BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR 1 LLC, et al., Defendants.	NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, RENEWABLE ENERGY COALITION AND COMMUNITY RENEWABLE ENERGY ASSOCIATION'S MOTION FOR SUMMARY JUDGEMENT

I. INTRODUCTION

Pursuant to OAR 860-001-0420, ORCP 47 and Administrative Law Judge ("ALJ") Allan Arlow's November 19, 2018 ruling, intervenors Northwest and Intermountain Power Producers Coalition ("NIPPC"), Renewable Energy Coalition (the "Coalition" or "REC"), and Community Renewable Energy Association ("CREA") (collectively, the "Intervenors" or "Industry Trade Associations"), hereby respectfully move the Oregon Public Utility Commission (the "Commission") for an order granting summary judgment in favor of the defendants Alfalfa Solar I LLC ("Alfalfa"), Dayton Solar I LLC ("Dayton"), Fort Rock Solar I LLC ("Fort Rock I"), Fort Rock Solar II LLC ("Fort Rock II"), Fort Rock Solar IV LLC ("Fort Rock IV"), Harney Solar I LLC ("Harney"), Riley Solar I LLC ("Riley"), Starvation Solar I LLC ("Starvation"), Tygh Valley Solar I LLC ("Tygh Valley"), and Wasco Solar I LLC ("Wasco") (collectively,

the "Defendants" or "NewSun Parties"). For the reasons explained below, the Commission should issue an order finding that the NewSun PPAs require Portland General Electric Company ("PGE") to pay the fixed prices contained in Tables 6a and 6b of the applicable Schedule 201 for fifteen years after the Commercial Operation Date.

This Commission has confirmed that the 15-year fixed-price period is intended to provide the full benefit of fixed prices to qualifying facilities ("QFs") and is therefore measured from the operation of the facility, *not* from the date, often years earlier, when the power purchase agreement is executed. The only source of potential confusion about 15-year fixed-price period in the NewSun PPAs is PGE's misinterpretations of the applicable terminology regarding a 15-year fixed-price "term" in the Commission's Order No. 05-584, as reflected in the NewSun PPAs and the applicable Schedule 201. PGE's position directly contradicts the common understanding and implementation of the Commission's policy underlying the 15-year fixed-price term. Because the NewSun PPAs do not contain language which explicitly contradicts the Commission's policy that the fixed price period applies for 15 years after operation of the facility, PGE's arguments fail.

PGE's attempts over the past few years to create ambiguity in the Commission's policy and executed contracts and have been very burdensome on developers and the independent power industry. Additionally, more generally, PGE's attempt in this matter to unilaterally redefine and defy longstanding express and repeatedly confirmed policy by its regulator is concerning. Accordingly, the Commission should again reject PGE's

attempts to deprive QFs of the full benefit of the Commission's 15-year fixed-price policy by granting summary judgment against PGE.

II. BACKGROUND AND SUMMARY

In this case, the Commission must decide whether PGE's PPAs with the NewSun Parties provide for 15 years of fixed pricing starting on the date of contract execution or starting on the date of power deliveries. The Industry Trade Associations intervened in this case because the issues involved are critically important to the independent power producer and qualifying facility industry (the financeability of QF projects, upholding Commission policies, and ensuring QFs can obtain prompt, fair and not overly burdensome dispute resolution) and related to a docket the Industry Trade Associations brought before this Commission and which is currently pending judicial review before the Oregon Court of Appeals (Docket No. UM 1805).[1]

A. Regulatory History

The contract term issue has come before the Commission in a variety of contexts, and the Commission's message since 2005 has been consistent: The 15 years of fixed prices commences when the QF achieves operation or is expected to achieve operation. The Commission originally established its 15-year fixed price policy in Docket No. UM 1129 in 2005, finding that "[g]iven our desire to calculate avoided costs as accurately as possible, and the testimony of several parties that avoided costs should not be fixed beyond 15 years, we are persuaded that standard contract prices should be fixed for only

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[1] *See* NIPPC's Petition to Intervene (Jul. 6, 2018), the Coalition's Petition to Intervene (Jul. 6, 2018), and CREA's Petition to Intervene (Jul. 20, 2018).

the first 15 years of the 20-year term."[2] The underlying reason for the Commission's decision was a conclusion that: "that the contract term length minimally necessary to ensure that most QF projects can be financed should be the maximum term for standard contracts."[3]

In Docket No. UM 1396, the Commission found that PacifiCorp and PGE should offer separate renewable avoided cost rates.[4] PGE made a Compliance filing in that docket on March 16, 2012, which included a revision to Schedule 201 and a corresponding proposal for a new "Schedule 211" that would address renewable rates and contract terms.[5] In both proposed tariffs, PGE proposed to change Commission policy and included language that would make its renewable fixed price option "available for a maximum period of 15 years *immediately following the effective date*."[6]

In response to these proposed changes, Commission Staff identified that PGE's language "*immediately following the effective date*" in Schedule 201 was a substantive change and should be removed.[7] PGE never submitted finalized compliance filings in UM 1396 because the issues were rolled into a larger list of items in the UM 1610 docket.[8]

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2 *Re Commission's Investigation Related to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 20 (May 13, 2005).

3 *Id.* at 19.

4 *Re Commission's Investigation Into Resource Sufficiency Pursuant to Order No.06-538*, Docket No. UM 1396, Order No. 11-505 (Dec. 13, 2011).

5 CREA-NIPPC-REC/200, Sanger/4.

6 *Id.* (emphasis added in the original).

7 *Id.* at 8 (emphasis added in the original).

8 *Id.* at 11.

In Docket No. 1610, the Commission maintained its policy of offering QFs contracts of up to 20 years with 15 years of fixed pricing. The Commission noted several parties' testimony that "a QF developer may only have access to financing after a PPA has been signed [and that] prior to that time, the QF developer may rely only on the developer's own resources."[9] In compliance with Order No. 14-058, PGE drafted a Schedule 201 and standard PPA which removed the language it had previously proposed in UM 1396 that would have limited the fixed-price period to the fifteen years "*immediately following the effective date*."[10] Rather, the schedule that was ultimately approved provided that the renewable fixed price period option was "available for a maximum term of 15 years."[11] Therefore, PGE abandoned its proposal to change the meaning of its standard contract to start the 15-year fixed price period at contract execution, and the Commission approved a standard contract that specified that the 15-year fixed price term started at power deliveries.

This issue also arose in Dockets Nos. UM 1734 and UM 1725, regarding PacifiCorp and Idaho Power's requests to reduce the contract terms. In UM 1734, the Commission determined that "our use of 20-year contracts, with prices fixed at avoided costs for 15 years followed by index pricing for the remaining five years, continues to

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9 *Re Commission's Investigation Into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 14-058 at 7 (Feb. 24, 2014).

10 CREA-NIPPC-REC/200, Sanger/10.

11 *Id.*

have merit."[12] In UM 1725, the Commission upheld the 20 year standard contract term for Idaho Power finding that "our current policy. . . provides for 20-year contracts, with prices fixed at avoided cost rates in place at the time of signing remaining in effect for a 15-year period, and indexed pricing for the remaining five years."[13] The Coalition and CREA moved the Commission to clarify that in Order No. 16-129, the Commission was not changing its pre-existing policy that the 15-year term of fixed prices commences when the QF achieves operation.[14] PGE responded to the motion arguing that the Commission's policy does not require 15 years measured from the date of operation.[15] The Commission clarified that its "use of 'in place at the time of signing' in Order No. 16-129 meant only that the fixed avoided cost rate to be paid during the first 15-year period following commercial operation, is the rate that existed at the time of signing."[16]

Despite all this, PGE continued its attempts to implement its contracts inconsistently with the Commission's policy that the 15-year fixed price term begins

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12 *Re PacifiCorp Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap*, Docket No. UM 1734, Order No. 16-130 at 5 (Mar. 29, 2016).

13 *Re Idaho Power Company Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Charge, and for Change in Resource Sufficiency Determination*, Docket No. UM 1725, Order No. 16-129 at 8 (Mar. 29, 2016).

14 *NIPPC, CREA, and The Coalition v. PGE,* Docket No. UM 1805 Complaint at ¶ 35 (Dec. 6, 2016).

15 *Id.* at ¶ 36

16 *Re Idaho Power Company Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Charge, and for Change in Resource Sufficiency Determination*, Docket No. UM 1725, Order No. 16-175 at 2 (May 16, 2016).

when the QF achieves operation or is expected to achieve operation.[17] Sometime recently, PGE began informing QFs that it was taking the position that the 15-year fixed price term began at contract execution. However, despite PGE's assertions to the contrary, PGE has not always held this view, and it appears to be a recent change in PGE's "interpretation" of Commission policy and the standard contract. For example, PGE entered into the OneEnergy Oregon Solar, LLC PPA that included a QF's request to even further clarify that the standard contract provides for 15 years of fixed prices following the Commercial Operation Date.[18] And PGE also entered into the PaTu Wind Farm, LLC PPA that provides for a full 20-year contract term following the Commercial Operation Date, despite the contract's execution a year earlier.[19] PGE's inconsistent implementation is further evidence that PGE was not implementing its contracts in compliance with Commission orders.

On December 6, 2016, the Industry Trade Associations filed a complaint before the Commission to bring this issue to the Commission's attention on a broad scale. The Industry Trade Associations informed the Commission that PGE was "implementing its standard contracts. . . in a manner that is inconsistent with well-established Commission policy."[20] The Industry Trade Associations requested that the Commission "reaffirm its policy and direct PGE to conform its business practices to be consistent with the terms of

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17 Docket No. UM 1805 Complaint at ¶¶ 39-44.

18 *Id.* at ¶ 25.

19 *Id.* at ¶ 24 (Thus, this PPA contradicts PGE's position that it will only enter into a 20 year PPA from contract execution).

20 *Id.* at 1.

its standard contract and Commission orders and policy to pay 15 years of fixed prices after the QF begins delivering its net output to the utility."[21]

The Commission ultimately ordered PGE to "offer standard contracts in which the 15-year period of fixed prices begins on the date that a QF begins to transmit power to the utility."[22] The Commission also clarified that it did not interpret any executed contracts or standard contract forms in reaching its decision,[23] and that the scope of the proceeding was limited by the Industry Trade Associations' complaint, which "did not seek interpretation of any executed contract."[24] The Commission answered the Industry Trade Associations' request and:

> [A]ffirmed and made explicit [its] policy adopted in Order No. 05-584: "Prices paid to a QF are only meaningful when a QF is operational and delivering power to a utility. Therefore, we believe that, to provide a QF the full benefit of the fixed price requirement, the 15-year term must commence on the date of power delivery."[25]

The Commission also suggested that it would be the most convenient and efficient forum to interpret the meaning of the various generations of PGE's standard contract forms, stating: "We emphasize, however, that we continue to stand ready to interpret individual standard contract *forms* as they are brought to us."[26]

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21 *Id.* at 3.

22 *NIPPC, CREA, and The Coalition v. PGE,* Docket No. UM 1805, Order No. 17-256 at 1 (Jul. 13, 2017).

23 *NIPPC, CREA, and The Coalition v. PGE,* Docket No. UM 1805, Order No. 17-465 at 4 (Nov. 13, 2017).

24 *NIPPC, CREA, and The Coalition v. PGE,* Docket No. UM 1805, Order No. 18-079 at 3 (Mar. 5, 2018).

25 *Id.* (quoting UM 1805 Order No. 17-256).

26 *Id.* (emphasis added).

Thus, although the Commission has reaffirmed its policy regarding the 15-year fixed-price term, individual QFs that entered into PPAs with PGE in reliance upon that policy and its obvious intent since 2005 must now fend for themselves against PGE. Additionally, despite the Commission's expressed intent to interpret contract *forms* as they are brought to the Commission, this proceeding—which is the first such proceeding to interpret PGE's previous contract forms—has subjected the NewSun Parties to costly discovery and delays to investigate the state of mind of PGE and the QF parties at the time of contracting. Notably, the NewSun Parties sought to avoid the unnecessary process by promptly moving for summary disposition on July 2, 2018. But PGE successfully argued that the Commission could not address meaning of an executed contract form without first allowing PGE to propound extensive discovery on its QF counter party, all during the critical period where the QF would ordinarily be focusing on the task on financing and development of its facility.

B. Trade Usage of the Word "Term"

As noted above, the matter in dispute is whether the fixed-price term of fifteen years called for in Order No. 05-584 and incorporated into the NewSun PPAs begins when the parties execute the contract or when the QF becomes operational and is delivering and selling power. There is ample industry experience and background to inform the Commission's decision on this point.

In the context of QF PPA negotiation for developing a facility, the use of the word "term" has commonly been used in the industry to describe the power purchase and sale period, a period which for a new generation facility begins operating and delivering

power subsequent to when the facility is built , even though the PPA may become effective before that time.[27] It is typical for proposed facilities to have a period of time after contract execution but before commercial operation during which the facility may obtain financing and construct the project, while having a known commitment at known prices for the purchase of future output from the facility.[28] Most importantly,

> The period of years of the agreement that are most relevant to the parties to a *power purchase* agreement is the period of years during which [the] utility is *purchasing the power*, this is commonly referred to as the 'contract term.' While the agreement is executed before that time as a matter of course and practicality, the period after power deliveries and purchases begin is the focus of the parties' analysis underlying the transaction.[29]

This is the natural understanding in the industry that provides context not only to all of PGE's standard contract forms, but also the use of the very same terminology and concepts in the Commission's Order No. 05-584 that created the fixed-price term of 15 years and the overall contract term of 20 years.

As NewSun Parties' witness, Thomas Harnsberger, stated so succinctly, an industry participant would find it "very surprising" to learn of PGE's interpretation.[30] Of course, PGE might as well, given that their own RFPs also implement term in the same manner industry would expect, but directly opposite their assertions in this dispute. Indeed, while PGE has forced litigation of this issue unnecessarily on the Commission, industry, and the NewSun Parties, it continues to run its RFPs using the prevailing

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27 CREA-NIPPC-REC/100, Lowe/3.
28 *See Id. at* 6.
29 *Id* (emphasis added in original).
30 NewSun Parties/200, Harnsberger/2.

industry understanding that a PPA term denotes the period of power sales and beings after the facility is built and operational.

Other Oregon utilities use words similar to PGE to describe the period of years after the facility commences operation. PacifiCorp's original schedule provided that "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" and the current schedule continues to use very similar language.[31]

Idaho Power's schedule has provided that "QFs have the unilateral right to select a contract length of up to 20 years for a PURPA contract," and that the "Agreement shall become effective on the date first written and shall continue in full force and effect for a period of _____ (not to exceed 20 years) Contract Years from the Operation Date."[32] Idaho Power's currently effective schedule uses the same language to describe a "contract length of up to 20 years."[33]

In short, PGE's language that the fixed pricing is available for a "maximum term of 15 years" is similar to language used in the industry to describe the period of an agreement commencing with the commercial operations. When PGE made its compliance and standard contracts with the Commission, any industry participant as well as the Commission itself reviewing PGE's standard contracts would interpret them to

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31 PGE/103, Macfarlane/38 (containing Ex. F, Schedule No. 37 at 2).
32 CREA-NIPPC-REC/100, Lowe/12.
33 *Id*.

mean that they would allow for 15-years of fixed prices from power deliveries. Or said another way, no reasonable industry participant would have interpreted them according to PGE's unique and non-industry standard view that a 15-year contract actually means something less than that (i.e., if the PPA was executed one year before power deliveries, then there would only be 14 years of fixed prices).

C. The NewSun PPAs

In this case, unlike Docket No. UM 1805 discussed above, the Commission is asked to interpret the particular language of a particular standard form contract—and specifically those executed by the NewSun Parties and PGE. The facts are straightforward. The NewSun Parties and PGE executed PPAs between January and June 2016.[34]

The standard form contains various relevant definitions. The "Contract Price" is defined as the on-peak and off-peak prices, as specified in the Schedule, and the "Schedule" refers to PGE's Schedule 201 filed with the Commission on the Effective Date.[35] The "Effective Date" means the date the both parties executed the PPA, and the "Commercial Operation Date" is "the date that the Facility is deemed by PGE to be fully operational and reliable," and the scheduled Commercial Operation Date chosen by the Seller in Section 2.2.2 may be up to thirty-six months after the Effective Date.[36] The "Contract Year" means "each twelve (12) month period commencing upon the

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34 Joint Statement of Undisputed Facts at ¶¶ 3-12 (Jan. 25, 2019).
35 *See e.g.,* PGE's Complaint at Ex. 1 at §§ 1.7, 1.33 (Jn. 25, 2018).
36 *See id.* at §§ 1.5, 2.1, 2.2.2.

Commercial Operation Date." The "Term" means the period beginning with the Effective Date and ending on the Termination Date, and the "Termination Date" is "the last day of the sixteenth (16th) Contract Year."[37]

PGE's Schedule 201 in effect on the Effective Date states that the renewable fixed price option is "available for a maximum term of 15 years," and "Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price and will retain all Environmental Attributes generated by the facility for all years up to five in excess of the initial 15."[38] Further, the PPA also provides that during "any period within the Term of the Agreement after completion of the first fifteen (15) years after the Commercial Operation Date, Seller shall retain all Environmental Attributes in accordance with the Schedule."

III. LEGAL STANDARD

The Commission should grant a motion for summary judgment if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law.[39] No genuine issue as to a material fact exists if, based on the record and viewed in a manner most favorable to the opposing party, no objectively reasonable person could return a verdict for the opposing party on the matter that is the subject matter of the motion for summary judgment.[40]

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37 *See id.* at §§ 1.7, 1.38, 2.3
38 *See id.* at Schedule 201-12
39 ORCP 47C.
40 *Id.*

IV. ARGUMENT

The language of the NewSun PPAs provides for 15 years of fixed prices after the Commercial Operation Date. When interpreting a contract there are three stages of analysis. The first step is to examine the text of the disputed provision, in the context of the document as a whole.[41] If it is clear, the trier of fact simply "construes the words of a contract as a matter of law."[42] If an ambiguity exists, then (and only then) the second step is to resolve the ambiguity through extrinsic evidence of the parties' intent.[43] If the ambiguity still cannot be resolved, then the third step is to resort to the appropriate maxims of construction.[44] As these are unambiguous and standard Commission-approved PPAs, any evidence of the parties individual intentions is irrelevant, and the Commission should base its decision on the objective meaning of the contract provisions, as it would be interpreted in its context by industry participants.

A. The NewSun PPAs Unambiguously Provide for 15 Years of Fixed Prices From Power Deliveries

Under *Yogman's* first level of analysis, an ambiguity exists only if the disputed terms lend themselves to more than one reasonable interpretation.[45] However, a term is "unambiguous if its meaning is clear enough to preclude doubt by a reasonable person."[46]

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41 *Yogman v. Parrott*, 325 Or 358, 361 (1997).
42 *Id.* (quoting *Eagle Industries, Inc. v. Thompson*, 321 Or 398, 405 (1995)).
43 *Id.* at 363.
44 *Id.* at 364.
45 Id. at 363-64.
46 *Quality Contractors v. Jacobsen*, 139 Or App 366, 370-71 (1996).

Further, it is appropriate to consider context and any applicable trade usage at this first level of analysis under *Yogman*.[47] Commercial contracts should be read "on the assumption that usages of trade 'were taken for granted when the document was phrased' so that they became 'an element of the meaning of the words used' if not carefully negated."[48] Usage of trade in this context means "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that the practice or method will be observed with respect to the transaction in question."[49] Additionally, any

> [U]sage of trade in the vocation or trade in which the parties are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement and may supplement or qualify the terms of the agreement.[50]

Here, the language of the NewSun PPAs is unambiguous by itself and especially when read in light of trade usage of the terms at issue. PGE's Schedule 201 explicitly provides that the fixed-price term is for 15 years with market-based pricing for the final 5 years following the 15 year fixed price period. The PPA generally may not have a total term longer than 20 years. The only logical conclusion from this language must be that the 15-year fixed price term commences when the fixed prices are paid (i.e., when the facility starts delivering power). Then it would receive 5 years of market-based pricing

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47 *Peace River Seed Coop. Ltd. v. Proseeds Mktg. Inc.,* 355 Or 44, 67 (2014) ("We conclude that it is appropriate to consider any applicable trade usage at the first level of analysis under *Yogman*.").

48 *Id.* (quoting Legislative Comment 2 to ORS 72.2020).

49 *Id.* at 66-67 (citing ORS 71.3030(3)).

50 ORS 71.3030(4).

for the final 5 years (15 + 5 = 20). Under PGE's interpretation, three years (or more) of that 15 year pricing period could be shaved off in the beginning of the contract. This is because the PPA allows for there to be up to three years (sometimes more) between the date the PPA is executed and the Commercial Operation Date. The end result of PGE's interpretation is that only 12 years of fixed prices would be paid, which is directly contradictory with the terms of the Schedule 201 that provide for 15 years of fixed prices.

Further, the word "term" is commonly used in the industry to describe the period of time during which a facility is operating, even if the PPA would be effective before that time. PGE did not introduce any evidence that the use of "term" is not commonly used in this industry to refer to the period after operations begin, but simply asserts that the parties to this case did not discuss its use in the industry.[51] The PPAs were drafted by PGE (an electric utility) at the Commission's direction (that regulates the utilities) and intended to be signed by QFs (that also operate within the electric industry). Because all parties involved operate within this trade, it is appropriate for the parties to expect that terms commonly used within the industry will be construed in conformance with their industry use.

This basic industry understanding is confirmed by, among other things, the undisputed contents and understanding of PacifiCorp's and Idaho Power's Oregon PURPA tariffs. As the Commission's orders in UM 1805 note, it is undisputed that Idaho

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[51] PGE/500, True/3 ("Q. Did Mr. Stephens make the argument that is in Mr. Lowe's testimony about industry standard expectations? A. Not to my memory. And he does not mention it in his testimony that he said anything to me about it.").

Power and PacifiCorp have always implemented Order No.05-584 to offer a fifteen-year fixed-price period and a maximum twenty-year contract term, both of which commence when the QF is operational or expected to be operational, not years earlier when the contract is executed. Yet both Idaho Power and PacifiCorp refer to the "term" of the fixed-price period and the overall contract term and similar phrases that is strikingly similar to the language in the version of PGE's Schedule 201 at issue here.

PacifiCorp's initial Schedule 37 filing 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.[52]

Nowhere in PacifiCorp's tariff 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 tariff, and it cannot be disputed that PacifiCorp also interprets the language in its tariff 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.[53]

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[52] *See Re Application of PacifiCorp for Approval of Proposed Schedule Nos. 37 and 38 and Standard Form Power Purchase Agreements for Qualifying Facilities up to 10 MW*, Docket No UM 1129, Application of PacifiCorp, Ex. F, Schedule 37 at 2 (July 12, 2005) (emphasis added) (Adams Declaration, Ex. D at 38).

[53] *See id.* at Power Purchase Agreement at 6.

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:

> Prices are fixed at the time that the contract is signed by both the Renewable Qualifying Facility and the Company and will not change during the term of the contract. 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 generated by the facility, as defined in the standard contract, to the Company during the Renewable Resource Deficiency Period identified on page 6, except that a *Renewable Qualifying Facility retains ownership of all Environmental Attributes* generated by the facility, as defined in the standard contract, during the Renewable Resource Sufficiency Period identified on page 6 and *during any period after the first 15 years of a longer term contract (up to 20 years)*.[54]

This language is substantively identical to the language in PGE's Schedule 201, but PacifiCorp interprets this generalized language in the tariffs as providing a fifteen-year fixed-price period that commences at the time of "Scheduled Initial Delivery," *not* the date of contract execution.[55]

Idaho Power's Oregon PURPA tariff also contains a similar language with respect to the term of negotiated or "nonstandard" contracts. The Idaho Power Schedule 85 in

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54 *PacifiCorp's Stipulation and Compliance Filing*, Docket No UM 1610/Advice No. 14-007, at Schedule 37 at 3 (Aug. 11, 2014) (emphasis added) (Adams Declaration, Ex. E at 19).

55 *See id.* at Oregon Standard New Qualifying Facility Power Purchase Agreement at § 5.3 (Adams Declaration, Ex. E at 44).

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."[56]

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 tariff uses this language to describe a period of twenty years commencing on the operation date, as Idaho Power's standard contract confirms.[57]

Additionally, PGE has not carefully negated the industry usage of the word "term" in its standard PPAs. PGE attempted to make such a change in its UM 1396 compliance filing by adding the words "*immediately following the effective date*" to the 15-year fixed pricing period; however, that was rejected as being a substantive change not addressed in that proceeding. PGE then removed that change in its next compliance filing in UM 1610. This all reflects the general industry understanding that absent any express statements to the contrary, the phrase used in PGE's Schedule 201—that the renewable fixed price option is "available for a maximum term of 15 years"—means that 15-year term commences at commercial operations. Therefore, in light of the objectively reasonable reading of the PPAs and this industry usage, the NewSun PPAs unambiguously provide for 15 years of fixed prices from power deliveries, not from execution.

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56 *See Idaho Power Company's Application for Approval of its Replacement Compliance Filing with Order No.14-058*, Docket No. UM 1610, at Schedule 85 at 11 (July 3, 2014) 9Adams Declaration, Ex. F at 210.

57 *Id.* at Standard Energy Sales Agreement at § 5.1 9Adams Declaration, Ex. F at 390.

B. As a Matter of Law, PGE Cannot Change the Objectively Reasonable Meaning of the Commission's Orders and PGE's Standard Contract through Statements to Individual QFs

PGE's statements to individual QFs about how PGE intends to implement a standard PPA is not adequate evidence of what that standard PPA actually means. Under the second phase of the *Yogman* analysis, a court or trier of fact looks to extrinsic evidence of the parties' intent if it has found that a contract is ambiguous. However, the individual intent of the parties to a standard-offer PURPA PPA is not necessarily helpful to deciphering the actual meaning in the Commission-approved standard PPA language. The assumption underlying *Yogman* step two, is that the parties to the contract negotiated and drafted the document at or immediately prior to entering into the contract, and therefore the individual intent of the parties at the time of drafting may be helpful to determine what the terms of that contract mean. However, in a PURPA standard offer contract, the QF's intent is not helpful because the QF had no role in drafting the standardized provisions of that PPA. Further, even the utility's intent is not helpful because the utilities do not voluntarily enter into PURPA contracts, but are required to by PURPA and the relevant state laws and regulations. Therefore, where the utility and the QF disagree about the meaning prior to executing those contracts, there is no meeting of the minds or shared intent about the meaning as would occur with a traditional voluntarily executed contract. Unlike a traditional contract, a PURPA standard offer PPA is not voluntarily entered by a utility and a QF does not have any role in drafting the standardized terms. Therefore, extrinsic evidence of the parties' intent via statements

they made to each other at or near the time of execution have no relevance to the standard contract's meaning and cannot change the meaning of the contract.

The thrust of PGE's arguments in this case is that PGE can dictate the meaning of Commission orders and standard contract forms to QFs and thereby change the otherwise applicable meaning of those orders and contract forms. Under this version of PURPA, a utility can draft a contract form that contains just enough ambiguities to allow the utility to later solidify the utility's preferred meaning through "negotiations" with individual QFs.

The Industry Trade Associations cannot overemphasize how strongly they oppose PGE's view and urge the Commission to explicitly reject this line of argument in its final order. If the Commission determines the contracts are ambiguous despite the recently reaffirmed purpose and intent of Order No. 05-584, PGE's statements to individual QFs should have no impact whatsoever on the outcome. Otherwise, the Commission will incent the utilities to sneak ambiguous provisions into their contracts to decrease the chances of an objection before it becomes the "standard contract" that the utility can subsequently change the meaning of through its statements to individual QFs—even where the utility's position is admittedly contrary to the intent of the underlying Commission orders.

PGE's subjective beliefs it allegedly held at the time of execution are not relevant. Nor are public arguments PGE made to deter QFs from executing PPAs with PGE. Rather, consistent with the United States District Court's ruling, the Oregon Supreme Court has held "in cases involving the interpretation of the parties' agreement, that it

'subscribes to the objective theory of contracts.'"[58] The Commission must determine "the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean."[59]

Summary judgment is appropriate where the extrinsic evidence of the parties' intent will not resolve the contract's meaning.[60] In the case of an executed standard contract where the parties made no substantive modifications on the point in dispute, extrinsic evidence cannot alter the intended result of the underlying Commission orders that gave rise to the contract. The purpose of the standard contract is to efficiently implement Commission policy without substantive negotiations. This purpose would be subverted if a utility—which is not a willing counter party to a QF contract—is allowed to undermine Commission policy through negotiations that were never intended to occur in the first place. As a matter of law, PGE's statements to an individual QF are irrelevant.

Among other reasons, this is bad policy because utilities often miscommunicate information to QFs and such miscommunications should not be allowed to impact the meaning of a PURPA contract.[61] In this very case, PGE's attorney, Denise Saunders

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58 *Kabil Devs. Corp. v. Mignot*, 279 Or 151, 156 (1977) (quoting *Harty v. Bye*, 258 Or 398, 403 (1971)).

59 *Harty*, 258 Or at 404 (quoting *Restatement of Contracts* § 230).

60 *Dial Temp. Help Serv. V. DLF Int'l Seeds Inc.*, 255 Or App at 612 (2012).

61 *See* CREA-NIPPC-REC/100, Lowe/17.

communicated numerous misinterpretations of Order No. 05-584 in her communication to the NewSun Parties. Ms. Saunders asserted Order No. 05-584 "makes it clear that the Commission intended that the term of the standard contracts should not exceed 20 years."[62] She also asserted "[t]he Commission clearly did not intend to guarantee every project 15 years of fixed prices."[63] Mr. True also asserts in his testimony that he made similar statements to every QF that asked him over the years.[64] The Commission has now reaffirmed that, in fact, Ms. Saunders and Mr. True were incorrect in their interpretation of the fifteen-year fixed-price policy in Order No. 05-584, and their incorrect legal conclusions should not be allowed to influence the meaning of individual contracts.

If the Commission were to allow this to occur, the standard contract would have a different meaning for different QFs solely based on what PGE communicated to them about the Commission's policy. And that meaning could be completely at odds with the actual words and intent of the Commission's underlying orders and policies that gave rise to the contract. Instead of resolving ambiguities in favor of the Commission's underlying policy giving rise to the contract, the Commission would have to hold a separate evidentiary hearing for each and every one of the dozens of executed contracts PGE now claims to be ambiguous, and the Commission would likely reach a different result in cases where the substantive language in the standard contract is identical. The very risk

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62 PGE/214, True/1.
63 PGE/214, True/2.
64 PGE/500, True/2.

of such litigation may deter most QFs from ever entering into PPAs with PGE or other Oregon utilities—even where the Commission's intent and policy on the point was consistent with the QF's position.

The Commission should reject this unsound result to protect the integrity of its standard contracts and QFs in the standard contract "negotiation" process. PGE often informs QFs of interpretations of law or fact that may be disputed by QF. Under PGE's view, a QF will then be held to PGE's incorrect interpretation, even if the Commission ultimately disagrees with PGE. In the context of a PURPA contract negotiation, especially when there is a pending avoided cost rate decrease (as was the case for at least some of the contracts at issue), PGE would be providing the QF a Hobson's choice. They can either execute the PPA or file a complaint against PGE, which experience has shown can take years to resolve and under which PGE typically argues that the QF is only entitled to the avoided cost rates in effect at the end of the litigation, not those at the time of the complaint filing. Given this choice, the vast majority of QFs will execute their contracts. And PGE will have then effectively changed Commission policy and the standard contract, merely by telling each QF that it interpreted a contract in manner that the Commission ultimately finds inconsistent with the law or Commission policy. Under such a rule, the Commission's authority will be fundamentally undermined by PGE.

This proposed rule is even more inappropriate in the instant case because the NewSun Parties unequivocally communicated their disagreement with PGE's position on the meaning of the standard contracts and the Commission's fixed-price policy before executing the agreements. PGE's witness Bruce True agrees on this point, and all parties

stipulated to the undisputed fact that the NewSun Parties communicated their disagreement with PGE.[65] In short, there is no basis to rely on PGE's misstatements of Commission policy to the NewSun Parties in interpreting the executed agreements.

C. The Commission Should Reject PGE's Reliance on Previously Available Contract Forms to Interpret the NewSun PPAs

Aside from its statements to individual QFs, PGE appears to rely primarily on an assertion that its previously available contract forms somehow inform the meaning of the entirely different contract forms executed by the NewSun Parties.

It would be bad policy and defeat the purpose of standard contracts to force a QF to somehow locate all prior versions of the utility's contract forms to decipher a hidden meaning not apparent on the face of the standard contract form it is executing.[66] As witness John Lowe explains:

> If the Commission relies on PGE's previously effective contract forms to interpret the meaning of the subsequent version of the contract form that contains entirely different provisions, the Commission will be establishing a policy where QFs need to investigate not only the underlying Commission orders giving rise to the currently effective contract forms but also all of the utility's previously effective versions of the form since 2005.[67]

It would be highly problematic if the Commission were to rule that every prior Commission-related contract ever executed or existing under a related Commission policy must be reviewed by parties signing a separate contract in order to interpret and understand their own contract. Such a rule would create very concerning precedent for

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65 PGE/200, True/5; Joint Statement of Undisputed Facts, at ¶¶ 16-17 (Jan. 25, 2019).

66 *See* CREA-NIPPC-REC/100, Lowe/15-16.

67 *Id* .at 15.

Oregon regulated markets. PGE's assertion that a counterparty must review, understand, agree to, and be bound by contracts that a counterparty never saw, was never provided, never made aware of, are not readily available, and which that party never signed, is in defiance of all contractual norms and precedents, starting with the integration clause in the NewSun PPAs.[68] If the Commission were to endorse PGE's arguments, every Commission-related agreement ever signed would functionally be re-opened to engage in a wide-ranging investigation of the evolution of the prior versions of the form going a decade or more back in time. PGE, and the Commission if it were to endorse such a position, would thus be inviting every QF that ever signed a contract with PGE to seek—and litigate—terms contained in every agreement any other prior QF signed with PGE and why their contract should be interpreted in light of that other party's contract.

Commission policy also does not support PGE's assertion that older versions of the standard contract have any relevance to this dispute. The Commission's goal in establishing standard contracts was to "eliminate negotiations and to thereby remove transaction costs."[69] A QF that is required to investigate all prior versions of a standard contract before executing one, would have incredibly high transaction costs. It would therefore be unreasonable and inconsistent with the Commission's policy to rely on PGE's past forms, because it will undermine the purpose of standard contracts to reduce

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68 *See* NewSun PPAs at § 19.

69 *Re Commission's Investigation Related to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 16 (May 13, 2005).

transaction costs by requiring the QF to locate and investigate the evolution of PGE's standard contract forms.

V. CONCLUSION

For the reasons stated above, the Commission should grant the Industry Trade Associations' motion for summary judgment.

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Respectfully submitted,

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