a request for a decision prior to July 1 of the year in which the petition is filed.

(d) Within 10 days of service of the petition, the respondent public utility shall file an answer setting forth the provisions of the contract proposed by the petitioner which are unacceptable along with the reasons for the objections. The objections and the reasons for the objections shall be stated in sufficient detail to enable the Commissioner to frame the issues to be disposed of during the proceeding. In a final order, the Commissioner shall specify a date by which the qualifying facility shall accept or reject the contract terms approved in the order.

(e) If the Commissioner finds the qualifying facility is not likely to perform pursuant to the terms of the contract, the Commissioner may deny the petition or a request for levelization included in a petition.

(f) If the qualifying facility rejects the contract terms approved in the order, the public utility shall bear no further obligation to purchase the energy capacity, or energy and capacity pursuant to the order. If the qualifying facility accepts the contract terms approved in the order, the public utility shall purchase the energy capacity, or energy and capacity pursuant to the unobjectionable contract terms contained in the petition, as well as those contract terms approved by the Commissioner. The legal obligation to purchase is incurred as of the effective date of the Commissioner's order.

Rule 860-29-010(29) is amended to read:

Definitions

860-29-010 (1) "Avoided costs" means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, the utility would generate itself or purchase from another source and shall include any costs of interconnection of such resource to the system.

(2) "Back-up power" or "stand-by power" means electric energy or capacity supplied by a public utility to replace energy ordinarily generated by a qualifying facility's own generation equipment during an unscheduled outage of the facility.

(3) "Capacity" means the average output in kilowatts (kW) committed by a qualifying facility to a utility during a specific period.

(4) "Capacity costs" means the costs associated with supplying capacity; they are an allocated component of the fixed costs associated with providing the capability to deliver energy.

(5) "Cogeneration" means the sequential generation of electric energy and useful heat from the same primary energy source or fuel for industrial, commercial, heating, or cooling purposes.

(6) "Cogeneration facility" means a facility which produces electric energy, and steam or other forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes, by cogeneration. Such facility must be at least 50 percent owned by a person who is not an electric utility, an electric holding company, an affiliated interest or any combination thereof.

(7) "Commissioner" means the Oregon Public Utility Commissioner.

(8) "Costs of interconnection" means the reasonable costs of connection, switching, dispatching, metering, transmission, distribution, equipment necessary for system protection, safety provisions and administrative costs incurred by an electric utility directly related to the installation and maintenance of the physical facilities necessary to permit purchases from a qualifying facility.

(9) "Demand" means the average rate in kilowatts at which electric energy is delivered during a set period of time, to be determined by mutual agreement between the utility and the customer.

(10) "Electric utility" means a non-regulated utility or a public utility.

(11) "Energy" means electric energy, measured in kilowatt hours (kWh).

(12) "Energy costs" means:

(a) For non-firm energy, the incremental costs associated with the production or purchase of electric energy by the utility, which costs include the cost of fuel and variable operation and maintenance expenses, or the cost of purchased energy;

(b) For firm energy, the combined allocated fixed costs and associated variable costs applicable to a displaced generating unit or to a purchase.

(13) "Firm Energy" means a specified quantity of energy committed by a qualifying facility to a utility.

(14) "Index rate" means the lowest avoided cost approved by the Commissioner for a generating utility for the purchase of energy or energy and capacity of similar characteristics including on-line date, duration of obligation and quality and degree of reliability.

(15) "Interruptible power" means electric energy or capacity supplied by a public utility to a qualifying facility subject to interruption by the electric utility under certain specified conditions.

(16) "Non-firm Energy" means:

(a) Energy to be delivered by a qualifying facility to a utility on an "as available" basis;

(b) Energy delivered by a qualifying facility in excess of its firm energy commitment.

NOTE: The rate for non-firm energy may contain an element representing the value of aggregate capacity of non-firm sources.

(17) "Maintenance power" means electric energy or capacity supplied by a public utility during scheduled outages of a qualifying facility.

(18) "Nonregulated Utility" means an entity providing retail electric utility service to Oregon consumers that is a people's utility district organized under ORS Chapter 261, a municipal utility operating under ORS Chapter 225 or an electric cooperative organized under ORS Chapter 62.

(19) "Primary energy source" means the fuel or fuels used for the generation of electric energy. The term does not include minimum amounts of fuel required for ignition, start-up, testing, flame stabilization, and control uses; the term does not include minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages and emergencies which directly affect the public health, safety, or welfare.

(20) "Purchase" means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

(21) "Public utility" means a utility regulated by the Commissioner under ORS Chapter 757, that provides electric power to consumers.

(22) "Qualifying facility" means a cogeneration facility or a small power production facility as defined by these rules.

(23) "Rate" means any price, charge, or classification made, demanded, observed, or received with respect to the sale or purchase of electric energy or capacity; any rule, regulation, or practice respecting any such rate, charge, or classification.

(24) "Sale" means the sale of electric energy or capacity or both by a public utility to a qualifying facility.

(25) "Small power production facility" means a facility which produces electric energy using as a primary energy source biomass, waste, solar energy, wind power, water power, geothermal energy, or any combination thereof. Such facility must be at least 50 percent owned by a person who is not an electric utility, an electric utility holding company, an affiliated interest or any combination thereof. Only small power production facilities which, together with any other facilities located at the same site, have power production capacities of 80 megawatts or less, are covered by these rules.

(26) "Supplementary power" means electric energy or capacity supplied by a public utility, regularly used by a qualifying facility in addition to that which the facility generates itself.

(27) "System emergency" means a condition on a public utility's system which is likely to result in imminent, significant disruption of service to customers, in imminent danger of life or property, or both.

(28) "Time of Delivery" means:

(a) In the case of capacity, when the generation is first on line and capable of meeting the capacity commitment of the qualifying facility to the utility under the terms of its contract or other legally enforceable obligation;

(b) In the case of firm energy and depending upon the contract between the parties, either:

(A) When the first kilowatt-hour of energy is able to be delivered under the commitment of the qualifying facility; or

(B) When each kilowatt-hour is delivered under the commitment of the qualifying facility.

(29) "Time the obligation to purchase the energy capacity, or energy and capacity is incurred" means the earlier of:

(a) The date on which a binding, written obligation [first exists] is entered into between a qualifying facility and a public utility to deliver energy, capacity or [firm] energy and capacity; or

(b) The date agreed to, in writing, by the qualifying facility and the utility as the date the obligation is incurred for the purposes of calculating the applicable rate; or

(c) The effective date of the Commissioner's order determining the terms of a contract between a qualifying facility and a public utility pursuant to OAR 860-29-005.

Rule OAR 860-29-040(7) is amended to read:

Rates for Purchases

860-29-040 (1) Rates for purchases by public utilities shall:

(a) Be just and reasonable to the ratepayers of the public utility and in the public interest; and

(b) Be in accordance with this section, regardless of whether the public utility making such purchases is simultaneously making sales to the qualifying facility.

(2) Nothing in this Division authorizes any public utility to pay more than its avoided costs for purchases unless expressly allowed by these rules or by the Commissioner.

(3) Establishing rates:

(a) Except for qualifying facilities in existence prior to November 8, 1978, and except in instances in which a public utility fails to make a good faith effort to comply with the request from a qualifying facility to wheel, a rate for purchases satisfies the requirements of section (1) of this rule if the rate equals the avoided costs after consideration of the factors set forth in section (6) of this rule.

(b) If a public utility fails to make a good faith effort to comply with the request from a qualifying facility to wheel, the public utility shall purchase at a rate which is the utility's avoided cost or the index rate, whichever is higher. A good faith effort shall be demonstrated by the public utility's publication of a generally applicable reasonable policy of the utility to use the public utility's transmission facilities on a cost-related basis.

(c) When the rates for purchases are based upon estimates of avoided costs over a specific term of the contract or other legally enforceable obligation, the rates do not violate these rules if any payment under the obligation differs from avoided costs.

(d) Nothing in these rules shall be construed as requiring payment of avoided-cost prices to qualifying facilities in existence prior to November, 1978; provided, however, that prices for such purchases shall be sufficient to encourage continued power production.

(4) Rates for purchases – time of calculation. Except for the purchases made under section (5) of this rule (standard rates) each qualifying facility shall have the option to:

(a) Provide non-firm energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing public utility's non-firm energy avoided cost, or index rate if subsection (3)(b) of this rule is applicable, in effect when the energy is delivered; or

(b) Provide firm energy and/or capacity pursuant to a legally enforceable obligation for the delivery of energy and/or capacity over a specified term, in which case the rates for purchases shall be based on:

(A) The avoided costs calculated at the time of delivery, or, if subsection (3)(b) of this rule is applicable, the index rate in effect at the time of delivery; or

(B) At the election of the qualifying facility, exercised at the time the obligation is incurred, the avoided costs, or the index rate then in effect if subsection (3)(b) of this rule is applicable, projected over the life of the obligation and calculated at the time the obligation is incurred.

(5) Standard rates for purchases shall be implemented as follows:

(a) Each public utility shall file with the Commissioner each April 1, to become effective the following July 1, standard rates for purchases from qualifying facilities with a nameplate capacity of one hundred kilowatts or less, in the same manner as it publishes rates for the sales of electricity. The publication shall contain all the terms and conditions of the purchase. Except in instances in which a public utility fails to make a good faith effort to comply with the request from a qualifying facility to wheel, the standard rate of the utility shall apply to purchases from qualifying facilities with a nameplate capacity of one hundred kilowatts or less.

(b) If a public utility fails to make a good faith effort to comply with the request from a qualifying facility to wheel, the public utility shall purchase at a rate which is the utility's standard rate or the index standard rate, whichever is higher. A good faith effort shall be demonstrated by the public utility's publication of a generally acceptable reasonable policy of the utility to use the public utility's transmission facilities on a cost-related bases.

(c) The utility's standard rate may differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.

(6) Factors affecting rates for purchases: In determining avoided costs and for determining the index rate the following factors shall, to the extent practicable, be taken into account:

(a) The data provided pursuant to OAR 860-29-080(3) and the Commissioner's evaluation of the data;

(b) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:

(A) The ability of the public utility to dispatch output of the qualifying facility;

(B) The expected or demonstrated reliability of the qualifying facility;

(C) The terms of any contract or other legally enforceable obligation;

(D) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the public utility's facilities;

(E) The usefulness of energy and/or capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;

(F) The individual and aggregate value of energy and capacity from qualifying facilities on the public utility's system; and

(G) The smaller capacity increments and the shorter lead times available, if any, with additions of capacity from qualifying facilities.

(c) The relationship of the availability of energy and/or capacity from the qualifying facility as derived in subsection (6)(b) of this rule, to the ability of the public utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

(d) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility if the purchasing public utility generated an equivalent amount of energy itself or purchased an equivalent amount of energy and/or capacity.

(7) (a) At the option of the qualifying facility, a contract between a public utility and a qualifying facility may provide for levelized payments for firm energy delivered under paragraph (4)(b)[A] of this rule when time of delivery is as defined by OAR 860-29-010(28)(b)[(A)], or for capacity delivered. [The levelized payments shall not commence until deliveries begin under the contract.] A qualifying facility may request from the public utility a form of levelization other than the form shown in the utility's avoided cost filing. The request for levelization shall be consistent with rule 29-040(7)(b) and (c).

(b) Levelized payments shall not begin until:

(A) The time of delivery, as defined in Rule 860-29-010(28)(b)(A); and

(B) The beginning of the lead time for the particular resource upon which the public utility has based its avoided costs. As used in this subparagraph, "lead time" means the time necessary to site, license, design and construct a resource or the notice period required for a contract to purchase firm energy, capacity, or energy and capacity from the Bonneville Power Administration or any other wholesale supplier, if the public utility intends to rely on that supplier for its capacity, energy or capacity and energy needs.

(c) A qualifying facility may obtain a waiver from the requirement of subparagraph (B) of paragraph (b) of this subsection, if it can show:

(A) The generating facility is included in a new, modified or expanded industrial or other plant; and

(B) The facility would not be built or could only be built at a much higher cost, if construction does not occur during the plant's initial construction, modernization or expansion.

(d) If a public utility has reason to believe that it is not in the public interest to levelize payments associated with a particular project or that the risk of non-performance by the qualifying facility is substantial, the utility may apply to the Commissioner for relief from the obligation to levelize payments under the contract.

ORDER NO. 08-112

ENTERED 01/31/08

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UCR 98

In the Matter of	)	
	)	
K. S.[1]	)	
	)	
Complainant	)	
	)	ORDER
v.	)	
	)	
QWEST CORPORATION	)	
	)	
Defendant.	)	

DISPOSITION: MOTION TO DISMISS GRANTED

On November 28, 2007, Complainant filed a formal consumer complaint with the Public Utility Commission of Oregon (Commission) against Qwest Corporation (Qwest). Qwest timely submitted a motion to dismiss on December 13, 2007, under OAR 860-013-0050(1)(b).

Complaint & Motion to Dismiss

In his complaint, Complainant alleges that Qwest's overhead distribution line providing service to his neighbor transects his property, thereby constituting a trespass. Complainant also contends that Qwest agreed to convert this overhead line to an underground line in exchange for his provision of an easement to the company. Finally, Complainant argues that since the line remains overhead, Qwest is in breach of their agreement. Complainant requests injunctive relief requiring the removal of the overhead line from his property.

In its motion to dismiss, Qwest's argues that the Commission lacks jurisdiction to resolve Complainant's complaint, noting that Complainant cites no statutes, rules, or tariff provisions conferring jurisdiction upon the Commission. Qwest also regards the issues raised by Complainant to be beyond the Commission's jurisdiction to adjudicate. Specifically, Qwest asserts that Complainant raises common law "real estate" issues of "trespass" and "easements" that fall outside the Commission's jurisdiction.

[1] The posting of this consumer complaint order represents policy change intended to increase the precedential value of such decisions. In such cases, the Commission will use complainants' initials to protect their privacy.

Jurisdiction

Qwest is a public utility subject to the authority of the Commission.[2] The Oregon Legislature has vested the Commission with broad powers to "supervise and regulate" public utilities, with the authority to do "all things necessary and convenient in the exercise of such power and jurisdiction."[3] The Commission, however, does not have jurisdiction over each and every activity of a utility, its employees, or its agents. With some specific statutory exceptions, the Commission's role is restricted to "controversies regarding rates, valuations, and service."[4]

Here, Complainant raises no controversy with respect to rates and service provided by Qwest. Rather, Complainant contends that Qwest's failure to bury his neighbor's service drop constitutes trespass and breach of a private contract. Both claims fall outside the Commission's jurisdiction.

First, trespass is a common law action that lies in civil court. *See* ORS 756.200. Second, while the Commission has exclusive jurisdiction over the service agreement (tariff) between a utility and its customers, it has no jurisdiction over private contracts falling outside tariff provisions.[5] Qwest's tariff does contemplate private contracts regarding distribution lines between itself and its direct customers.[6] In this case, however, the alleged contract exists between Qwest and Complainant as a third party –not as a direct customer. Since this contract does not fall under the tariff, the Commission cannot assert jurisdiction; the contract claims properly belong before a court of law.[7]

As stated in the complaint, Complainant intends to file suit in circuit court, an apparent acknowledgement that the claims belong before a court of law. Although a seemingly inconsistent statement, since found in a Commission filing, we presume that Complainant filed with the Commission out of an abundance of caution, uncertain whether concurrent jurisdiction may exist.

Resolving any ambiguities in the complaint in favor of Complainant, and reading Qwest's motion in the light most favorable to Complainant, the Commission holds it does not have jurisdiction to hear the complaint, and therefore does not reach its merits.

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[2] ORS 759.005(1)(a)(A).
[3] ORS 756.040(2).
[4] ORS 756.040(1).
[5] Private agreements whose subject matter is rates paid for services provided are an exception to this general rule.
[6] Qwest Tariff P.U.C. Oregon No. 33, Section 4; see also ORS 758.250.
[7] We note that, in its defense, Qwest relies on the fact that Complainant fails to note any statutes, rules, or tariff provisions. While we encourage complainants to cite authority if known, we do not require them to plead with particularity. Moreover, as a matter of public policy, the Commission prefers that the public articulate consumer grievances broadly rather than bear them silently.

ORDER

IT IS ORDERED that:

1. Qwest Corporation's Motion to Dismiss is granted.

2. The complaint filed by K.S. against Qwest Corporation is dismissed with prejudice for lack of subject matter jurisdiction.

Made, entered, and effective JAN 3 1 2008.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.