

January 29, 2019

Via Electronic Filing

Public Utility Commission of Oregon
Filing Center
201 High Street SE, Suite 100
Salem, Oregon 97301-3398

Re: UM 1931 - Portland General Electric Company v. Alfalfa Solar I LLC, et al.

Attention Filing Center:

Enclosed for filing in the above-named docket is Portland General Electric Company's Motion for Summary Judgment.

Thank you for your assistance.

Very truly yours,



Jeffrey S. Lovinger

Enclosure

830511

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY,)	
)	PORTLAND GENERAL ELECTRIC COMPANY’S MOTION FOR SUMMARY JUDGMENT
)	
v.)	<i>Oral Argument Requested</i>
ALFALFA SOLAR I LLC, et al.)	
)	
	Defendants.)	

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	UNDISPUTED FACTS	3
A.	In UM 1129, the Commission ordered that utilities offer QFs standard contracts with prices “fixed for only the first 15 years” of the contract’s term.	3
B.	PGE intended and interpreted its standard PPA forms as providing for fixed prices during the first 15 years following contract execution, and rejected the NewSun Parties’ proposed alterations to the forms to provide for a longer fixed-price period.	4
C.	In UM 1805, the Commission ruled in PGE’s favor and determined that in UM 1129 it did not set a particular start date for the 15-year fixed price period.	7
D.	Legal Standard	9
1.	Summary judgment standard	9
2.	Interpreting Commission-approved signed PPAs requires both contract and statutory interpretation methodologies.	10
III.	ARGUMENT	12
A.	The PPA forms unambiguously provide for 15 years of fixed prices beginning at contract execution.	13
1.	The QF is entitled to receive fixed prices for only the “initial 15” years of the “PPA,” and the “PPA” unambiguously begins upon “execution by both Parties.”	13
2.	The fixed price option begins at contract execution because numerous PPA provisions apply fixed prices to deliveries prior to commercial operation.	16
3.	The defined term “Contract Year[s]” refers to the years after the Commercial Operation Date, but is not referenced in the fixed-price option.	18
B.	The regulatory history confirms that the 15-year period runs from contract execution because the Commission has consistently approved of PGE’s standard PPAs with 15-year fixed-price periods that run from contract execution.	19
1.	PGE’s 2005 PPA, which first implemented the 15-year period of fixed prices, set contract execution as the triggering event for the 15-year period.	19

2.	In approving a later revision to the definition of “Contract Price” in PGE’s standard PPA, the Commission and PGE did not intend to alter the triggering event for the fixed price period.	21
3.	In approving PPA provisions that transferred ownership of environmental attributes, the Commission and PGE did not intend to, and did not, alter the triggering event for the fixed price period.....	24
4.	Section 4.5 does not set the start date for the fixed-price period, because half of PGE’s standard PPAs that the Commission approved in September 2015 do not even have that Section 4.5 language governing environmental attribute ownership.....	26
C.	The parties’ contracting history confirms that the 15-year period runs from contract execution because NewSun sought alterations to change the start date of this 15-year period, which PGE rejected.	27
V.	CONCLUSION.....	31

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Am. Wholesale Prod. v. Allstate Ins. Co.</i> 288 Or App 418 (2017).....	10
<i>Batzer Const., Inc. v. Boyer</i> 204 Or App 309 (2006).....	19
<i>Bridge City Family Med. Clinic, P.C. v. Kent & Johnson, LLP</i> 270 Or App 115 (2015).....	28
<i>Britt v. Kinzua Corp.</i> 124 Or App 658 (1993).....	10
<i>Fox v. Country Mut. Ins. Co.</i> 327 Or 500 (1998).....	11
<i>Hall v. Regence Bluecross Blueshield of Oregon/HMO Oregon</i> No. CV 00-695-AS, 2001 WL 34041892 (D. Or. Mar. 6, 2001).....	10, 17
<i>Heathman Hotel Portland, LLC v. McCormick & Schmick Rest. Corp.</i> 284 Or App 112 (2017).....	10
<i>Hekker v. Sabre Const. Co.</i> 265 Or 552 (1973).....	10
<i>Kaiser Found. Health Plan of the Nw. v. Doe</i> 136 Or App 566 (1995), <i>opinion mod on recon</i> , 138 Or App 428 (1996) <i>rev den</i> , 324 Or 394 (1996).....	28
<i>Krieger v. Just</i> 319 Or 328 (1994).....	19
<i>Landye Bennett Blumstein, LLP v. Jeffrey S. Mutnick, PC</i> 270 Or App 158 (2015).....	12
<i>Nieminen v. Pitzer</i> 281 Or 53 (1978).....	28
<i>Oregon Bank v. Nautilus Crane & Equip. Corp.</i> 68 Or App 131 (1984).....	10, 17
<i>Oregon Trail Electric Consumers Co-op, Inc. v. Co-Gen Co.</i> 168 Or App 466 (2000).....	29
<i>Petrillo v. Pub. Employees Ret. Bd.</i> 286 Or App 200, <i>rev den</i> , 362 Or 175 (2017).....	9

<i>Real Estate Loan Fund Oreg. Ltd. v. Hevner</i> 76 Or App 349 (1985).....	27, 28
<i>Schmidt v. Underwriters At Lloyds Of London</i> 191 Or App 340 (2004).....	11
<i>Snow Mountain Pine, Ltd. v. Tecton Laminates Corp.</i> 126 Or App 523 (1994).....	11, 26
<i>State v. Cloutier</i> 351 Or 68 (2011).....	26
<i>State v. Gaines</i> 346 Or 160 (2009).....	9, 11
<i>State v. Klein</i> 352 Or 302 (2012).....	26
<i>State v. Thomas</i> 281 Or App 685 (2016).....	15
<i>Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.</i> 254 Or App 24 (2012), <i>aff'd</i> , 355 Or 286 (2014)	16, 18
<i>Thomas Creek Lumber & Log Co. v. Dep't of Revenue</i> 344 Or 131 (2008).....	25
<i>Wieck v. Hostetter</i> 274 Or App 457 (2015).....	30
<i>Yogman v. Parrott</i> 325 Or 358, 363-64 (1997)	11, 12
<i>Zygar v. Johnson</i> 169 Or App 638 (2000).....	9
<u>PUC Orders</u>	
<i>City of Portland v. PGE</i> UM 1262, Order No. 06-636 (Nov. 17, 2006)	10
<i>In the Matter of Pac-West Telecomm, Inc. v. Qwest Corp.</i> IC 9, Order No. 05-874 (Jul. 26, 2005).....	10
<i>Northwest and Intermountain Power Producer's Coalition, Renewable Energy Coalition, and Community Renewable Energy Association v. Portland Gen. Elec. Co.</i> Docket No. UM 1805, Order No. 17-256 (Jul. 13, 2017).....	1
<i>Re Investigation Into Qualifying Facility Contracting and Pricing</i> Docket No. UM 1610, Order No. 14-058 (Feb. 24, 2014)	3
<i>Re Investigation Related to Electric Utility Purchases from Qualifying Facilities</i> Docket No. UM 1129, Order 05-584 (May 13, 2005)	1

Statutes and Other Authorities

OAR 860-001-04201
ORCP 471, 9
ORS 42.230.....15, 17
Webster's Third New Int'l Dictionary (unabridged ed 2002).....14

Pursuant to Oregon Rule of Civil Procedure 47, OAR 860-001-0420, and the November 19, 2018, Ruling adopting a procedural schedule in this matter, Portland General Electric Company (“PGE”) respectfully files this Motion for Summary Judgment. PGE respectfully requests that the Public Utility Commission of Oregon (“Commission”) interpret the ten power purchase agreements attached to the complaint (the “NewSun PPAs”) and conclude as a matter of law that the 15-year fixed-price payment period under those agreements begins at contract execution. PGE requests oral argument on this motion.

I. INTRODUCTION

In 2005, the Commission set the maximum term for standard power purchase agreements (“standard PPAs”) at 20 years. In the interest of limiting “divergence between forecasted and actual avoided costs” at the end of the standard PPA term, the Commission explained that “standard contract prices should be fixed for only the first 15 years of the 20-year term.”¹ As the Commission stated in a recent order, “[w]hen we concluded that QFs should receive 15 years of fixed prices under standard contracts in Order No. 05-584, we did not specify the date on which that 15-year term begins. . . . Due to this fact, Oregon utilities have filed, and we have approved, standard QF contracts that have used, as the triggering event, both the date of contract execution and the date of power delivery.”² Thus, it is undisputable that *both* options were allowed and approved from 2005 through 2017. The question in this case is whether the NewSun PPAs, and generally the September 2015 contract forms on which they were based, provide for fixed prices starting at contract execution or at commercial operation.

PGE told defendants before they signed the NewSun PPAs that the PGE standard PPA forms unambiguously use contract execution as the triggering event. Unhappy with that, Defendants informed PGE that they had found one prior executed PPA where the

¹ *Re Investigation Related to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order 05-584 at 20 (May 13, 2005).

² *Northwest and Intermountain Power Producer’s Coalition, Renewable Energy Coalition, and Community Renewable Energy Association v. Portland Gen. Elec. Co.*, Docket No. UM 1805, Order No. 17-256 at 3 (Jul. 13, 2017).

qualifying facility (“QF”) had revised the standard PPA to make the 15-year fixed price period begin at the commercial operation date (“COD”). Defendants then asked PGE to change the terms in the standard PPA so that defendants, too, would receive fixed prices for 15 years from COD. PGE repeatedly rejected that request and re-stated to defendants that the 15-years of fixed prices begins at contract execution. Without achieving any of the changes that they requested, defendants signed the standard PPA form, committing all 10 defendants to standard PPAs that provide for fixed prices that commence at contract execution.

PGE’s standard PPA forms are unambiguous on this point. The Schedule 201 applicable to all eight versions of the standard PPA form³ that the Commission approved in September 2015 states that the fixed price “option is available” (but not guaranteed) “for a maximum term of 15 years.”⁴ It also provides that “Sellers with PPAs exceeding 15 years will receive [market prices] . . . for all years up to five in excess of the initial 15.”⁵ Thus for all years after the fifteenth year of the PPA, the QF receives market prices. Because the PPA’s “Term” unambiguously begins at “execution,” the fixed-price option begins at contract execution.

The administrative history and the parties’ pre-execution discussions both confirm this plain meaning. First, until 2017 (well after execution of the NewSun PPAs), PGE never proposed a standard PPA that started the 15 years of fixed prices from the Commercial Operation Date, and the Commission never ordered PGE to do so. PGE’s first standard PPA forms complying with the Commission’s 2005 order requiring 15 years of

³ PGE offers PPA forms based on three attributes (i) variable or non-variable resources, (ii) on or off-system, and (iii) renewable or non-renewable (depending on whether the QF elects to sell its renewable energy credits to PGE), resulting in eight PPA forms that are the same except for differences based on these three attributes. *See* Declaration of Dallas DeLuca (“DeLuca Decl.”), Ex. 1 (Excerpt from PGE’s May 27, 2015, Compliance Filing in Docket No. UM 1610). Nine of the ten NewSun PPAs are renewable off-system variable PPAs and one is a renewable in-system variable PPA. *See* Compl., Exs. 1-10 (Ten NewSun PPAs, executed in 2016). The provisions governing the issue in this case – when the 15-year fixed-price period begins – are the same in all ten of the NewSun PPAs.

⁴ Compl., Ex. 1 at 26, 30 (Alfalfa Solar I LLC PPA’s Schedule 201 at Sheet No. 201-4 and Sheet No. 201-12, describing prices for non-renewable and renewable QFs, respectively).

⁵ *Id.* at 27, 30 (Alfalfa Solar I LLC PPA’s Schedule 201 at Sheet No 201-5 and Sheet No. 201-12, describing prices for non-renewable and renewable QFs, respectively).

fixed prices set the fixed-price period as the first 15 “Contract Years,” which were defined as beginning at “execution.” Nearly a decade later, in 2014, when PGE altered the original language, PGE did so simply to comply with a Commission order⁶ that had nothing to do with the start date of the fixed-price period.

Second, during contract negotiations, defendants requested alterations to the PPAs that would begin the fixed-price period at COD. PGE rejected these proposed alterations and defendants signed the PPAs, unaltered.

PGE’s motion for summary judgment should be granted. The PPAs’ unambiguous terms, and all relevant interpretive evidence, show that the fixed-price period begins at contract execution. 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.⁷

II. UNDISPUTED FACTS

A. **In UM 1129, the Commission ordered that utilities offer QFs standard contracts with prices “fixed for only the first 15 years” of the contract’s term.**

In 2004, the Commission opened Docket No. UM 1129 to investigate the terms and conditions of standard contracts offered by utilities for the purchase of electricity from QFs.⁸ That docket resulted in orders creating requirements for the terms to be included in standard contracts between QFs and utilities.⁹ The Commission set “the maximum term of a standard contract” as 20 years and ruled that “standard contract prices should be fixed for only the first 15 years of the 20-year term” with market prices for the “final five years of the contract.”¹⁰

⁶ *Re Investigation Into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 14-058 (Feb. 24, 2014).

⁷ PGE/300, Khandoker/4 (Direct Testimony of Ryin Khandoker); PGE/301, Khandoker/5 (Summary of Analysis).

⁸ Docket No. UM 1129, Order 05-584 at 1.

⁹ *See id.*

¹⁰ *Id.* at 20.

Fixing prices for “the first 15 years” served the Commission’s “primary goal” of “accurately pric[ing] QF power” by limiting divergence between actual avoided costs and the fixed prices over the course of the 20-year term.¹¹ In Order No. 05-584, the Commission did not state that QFs are entitled to receive 15 years of fixed pricing, but instead stated “standard contract prices *should be fixed* for only the first 15 years of the 20-year term.”¹² Providing market prices for the “final five years” helped QFs secure financing and also served the “primary goal” by eliminating divergence between fixed prices and actual avoided costs for the final five years of the PPA’s term.¹³ Notably, in Order No. 05-584, the Commission discussed only one “term”—“the 20-year term” of the PPA; there was no discussion of a second definition of the word “term” to mean post-COD energy production.¹⁴

B. PGE intended and interpreted its standard PPA forms as providing for fixed prices during the first 15 years following contract execution, and rejected the NewSun Parties’ proposed alterations to the forms to provide for a longer fixed-price period.

NewSun Energy LLC (“NewSun”) is a company responsible for management of the ten defendants (the “NewSun Parties”).¹⁵ In October 2015, Jake Stephens, the principal at NewSun, contacted Bruce True, an energy economist working in contract management in the Wholesale Power Operations group at PGE, indicating that some of the NewSun Parties would sign standard PPAs with PGE.¹⁶ Stephens asked True to forward along PGE’s current standard contract forms.¹⁷ The next day True forwarded PGE’s standard, Commission-approved PPAs to Stephens.¹⁸ Those PPAs incorporated by reference PGE’s “currently in-effect Schedule 201.”¹⁹ The PPAs provided for a “Term” that was defined

¹¹ *Id.*

¹² *Id.* (emphasis added).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ NewSun Parties/100; Stephens/1.

¹⁶ PGE/200; True/1; PGE/201, True/1 (October 14, 2015, Email from Jake Stephens to Bruce True).

¹⁷ *Id.*

¹⁸ PGE/202, True/1 (October 15, 2015, Email from Bruce True to Jake Stephens).

¹⁹ PGE/203, True/22 (Attachment to Email in Exhibit 202, Blank Standard Renewable Variable Off-System PPA at Exhibit D).

so as to begin upon “execution by both Parties,” and Schedule 201 stated that this term was “not to exceed 20 years.”²⁰ Schedule 201 further stated that fixed prices would be “available for a maximum term of 15 years,” but that the QF would receive market prices “for all years up to five in excess of the *initial* 15” years of the PPA.²¹ The QF could select a Commercial Operation Date of its choosing, so long as that date was “no more than three (3) years from the Effective Date.”²²

Stephens responded to True by attaching proposed PPAs for three NewSun Parties (Wasco Solar I, Dayton Solar I, and Tygh Solar I), which set the “Term” of the PPAs as running until 20 years after the Commercial Operation Date instead of from contract execution.²³ Stephens also requested to extend the QFs’ Commercial Operation Date beyond the three-year limit provided for in the PPAs, to five, four, and five and a half years, respectively.²⁴ The net result would have been PPAs with terms exceeding 24 years.

True, acting for PGE, rejected these changes and explained “the contract must run no more than 20 years from EXECUTION, not commercial operation.”²⁵ In a series of follow-up emails a week later, True stated that the PGE would not accept “a contract more than 20 years in length” for any of these three NewSun Parties.²⁶

²⁰ PGE/203, True/2, 6, 7 (Blank Standard Renewable Variable Off-System PPA at Sections 1.8, 1.38, and 2.1); *see* PGE/206, True/24 (Attachment to Email in Exhibit 205, PGE’s Schedule 201 Avoided Cost Power Purchase Information, which is Exhibit D to the PPA at Sheet No. 201-24).

²¹ PGE/206, True/12 (PGE’s Schedule 201 Avoided Cost Power Purchase Information at Sheet No. 201-12) (emphasis added).

²² PGE/203, True/7 (Blank Standard Renewable Variable Off-System PPA at Section 2.2.3).

²³ New Sun Parties/105, Stephens/1 (October 19, 2015, Email from Jake Stephens to Bruce True); New Sun Parties/106, Stephens/2, 6, 7 (Attachment to Email in Exhibit 105, Wasco Solar I LLC PPA at Sections 1.38, 1.7, and 2.3); New Sun Parties/107, Stephens/1 (October 21, 2015, Email from Jake Stephens to Bruce True); New Sun Parties/108, Stephens/2, 6, 7 (Attachment to Email in Exhibit 107, Dayton Solar I LLC PPA at Sections 1.38, 1.7, and 2.3); New Sun Parties/109, Stephens/1 (October 21, 2015, Email from Jake Stephens to Bruce True); New Sun Parties/110, Stephens/2, 6, 7 (Attachment to Email in Exhibit 109, Tygh Valley Solar I LLC PPA at Sections 1.38, 1.7, and 2.3).

²⁴ New Sun Parties/108, Stephens/7 (Dayton Solar I LLC PPA at Section 2.2); New Sun Parties/110, Stephens/7 (Tygh Valley Solar I LLC PPA at Section 2.2); New Sun Parties/117, Stephens/1 (November 19, 2015 email from Jake Stephens to Bruce True).

²⁵ New Sun Parties/111, Stephens/1 (October 21, 2015, Email from Bruce True to Jake Stephens) (emphasis in original).

²⁶ New Sun Parties/112, Stephens/1 (October 28, 2015, Email from Bruce True to Jake Stephens); New Sun Parties/113, Stephens/1 (October 28, 2015, Email from Bruce True to Jake Stephens); New Sun Parties/114, Stephens/1 (October 28, 2015, Email from Bruce True to Jake Stephens).

In early November, Stephens responded to True and asked, notwithstanding the overall contract term running from contract execution, whether the “15 year fixed price schedule” would begin running “after COD.”²⁷ In response, in both telephone conversations and emails, True stated that the 15-year fixed price period and the PPA’s total 20-year duration both began at contract execution, and Stephens disagreed.²⁸

In mid-November, Stephens reiterated his position in a follow-up email. Stephens stated that “Order 05-584” required “15 year fixed pricing and 20 year contract terms from COD.”²⁹ Stephens also identified a single standard PPA in which a QF (OneEnergy Oregon Solar) inserted language into the standard PPA form, which set the fixed-price period as the “first 15 years following the Commercial Operation Date.”³⁰ True responded and again rejected Stephens’ proposed alterations, stating “under the current form contract, PGE provides a 15 year fixed price term starting on the Effective Date” and “[t]he adjustment to the term in the OneEnergy Oregon Solar contract was in error.”³¹

On December 3, 2015, the NewSun Parties’ counsel sent PGE’s counsel a letter again interpreting Order 05-584 as requiring that “the 15 years [of fixed prices] must commence when the QF achieves operation.”³² Accordingly, NewSun requested that PGE add text to the PPA that would “clearly explain that the QF will sell its output under the fixed prices for a period of 15 years after the commercial operation date and an additional five years at the market prices.”³³

//

//

²⁷ New Sun Parties/115, Stephens/1 (November 3, 2015, Email from Jake Stephens to Bruce True).

²⁸ PGE/200, True/5 (“I recall telling Mr. Stephens several times by phone and once in person that the 15-years of fixed prices starts at execution of the PPAs.”); New Sun Parties/100, Stephens/18 (“[True] told me PGE interprets its contract forms to not allow for payment of fixed prices for a period longer than fifteen years after the date of execution.”); *see also* PGE/200, True/7.

²⁹ NewSun Parties/100, Stephens/18, 34; New Sun Parties/116, Stephens/1 (November 12, 2015, Email from Jake Stephens to Bruce True).

³⁰ *Id.*

³¹ PGE/210, True/1 (November 20, 2015, Email from Bruce True to Jake Stephens, including several prior emails between them).

³² PGE/212, True/2 (December 3, 2015, Letter from Greg Adams to Denise Saunders).

³³ *Id.* at 4.

The next day, without waiting for the contract alterations that the NewSun Parties requested, Stephens signed, unaltered, standard PPA forms on behalf of one NewSun Party (Starvation Solar I).³⁴

On December 14, PGE's counsel rejected NewSun's counsel's request for additional text that changed the standard PPA. She stated that "the 15 year fixed price term of PGE's current standard contracts starts at execution."³⁵

On December 18, Stephens signed, again without changing any text relating to the start of the 15-year fixed price period, standard PPAs on behalf of five additional NewSun Parties (Tygh Valley Solar I, Wasco Solar I, Dayton Solar I, Fort Rock I, and Fort Rock II), including the three QFs for which Stephens initially requested extended commercial operation and termination dates.³⁶ In the cover emails attaching the PPAs for those three NewSun Parties, Stephens expressly acknowledged the different interpretations of what Order No. 05-584 means concerning the relationship between the Commercial Operation Date, termination date, and length of the fixed price period. But, NewSun signed the PPAs unaltered anyway because "the development needs to move forward."³⁷

C. In UM 1805, the Commission ruled in PGE's favor and determined that in UM 1129 it did not set a particular start date for the 15-year fixed price period.

The NewSun PPAs have effective dates in the first half of 2016. Later in 2016, in UM 1805, several organizations representing the interests of independent power producers and developers of local energy projects filed a complaint with the Commission alleging that PGE's practice of beginning the 15-year period of fixed prices from the contract execution date, rather than the commercial operation date, "violate[d] the plain terms and intent of the Commission's Orders and policy[.]"³⁸ The organizations asked the Commission to order PGE to cease engaging in any business practice inconsistent with that

³⁴ PGE/211, True/1 (December 4, 2015, Email from Jake Stephens to Bruce True).

³⁵ PGE/214, True/2 (December 14, 2015, Letter from Denise Saunders to Greg Adams).

³⁶ NewSun Parties/100, Stephens/25-31.

³⁷ *Id.* at 25-30.

³⁸ Docket No. UM 1805, Complaint at 15 (Dec. 6, 2016).

purported policy, and to declare that PGE’s standard contract forms obligated PGE to make fixed-price payments for 15 years after a QF begins commercial operation.³⁹ PGE and the complainants in UM 1805 filed cross motions for summary judgment.⁴⁰

The Commission granted PGE’s motion for summary judgment, denied the complainant’s cross-motion, and ruled that Order No. 05-584 “did not specify the date on which th[e] 15-year term begins.”⁴¹ The Commission further stated that “Oregon utilities have filed, and we have approved, standard QF contracts that have used, as the triggering event, both the date of contract execution and the date of power delivery.”⁴² Thus, the Commission determined that PGE “lawfully offered standard contracts to operators of qualifying facilities (QFs) that have 15-year periods of fixed prices that begin on the date of execution, rather than on the date that the QF begins to transmit power.”⁴³ However, “on a going forward basis,” the Commission “clarif[ied]” its policy “to provide a QF the full benefit of the fixed price requirement.”⁴⁴ Thus, the Commission ordered PGE, on a going-forward basis, to revise its PPA forms to provide 15 years of fixed prices starting at scheduled commercial operations.

In a second order, the Commission amended its prior ruling to remove language which could be read as interpreting particular PGE PPA forms. The Commission stated it “neither examined nor addressed the specific terms and conditions of any past QF contract,” in issuing its earlier ruling.⁴⁵

//

³⁹ *Id.* at 16.

⁴⁰ Docket No. 1805, Order 17-256 at 1; *see* Docket No. 1805, Complainants’ Motion for Summary Judgment (Apr. 24, 2017).

⁴¹ Docket No. 1805, Order 17-256 at 1.

⁴² *Id.* at 3.

⁴³ *Id.* at 1.

⁴⁴ *Id.* at 4.

⁴⁵ Docket No. UM 1805, Order 17-465 at 4 (Nov. 13, 2017) (“We recognize that the actual terms of PGE’s standard contract forms have varied over time, and we did not undertake a review of all those forms prior to rendering our decision.”). After granting PGE’s motion for summary judgment, the Commission separately ordered PGE to amend its PPA forms on a going-forward basis to offer fixed prices for fifteen years starting at the scheduled Commercial Operation Date. PGE is currently appealing that separate ruling as lacking substantial reason and exceeding the Commission’s discretionary authority. *See* Docket No. UM 1805, Pet. for Jud. Review of Order (May 3, 2018).

PGE sought reconsideration of the Commission’s second order. PGE argued that the second order lacked in substantial reason were it to stand: The Commission could not both order PGE to revise its standard contract forms (as it did in the first order) and then conclude that the Commission had not actually reviewed those same forms (as it did in the second order).⁴⁶ The Commission denied PGE’s motion for reconsideration, deferring interpretation of particular standard contract forms to a later date. The Commission confirmed its clarified policy, but stated “We emphasize, however, that we continue to stand ready to interpret individual standard contract forms as they are brought to us.”⁴⁷ PGE now seeks a ruling from this Commission confirming that the NewSun Parties’ PPAs begin the fixed-price period at contract execution.

D. Legal Standard

1. Summary judgment standard

A plaintiff may move for summary judgment in plaintiff’s favor to all or any of the claims it asserted.⁴⁸ As applied to contract cases, a movant is entitled to summary determination if the disputed contract provision is unambiguous or if the “competing extrinsic evidence” is insufficient to create a “triable factual issue” as to the meaning of the disputed term.⁴⁹ Extrinsic evidence is relevant not just in resolving an ambiguity, but in illuminating a potential latent ambiguity.⁵⁰ For purposes of summary judgment, “[a] material fact is one that, under applicable law, might affect the outcome of the case.”⁵¹

//

⁴⁶ See Docket No. UM 1805, PGE Mot. for Recon. (Jan 12, 2018).

⁴⁷ Docket No. 1805, Order No. 18-079 at 3 (Mar. 5, 2018).

⁴⁸ ORCP 47 A (“A party seeking to recover on any type of claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits or declarations, for a summary judgment in that party’s favor as to all or any part of any claim or defense.”); see also OAR 860-001-0000(1) (“The Oregon Rules of Civil Procedure (ORCP) also apply in contested case and declaratory ruling proceedings unless inconsistent with these rules, a Commission order, or an Administrative Law Judge (ALJ) ruling.”)

⁴⁹ *Petrillo v. Pub. Employees Ret. Bd.*, 286 Or App 200, 206 n2, rev den, 362 Or 175 (2017).

⁵⁰ *State v. Gaines*, 346 Or 160, 172 & n8 (2009) (describing analogous use of legislative history and parole evidence in statutory and contract interpretation, respectively).

⁵¹ *Zygar v. Johnson*, 169 Or App 638, 646 (2000).

Similar to interpreting a contract on a summary judgment motion, the interpretation of a statute, rule, or Commission order is a question of law, and a dispute between the parties regarding the meaning of a statute, rule or order does not prevent the Commission from deciding the proper interpretation in response to a motion for summary judgment.⁵² If the language of a contract (or a statute, rule, or order) is unambiguous, its construction is generally a matter of law for the court⁵³ and can be decided on summary judgment.

Ambiguity means that a provision, or multiple provisions read together, have no definite meaning or are capable of more than one sensible and reasonable interpretation.⁵⁴ When determining whether provisions are ambiguous, the Commission should read the provisions “in the context of the contract as a whole.”⁵⁵ The Commission must give each PPA provision “a reasonable interpretation” and avoid an interpretation that “would directly contradict the specific language” of any of the PPAs’ provisions.⁵⁶ A construction of an agreement that renders any part of it meaningless should be avoided.⁵⁷

2. Interpreting Commission-approved signed PPAs requires both contract and statutory interpretation methodologies.

Interpreting executed standard PPAs requires the Commission (or a court) to combine the interpretative methodologies that the Oregon Supreme Court established for interpreting contracts and for interpreting statutes. That is what the Oregon Supreme Court

//

//

//

⁵² See e.g., *City of Portland v. PGE*, Docket No. UM 1262, Order No. 06-636 (Nov. 17, 2006) (Commission granted defendant PGE’s motion for summary judgment and dismissed complaint after interpreting statute as a matter of law).

⁵³ *Britt v. Kinzua Corp.*, 124 Or App 658, 660, (1993); see also, *In the Matter of Pac-West Telecomm, Inc. v. Qwest Corp.*, IC 9, Order No. 05-874 at 5 (Jul. 26, 2005) (noting with approval *Hekker v. Sabre Const. Co.*, 265 Or 552, 555 (1973) for the proposition “As a general rule the construction of a contract is a question of law for the court.”).

⁵⁴ *Am. Wholesale Prod. v. Allstate Ins. Co.*, 288 Or App 418, 424 (2017).

⁵⁵ *Heathman Hotel Portland, LLC v. McCormick & Schmick Rest. Corp.*, 284 Or App 112, 117 (2017).

⁵⁶ *Hall v. Regence Bluecross Blueshield of Oregon/HMO Oregon*, No. CV 00-695-AS, 2001 WL 34041892, at *3 (D. Or. Mar. 6, 2001).

⁵⁷ *Oregon Bank v. Nautilus Crane & Equip. Corp.*, 68 Or App 131, 146 (1984).

requires for interpreting contracts that contain text that is required by statute, such as automobile insurance contracts that include statutory language concerning coverage.⁵⁸

Here, similarly, standard PPAs are not simply common-law contracts subject only to a traditional *Yogman v. Parrot* analysis. As the Commission has already stated, “[t]he instant proceeding is not a common law contract dispute” and “the obligation to enter into a PURPA contract is not governed by common law concepts of contract law, but rather an obligation created by statutes, regulations, and this Commission’s administrative rules.”⁵⁹ The terms and conditions of the standard PPAs at issue “were litigated before the Commission, adopted by the Commission, and have the force of regulation under [the Commission’s] implementation of PURPA.”⁶⁰

Because PGE included the terms at issue here in its standard PPA forms to comply with Commission requirements, PGE’s intent and the Commission’s intent in ordering PGE to draft the contested terms are relevant to determining the meaning of the terms. And those terms should be interpreted in the manner that statutes are, which includes looking at the legislative history and examining prior versions of the statute. Here, analogous to legislative history, that means examining the prior Commission orders and prior versions of the standard PPAs that led to the standard PPAs at issue.

PGE understands that the Commission may also use Oregon’s methods for interpreting common law contracts when it interprets these PPAs. In his order denying NewSun’s first motion for summary judgment, Administrative Law Judge Arlow stated

//

//

⁵⁸ See *Schmidt v. Underwriters At Lloyds Of London*, 191 Or App 340, 343 (2004) (“Where language appears in the contract because the legislature requires it, courts must necessarily determine the meaning intended by the legislature.”); see also *Fox v. Country Mut. Ins. Co.*, 327 Or 500, 506 (1998) (to interpret a contract term required by statute, courts “attempt to determine the legislature’s intention in enacting that statute rather than the parties’ contractual intention”).

⁵⁹ Docket No. 1931, Order 18-174 at 3-4 (May 23, 2018); see also *Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 598 (holding that a Standard PPA “is not governed by common law concepts of contract law; it is created by statutes, regulations and administrative rules”).

⁶⁰ Docket No. 1931, Order 18-174 at 4.

that the Commission would look to Oregon contract interpretation principles when interpreting the PPA forms.⁶¹ Hence, PGE refers to both methods throughout this brief.

The methods for interpreting statutes and contracts are similar. Oregon courts interpret common-law contracts under the three-step analysis from *Yogman v. Parrot*:

When interpreting a contract, we begin by examining the text in the context of the document as a whole. If the provision is clear, the analysis ends there. If the provision is ambiguous, we look to extrinsic evidence of the contracting parties' intent. If the provision is still ambiguous, we employ appropriate maxims of construction.⁶²

When analyzing a statute, the court similarly first looks at the text and context of a statute as a whole.⁶³ In the second step, a court looks to legislative history, instead of the parties' intent, and then applies maxims of statutory construction at step three.⁶⁴

III. ARGUMENT

Consistent with the methods of interpretation discussed above, the Commission should enter summary judgment in PGE's favor for three reasons: (1) the text and context of the NewSun PPAs unambiguously provide that the fixed-price period covers the "initial 15" years of the "PPA," not the first 15 years after the QF becomes operable; (2) the drafting history shows that PGE has consistently offered standard PPAs that begin the period of fixed prices at contract execution and the Commission never ordered otherwise until 2017; and (3) when the NewSun Parties sought amendments to these standard terms to alter the start date of the fixed-price period, PGE rejected the amendments, and the NewSun Parties acquiesced to PGE's offer by signing unaltered PPA forms.

//

//

⁶¹ See Aug. 23, 2018 ALJ Ruling at 9 (citing *Yogman* for the proposition that the "contracting parties' intent" is relevant in interpreting the NewSun QFs' PPAs).

⁶² *Landye Bennett Blumstein, LLP v. Jeffrey S. Mumick, PC*, 270 Or App 158, 171 (2015) (citing *Yogman v. Parrott*, 325 Or 358, 361, 363-64 (1997)).

⁶³ *Gaines*, 346 Or at 171.

⁶⁴ See *id.* at 171-72 (stating standard for statutory interpretation).

- A. The PPA forms unambiguously provide for 15 years of fixed prices beginning at contract execution.**
- 1. The QF is entitled to receive fixed prices for only the “initial 15” years of the “PPA,” and the “PPA” unambiguously begins upon “execution by both Parties.”**

The Commission should grant summary judgment for PGE because the PPAs at issue unambiguously begin the 15-year period of fixed prices at contract execution.

The standard PPA includes the PPA form and Schedule 201.⁶⁵ The PPA incorporates by reference the terms of Schedule 201, and therefore the terms of Schedule 201 are terms of the PPA.⁶⁶

Here, in the PPA, PGE agreed to pay the “Contract Price” in exchange for “Net Output,” “[c]ommencing on the Effective Date and continuing through the Term of this Agreement.”⁶⁷ The “Net Output” is defined as “*all* energy . . . produced by the Facility,” not just energy produced after the Commercial Operation Date.⁶⁸ The PPA defines the “Effective Date” as “execution by both Parties,” not the Commercial Operation Date.⁶⁹ Thus, PGE’s obligation to pay the “Contract Price” begins at “execution,” not the Commercial Operation Date.⁷⁰

The PPA defines “Contract Price” as the price specified in Schedule 201.⁷¹ For QFs like the NewSun Parties that choose the “Renewable Fixed Price Option,” Schedule 201 provides that the prices “will be equal to” the fixed prices in the “Renewable Avoided Costs” tables.⁷² This Renewable Fixed Price Option is only “available for a maximum

⁶⁵ See PGE/205 (Attachment to Email in Exhibit 204, Draft Wasco Standard Renewable Variable Off-System PPA); see PGE/206 (PGE’s Schedule 201 Avoided Cost Power Purchase Information, which is Exhibit D to the PPA).

⁶⁶ See PGE/205 at Section 1.33.

⁶⁷ Compl., Ex. 1 at 10 (Alfalfa Solar I LLC PPA at Section 4.1). All 10 of the NewSun QFs’ PPAs are attached to the complaint. (See Complaint Exs. 1-10.) Because the terms at issue in this case are identical across all 10 PPAs, when referring to terms in the executed PPAs, PGE will simply cite to this PPA.

⁶⁸ *Id.* at 4 (Alfalfa Solar I LLC PPA at Section 1.22) (emphasis added).

⁶⁹ *Id.* at 7 (Alfalfa Solar I LLC PPA at Section 2.1).

⁷⁰ The PPA defined the “Commercial Operation Date” as “the date that the Facility is deemed by PGE to be fully operational and reliable.” *Id.* at 2 (Alfalfa Solar I LLC PPA at Section 1.5)

⁷¹ *Id.* at 2 (Alfalfa Solar I LLC PPA at Section 1.6).

⁷² *Id.* at 30 (Alfalfa Solar I LLC PPA’s Schedule 201 at Sheet No. 201-12).

term of 15 years.”⁷³ Critically, Schedule 201 further explains that “Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price [*i.e.* market prices] . . . for all years up to five in excess of the initial 15.”⁷⁴ That text makes it unambiguous that if the “PPA[] exceed[s] 15 years” the seller will receive Mid-C Index Prices for all years after the 15th *PPA* year, *i.e.* 15 years after contract execution. The 15th *PPA* year is 15 years after contract execution (not after COD) because Schedule 201 defines “PPA” to mean the “Standard Power Purchase Agreement.”⁷⁵

The “Standard Power Purchase Agreement” begins at contract execution. The PPA defines the “Term of this Agreement” as beginning on “the Effective Date,” *i.e.* contract execution.⁷⁶ Similarly, Schedule 201 states “A Seller must *execute a PPA* with the Company *prior to* delivery of power to the Company.”⁷⁷ Thus, the “initial 15” years of the “PPA” are the first 15 years following contract execution.

The NewSun Parties’ contrary reading would render several provisions of the PPA and Schedule 201 meaningless. The NewSun Parties read PGE’s PPA forms as requiring that PGE pay a guaranteed 15 years of fixed prices starting at the Commercial Operation Date, followed by an additional 5 years of market prices.⁷⁸ NewSun’s contention that the NewSun Parties are entitled to *receive* 15 years of fixed prices, is inconsistent with the provision of Schedule 201, which states that fixed prices are only “*available* for a maximum term of 15 years.”⁷⁹ “Available” means “capable of use for the accomplishment of a purpose.”⁸⁰ The fixed prices are capable of being used starting at contract execution. The QF can maximize its benefit from these available fixed prices by quickly attaining

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 24 (Alfalfa Solar I LLC PPA’s Schedule 201 at Sheet No. 201-1).

⁷⁶ *Id.* at 6 (Alfalfa Solar I LLC PPA at Sections 1.38 and 2.1).

⁷⁷ *Id.* at 24 (emphasis added) (Alfalfa Solar I LLC PPA’s Schedule 201 at Sheet No. 201-1)

⁷⁸ *See* New Sun Parties/100, Stephens/7-8 (“I further understood that the fifteen-years of fixed prices a QF could elect to receive would be the first fifteen years of the twenty-year period of net output sales beginning at COD and that any remaining term of power sales beyond the first fifteen years after COD (which could be up to five additional years) would be at market-rate prices.”).

⁷⁹ *Id.* at 7-8; *compare to* Compl., Ex. 1 at 26 (Alfalfa Solar I LLC PPA’s Schedule 201 at Sheet No. 201-4)

⁸⁰ *Webster’s Third New Int’l Dictionary* 150 (unabridged ed 2002).

commercial operability. But stating that fixed prices are “available” to be used necessarily implies that the QF may not in fact make use of 15 years of fixed prices; “available” does not mean that QFs are guaranteed 15 years of fixed prices.

Similarly, NewSun’s interpretation of the PGE forms contradicts the portions of those forms that set a maximum 20-year term. Because COD can be up to 3 to 4 years after contract execution, the NewSun Parties’ interpretation would create a total PPA term in excess of 20 years. The NewSun Parties’ interpretation contradicts the provision of Schedule 201 stating that the total “Term of [the] *Agreement*” is “not to exceed 20 years,” and the provision of the PPA that states that the “Term of this Agreement” starts at “execution.”⁸¹

NewSun also now contends that there is text in the PPA which simply does not exist. The NewSun Parties now contend that there are *two* “terms” in its contracts.⁸² First, NewSun states that there is a “term of the effectiveness of the agreement,” *i.e.* the defined “Term” in the PPA, which begins at contract execution.⁸³ Second, NewSun contends that there is a separate “term length of power sales,” which begins at commercial operations.⁸⁴ NewSun contends this “term length of power sales” is what was meant by the word “term” in Schedule 201.⁸⁵ NewSun’s position must be rejected because it is adding text that simply does not exist. Schedule 201, like the PPAs, defines the word “term” exclusively to mean the “term of the *agreement*,” not the length of power sales.⁸⁶ Under Oregon law, the Commission “may not read into a contract provisions that simply do not exist.”⁸⁷ NewSun contends that because the word “term” was not capitalized in Schedule 201, it could not

⁸¹ See Compl., Ex. 1 at 6-7, 36 (Alfalfa Solar I LLC PPA at Sections 1.38 and 2.1, and Schedule 201 at Sheet No. 201-24) (emphasis added).

⁸² New Sun Parties/100, Stephens/34-35.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See Compl., Ex. 1 at 36 (Alfalfa Solar I LLC PPA’s Schedule 201 at Sheet No. 201-24) (emphasis added).

⁸⁷ *State v. Thomas*, 281 Or App 685, 693 (2016) *also* ORS 42.230 (“office of the judge is . . . not to insert what has been omitted”). Based on NewSun’s evidentiary submissions, PGE anticipates that NewSun will contend in its own motion for summary judgment that the word “term” as used in the relevant industry has a particular meaning. PGE will respond to that argument, if made, in PGE’s response briefing.

have referred to the “Term” of the Agreement.⁸⁸ But where a word has a defined meaning in a contract, the parties’ failure to capitalize that word when using it does not render the definition inapplicable.⁸⁹

2. The fixed price option begins at contract execution because numerous PPA provisions apply fixed prices to deliveries prior to commercial operation.

Multiple provisions of the PPAs apply the fixed-price option to deliveries of Net Output starting at contract execution. The PPAs state that “[c]ommencing on the Effective Date,” *i.e.* contract execution, the QF “shall sell to PGE the entire Net Output[.]”⁹⁰ Here the PPA contemplates receipt of fixed prices starting “at the Effective Date,” not upon the Commercial Operation Date. Similarly, Schedule 201 provides that PGE must pay fixed prices for “all Net Output delivered *prior to* the Commercial Operation Date.”⁹¹

The PPAs at issue contemplate deliveries of energy prior to the Commercial Operation Date, and therefore naturally include these deliveries in the “initial 15” years of the fixed-price option. The start-up testing protocol attached as Exhibit C to each PPA requires the QF to deliver “[t]est energy” prior to the Commercial Operation Date.⁹² Further, Section 2.2.1 contemplates “initial deliveries of Net Output” one month prior to the scheduled Commercial Operation Date.⁹³ Under the terms of the PPAs, the NewSun Parties are to receive the “Contract Price,” *i.e.* the price stated in Schedule 201, for these pre-operation deliveries.⁹⁴ The fixed-price option as described in Schedule 201, sets fixed prices for the “initial 15” years of the PPA and market prices for the remaining years.⁹⁵

//

⁸⁸ New Sun Parties/100, Stephens/35.

⁸⁹ See *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, 254 Or App 24, 29 (2012), *aff’d*, 355 Or 286 (2014) (applying defined term “Substantial Completion” to contract provision that referred only to “substantial completion”).

⁹⁰ See Compl., Ex. 1 at 10 (Alfalfa Solar I LLC PPA at Section 4.1).

⁹¹ *Id.* at 26 (Alfalfa Solar I LLC PPA’s Schedule 201 at Sheet No. 201-4) (emphasis added).

⁹² *Id.* at 23 (Alfalfa Solar I LLC PPA at Exhibit C).

⁹³ *Id.* at 7 (Alfalfa Solar I LLC PPA at Section 2.2.1).

⁹⁴ *Id.* at 2, 10 (Alfalfa Solar I LLC PPA at Sections 1.6 and 4.2) (setting pre-COD price as off-peak fixed price).

⁹⁵ *Id.* at 30 (Alfalfa Solar I LLC PPA’s Schedule 201 at Sheet No. 201-12).

Similarly, Section 1.35 of each of the NewSun Parties' PPAs also contemplates applicability of the fixed-price period prior to the Commercial Operation Date. Section 1.35 defines "Start-Up Lost Energy Value," which is the amount that the QF must pay PGE in damages for the cost of missing the scheduled Commercial Operation Date.⁹⁶ If the QF fails to meet the three-year deadline for commercial operability, the PPA assumes a certain "Pre-Commercial Operation Date Minimum Net Output," which is the minimum energy the QF ought to deliver during this period and is calculated as a fraction of its Nameplate Capacity Rating.⁹⁷ The price that the QF must pay PGE for this lost energy is calculated in part based on the "Contract Price," *i.e.* the same term that determines the price for all Net Output under the PPA.⁹⁸ Again, this necessarily means that the "Contract Price" predates the Commercial Operation Date, because otherwise there would be no way of calculating the price for this Lost Energy Value.

The NewSun Parties contend that the "initial 15" years of the fixed-price option does not begin until the Commercial Operation Date. But that reading renders meaningless the numerous contract provisions discussed above. The Commission should reject defendants' proposal because the Commission must avoid an interpretation that "would directly contradict the specific language" of any of the PPAs' provisions.⁹⁹ The Commission should not interpret the PPA in a manner that renders any part of the PPA meaningless.¹⁰⁰ The Commission should reject defendants' interpretation because it renders several provisions of the standard PPA meaningless.¹⁰¹ Under Oregon law, a judge cannot "omit what has been inserted[.]"¹⁰²

//

⁹⁶ *Id.* at 6 (Alfalfa Solar I LLC PPA at Section 1.35).

⁹⁷ *Id.* at 5 (Alfalfa Solar I LLC PPA at Section 1.28).

⁹⁸ *Id.*

⁹⁹ *Hall*, 2001 WL 34041892, at *3.

¹⁰⁰ *Oregon Bank*, 68 Or App at 146.

¹⁰¹ *Id.* at 146 ("A construction of an agreement that renders any part of it meaningless should be avoided."); *Hall*, 2001 WL 34041892, at *3 (a court should avoid an interpretation that "would directly contradict the specific language" of any of the contract's provisions).

¹⁰² ORS 42.230

//

3. The defined term “Contract Year[s]” refers to the years after the Commercial Operation Date, but is not referenced in the fixed-price option.

The PPA has a defined term, “Contract Year[s],” to describe the period of time “commencing upon the Commercial Operation Date” and lasting “until the end of the Term.”¹⁰³ If the fixed-price period began at the Commercial Operation Date, the PPA forms would have limited the fixed-price option to Contract Years. Instead, the PPAs required that the QFs receive the “Contract Price,” *i.e.* the price contained in Schedule 201, starting on “the Effective Date,” *i.e.* contract execution. When construing these contract forms, the Commission must give meaning to the use of the defined term “Effective Date,” which begins at contract execution, instead of the defined term “Contract Year,” which begins at commercial operations, and is not used in Schedule 201, the sole source for prices in the PPAs.¹⁰⁴

Where other utilities intended the fixed-price period to begin on some date other than contract execution, they said so with explicit language. Idaho Power, like PGE, defines the term “Contract Year[s]” in its PPA forms as “commencing . . . on the same calendar date as the Operation Date.”¹⁰⁵ But the Idaho Power form expressly states that the QF will receive fixed prices “[f]or the first fifteen (15) Contract Years.”¹⁰⁶ PacifiCorp’s standard PPA forms begin the fixed-price period at the “Scheduled Initial Delivery Date,” which is defined elsewhere as the date on which the QF “intends to commence delivery of Net Output under this Agreement, for the purpose of Start-up Testing.”¹⁰⁷ By contrast, PGE’s PPA forms define the fixed-price period as the “initial 15” years of the PPA itself, not some later milestone described in the PPA.

¹⁰³ Compl., Ex. 1 at 2 (Alfalfa Solar I LLC PPA at Section 1.7).

¹⁰⁴ See *Sunset Presbyterian Church*, 254 Or App 24 at 29 (rejecting contractual interpretation that would “ignore the parties’ decision to use [a] defined term.”).

¹⁰⁵ Decl. of Greg Adams in Support of Defs’ Mot. for Summ. Disposition, Ex. F at 28 (Idaho Power’s July 3, 2014, Compliance Filing in Docket No. UM 1610, Blank Energy Sales Agreement at Section 1.4).

¹⁰⁶ *Id.* at 41 (Idaho Power Blank Energy Sales Agreement at Section 7.1).

¹⁰⁷ See CREA-NIPPC-REC/101, Lowe/14, 20 (Pacific Power Oregon Standard QF PPA at Recital B and Section 1.45).

//

B. The regulatory history confirms that the 15-year period runs from contract execution because the Commission has consistently approved of PGE’s Standard PPAs with 15-year fixed-price periods that run from contract execution.

The Commission should consider the history of PGE’s PPA forms to determine the Commission’s intent in approving the PPA language at issue. Prior drafts of a disputed contract provision are relevant to determining that provision’s meaning.¹⁰⁸ Similarly, “[i]n a serially amended statute . . . the wording changes adopted from session to session are a part of context of the present version of the statute being construed.”¹⁰⁹ Thus, under either a contractual analysis or a statutory analysis, the prior versions of the PPA forms are relevant at the first step of interpretation.

The amendment history shows that until 2017 (well after the NewSun PPAs were executed), PGE’s standard PPAs measured the 15-year period from contract execution. Since its 2005 compliance filing setting the fixed-price term as beginning at contract execution until 2017, PGE has submitted amendments to the relevant provisions only in response to Commission mandates on unrelated issues. The unbroken line of regulatory history of Commission orders and PGE’s approved PPAs confirms what is already clear from the text: the 15-year fixed price period runs from contract execution, not commercial operation.

1. PGE’s 2005 PPA, which first implemented the 15-year period of fixed prices, set contract execution as the triggering event for the 15-year period.

Until 2017, no Commission order prevented PGE from beginning the fixed-price period at contract execution. The Commission first created the 15-year fixed price term in a 2005 order, Order No. 05-584. That order set the standard PPA’s maximum term at 20 years. But Order No. 05-584 concluded that “standard contract prices should be fixed for

¹⁰⁸ See *Batzer Const., Inc. v. Boyer*, 204 Or App 309, 320 (2006) (holding that “prior drafts of the parties’ agreement” constituted extrinsic evidence of parties’ intent).

¹⁰⁹ *Krieger v. Just*, 319 Or 328, 336 (1994).

only the first 15 years of the 20-year term.”¹¹⁰ The Commission limited the period of fixed prices in order to limit the “possible divergence of standard contract rates from actual avoided costs.”¹¹¹

Order No. 05-584 did not require a particular triggering event for the beginning of the 15-year term of fixed prices. In a recent 2017 order—Order No. 17-256—the Commission explicitly stated for the first time that 15-year period should begin at commercial operability. But in so ruling, the Commission was clear that the 2005 order did not include such a requirement.¹¹² Instead, the Commission stated: “When we concluded that QFs should receive 15 years of fixed prices under standard contracts in Order No. 05-584, we did not specify the date on which that 15-year term begins. . . . Due to this fact, Oregon utilities have filed, and we have approved, standard QF contracts that have used, as the triggering event, both the date of contract execution and the date of power delivery.”¹¹³ In future contracts, the Commission ordered PGE to apply a “policy” that provided QFs the “full benefit” of the 15-year period, but was clear that PGE “lawfully” may not have applied the policy in the past.¹¹⁴ In a later order, the Commission stated that it stood “ready to interpret individual standard contract forms as they are brought to us.”¹¹⁵

Until Order No. 17-256, every PGE standard PPA used contract execution as the triggering event of the fixed-price period. In 2005, PGE filed its revised PPA form in response to Order 05-584.¹¹⁶ Like the PPA at issue here, the 2005 PPA form began the 15-year fixed price period at contract execution. The 2005 PPA form provided for a term “not to exceed 20 years;”¹¹⁷ a fixed-price option that would be “available for a maximum term of 15 years;”¹¹⁸ state that for PPAs “exceeding 15 years,” the Seller would receive

¹¹⁰ Docket No. 1129, Order. No. 05-584 at 20.

¹¹¹ *Id.* at 19.

¹¹² Docket No. 1805, Order 17-256 at 3.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Docket No. 1805, Order No. 18-079 at 3.

¹¹⁶ PGE/102, Macfarlane/1 (PGE’s July 12, 2005, Compliance Filing, PGE Advice No. 05-10 in Docket No. 1129).

¹¹⁷ *Id.* at 19 (PGE Advice No. 05-10, Schedule 201, Original Sheet No. 201-16).

¹¹⁸ *Id.* at 7 (PGE Advice No. 05-10, Schedule 201, Original Sheet No. 201-4).

market prices “for all years up to five in excess of the initial 15;”¹¹⁹ and included an “Effective Date” defined as the date of “execution by both Parties.”¹²⁰

The 2005 PPA form differed from the 2015 PPA form used for the NewSun PPAs in its definition of “Contract Price”; the 2005 PPA form included three different methods for calculating market prices, while the 2015 PPA form included only one method of calculating market prices (the Mid-C Index Price). The 2005 PPA form defined Contract Price to require the QF to select between the “Fixed Price” option and three market-based pricing options.¹²¹ For QFs that selected the fixed-price option, the 2005 PPA required the QF to select a second market-based pricing option “for all Contract Years in excess of 15 until the remainder of the Term.”¹²² The 2005 PPA defined “Contract Years” as “each [calendar year] falling at least partially in the Term of this Agreement.”¹²³ Thus, the 2005 PPA began measuring “Contract Years” at contract execution, and provided for market prices “for all Contract Years,” *i.e.* years following contract execution, “in excess of 15.” It is undisputable that the 2005 PPA filed by PGE, and approved by the Commission, explicitly set contract execution as the start date for the fixed price period.

2. In approving a later revision to the definition of “Contract Price” in PGE’s standard PPA, the Commission and PGE did not intend to alter the triggering event for the fixed price period.

In 2014, the Commission issued Order No. 14-058. That order eliminated the requirement described above that utilities offer all three market-based options for the last five years of the term because “no QF has used these variable market-based options.”¹²⁴ In response to Order 14-058, PGE filed new PPA forms that simplified the definition of

//

//

¹¹⁹ *Id.*

¹²⁰ *Id.* at 24 (PGE Advice No. 05-10, Standard Contract PPA at Section 2.1).

¹²¹ *Id.* at 26 (PGE Advice No. 05-10, Standard Contract PPA at Section 5).

¹²² *Id.*

¹²³ *Id.* at 21 (PGE Advice No. 05-10, Standard Contract PPA at Section 1.6).

¹²⁴ Docket No. 1610, Order No. 14-058 at 23.

Contract Price.¹²⁵ The new definition, which survived through to the NewSun PPAs, simply referred to the prices provided in Schedule 201.¹²⁶

PGE's revised 2014 PPA and Schedule 201 preserved the other language in the PPA that made clear that the 15-year start date runs from contract execution. In particular, the revised 2014 PPA forms, like all PGE PPA forms that preceded them, provided for a term "not to exceed 20 years;"¹²⁷ a fixed-price option that would be "available for a maximum term of 15 years;"¹²⁸ that Sellers with "PPAs exceeding 15 years," would receive market prices "for all years up to five in excess of the initial 15;"¹²⁹ and an "Effective Date" defined as the date of "execution by both Parties."¹³⁰ These unambiguous terms preserved the contract execution date as the triggering event for the 15-year period and continued in all PPAs through 2017, including the NewSun PPAs at issue here.

Order No. 14-058 also permitted utilities to institute monetary penalties for "intermittent QFs" that failed to meet a specified "mechanical availability guarantee."¹³¹ The Commission ruled "that the penalty should be based on the costs of replacement power for the shortfall in output from the qualifying facility."¹³² In responding to this part of Order No. 14-058, PGE altered the definition of "Contract Years," to no longer begin at contract execution but instead begin at the "Commercial Operation Date."¹³³ PGE stated that it made this amendment to "[t]he requirements for minimum delivery to commercial operation, rather than start of the contract."¹³⁴ In turn, the revised PPA used this definition of "Contract Year" in calculating the newly-defined "Mechanical Availability

¹²⁵ See PGE/100, Macfarlane/23-24. (There is a typographical error at page 23. "Order No. 16-058" should read "Order No. 14-058.")

¹²⁶ PGE/106, Macfarlane/93 (PGE's November 25, 2014 Compliance Filing in Docket No. 1610, Redline Standard Off-System Variable PPA at Section 1.6).

¹²⁷ *Id.* at 25 (Schedule 201 QF Avoided Cost Power Purchase Information, which is Exhibit D to the PPA at Sheet No. 201-23).

¹²⁸ *Id.* at 14 (Schedule 201 QF Avoided Cost Power Purchase Information at Sheet No. 201-12).

¹²⁹ *Id.*

¹³⁰ *Id.* at 31 (Standard Off-System Variable PPA's Schedule 201 at Section 2.1).

¹³¹ Docket No. 1610, Order No. 14-058 at 28.

¹³² *Id.* at 30.

¹³³ PGE/106, Macfarlane/27 (Standard Off-System Variable PPA at Section 1.7).

¹³⁴ CREA-NIPCC-REC/208, Sanger/32 (Barbara Parr Email on August 20, 2014, Attachment Redline Standard Renewable In-System Non-Variable PPA at Section 1.8).

Percentage.”¹³⁵ At the same time, PGE eliminated the reference to “Contract Years” in the provisions discussing the fixed-price period in the same revisions in which it amended the definition of “Contract Years” to begin at Commercial Operation Date instead of contract execution.¹³⁶ The simultaneous change to the definition of “Contract Years” and the elimination of “Contract Years” from the provisions describing the fixed-price period must mean that the new definition of “Contract Years” is now disconnected from the start of the 15-year fixed-price period.

This regulatory context demonstrates that neither the Commission nor PGE intended to alter the preexisting, clear PPA terms that provided for fixed prices running from contract execution. Prior versions of PGE’s PPA defined the fixed-price period as coinciding with the first 15 “Contract Years” and defined “Contract Years” as beginning at contract execution.¹³⁷ PGE eliminated the reference to Contract Years from the provision governing Contract Price when PGE altered the definition of Contract Years to no longer run from contract execution.¹³⁸ Order No. 14-058 had nothing to do with the start date or length of the 15-year term of fixed prices. As Mr. Macfarlane explains in his testimony, deletion of the various market pricing options was “not intended to change, and did not change, the start date for the 15-year period for paying the fixed prices.”¹³⁹ Thus, the Commission’s approval of PGE’s compliance filing cannot reasonably be interpreted as the Commission or PGE altering the triggering event for the fixed-price period.

Supporting that interpretation, in Order No. 18-079, the Commission stated that “up until the filing of PGE’s most recent standard contracts,” the start date of the 15-year period was “neither a source of controversy nor litigation by either a QF or a utility.”¹⁴⁰ That is

¹³⁵ PGE/106, Macfarlane/94, 98-99 (PGE’s November 25, 2014 Compliance Filing in Docket No. 1610, Redline Standard Off-System Variable PPA at Sections 1.1.17 and 3.1.10).

¹³⁶ See PGE/106, Macfarlane/100 (Redline Standard Off-System Variable PPA at Section 5, showing elimination of “Contract Year” from definition of “Contract Price”).

¹³⁷ See *id.*

¹³⁸ PGE/106, Macfarlane/27 (Standard Off-System Variable Power Purchase Agreement at Sections 1.6 and 1.7).

¹³⁹ PGE/100, Macfarlane/22.

¹⁴⁰ UM 1805, Order No. 18-079 at 3.

so because prior to PGE’s compliance filings in response to Order No. 14-058, PGE’s standard PPA forms explicitly provided for 15 years of fixed prices beginning at contract execution, and because the amendments that eliminated the language in section 5 of the 2005 PPA were not intended to, and did not, alter the start date for the fixed-price period.

3. In approving PPA provisions that transferred ownership of environmental attributes, the Commission and PGE did not intend to, and did not, alter the triggering event for the fixed price period.

The NewSun Parties look to the provisions of the standard PPAs dealing with ownership of “Environmental Attributes” as evidence that the fixed-price period runs from commercial operations.¹⁴¹ But ownership of the Environmental Attributes has nothing to do with the start date of the fixed-price period. In relevant part, Section 4.5 of the NewSun PPAs states “During the Renewable Resource Sufficiency Period, and any period within the Term of this 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.”¹⁴² Schedule 201 states “Sellers with PPAs exceeding 15 years . . . will retain all Environmental Attributes generated by the facility for all years up to five in excess of the initial 15.”¹⁴³ In total, these provisions mean that the QF retains the Environmental Attributes during any of the following three periods: (1) “the Renewable Resource Sufficiency Period;” (2) “all years up to five in excess of the initial 15” years following contract execution; and (3) “after completion of the first fifteen (15) years after the Commercial Operation Date.”¹⁴⁴

There is no contradiction or inconsistency. To be sure, the provision of the PPA, which states that the QF retains the Environmental Attributes “after completion of the first fifteen (15) years after the Commercial Operation Date” is redundant. Schedule 201 already states that the QF retains the Environmental Attributes for all years after the “initial 15” years following contract execution, a period which necessarily includes all years after

¹⁴¹ Answer at 4-5 (Jun. 6, 2018); NewSun Parties/100, Stephens/13.

¹⁴² Compl., Ex. 1 at 10 (Alfalfa Solar I LLC PPA at Section 4.5).

¹⁴³ *Id.* at 30 (Alfalfa Solar I LLC PPA’s Schedule 201 at Sheet 201-12).

¹⁴⁴ *Id.* at 10-11 (Alfalfa Solar I LLC PPA at Section 4.5)

the “first fifteen (15) years after the Commercial Operation Date.” Where one interpretation of a contract or statute will render a provision “redundant,” but the alternative interpretation will render other provisions of the contract or statute meaningless, then a court or other adjudicatory body should choose the redundancy.¹⁴⁵ As described above, NewSun’s interpretation of the PPA forms would render numerous provisions meaningless and therefore must be rejected.

The redundancy in Section 4.5 derives from the unique drafting history of Section 4.5, which again had nothing to do with the start date of the fixed-price period. In Order No. 11-505, the Commission determined that “[d]uring periods of renewable resource sufficiency, the rates will be based on market rates” and “[t]he renewable resource QF will keep all associated Renewable Resource Energy Certificates (RECs).”¹⁴⁶ During subsequent workshops to draft language to comply with this order, the Oregon Department of Energy suggested a revision to Schedule 201 to make clear that the “RECs are not ceded after the [QF] stops receiving deficiency period avoided cost prices.”¹⁴⁷ To accommodate this request, PGE added proposed language to Schedule 201 stating that the QF would “retain all Environmental Attributes generated by the facility for all years up to five in excess of the initial 15.”¹⁴⁸ As described above, the “initial 15” years of the PPA begin at contract execution. Thus, the revised draft that PGE proposed in August 2014 transferred Environmental Attribute ownership to the QF 15 years after contract execution.

In a later mark-up, the Community Renewable Energy Association (“CREA”) proposed language in the PPA which stated that the QF would “retain[] ownership of all Environmental Attributes . . . after completion of the first fifteen (15) years after the

//

¹⁴⁵ See *Thomas Creek Lumber & Log Co. v. Dep’t of Revenue*, 344 Or 131, 138 (2008) (accepting interpretation of a statute that resulted in one section being “redundant” because the alternative interpretation would result in a separate section being “completely ineffective”).

¹⁴⁶ Docket No. UM 1129, Order No. 11-505 at 1.

¹⁴⁷ CREA-NIPCC-REC/208, Sanger/16 (Redline Schedule 201 QF Avoided Cost Power Purchase Information, which is Exhibit D to the PPA at Sheet No. 201-10).

¹⁴⁸ *Id.*

Commercial Operation Date.”¹⁴⁹ CREA noted that this made PGE’s PPA “consistent with the PacifiCorp contract” to protect QFs’ ability “to use the attributes that they retain.”¹⁵⁰ But PGE’s revised Schedule 201 already transferred Environmental Attribute ownership to QFs 15 years after contract execution, instead of the later date of 15 years after commercial operations. Thus, in the next revision from PGE (which became the text used in the NewSun PPAs), PGE incorporated CREA’s proposed language (“after completion of the first fifteen (15) years after the Commercial Operation Date”), but also revised the text to add the clarification that QF would “retain all Environmental Attributes *in accordance with the Schedule*.”¹⁵¹ This language now appears at Section 4.5 and explicitly provides that the Schedule controls, and thus that Section 4.5 has nothing to do with the Contract Price, let alone the start date of the fixed-price period.

4. Section 4.5 does not set the start date for the fixed-price period, because half of PGE’s standard PPAs that the Commission approved in September 2015 do not even have that Section 4.5 language governing environmental attribute ownership.

Under Oregon law, the context for interpreting a statutory provision includes other statutes *in pari materia*; that is, other statutes on the same general subject.¹⁵² Similarly, in interpreting a contract, Oregon courts construe related agreements together.¹⁵³ In complying with Order No. 11-505, PGE filed eight different contract forms, four for QFs who elect to sell the environmental attributes associated with their generating facility and four for QFs who are not selling environmental attributes to PGE.¹⁵⁴ The four renewable PPA forms include the Section 4.5 language quoted above about transferring

¹⁴⁹ CREA-NIPCC-REC/209, Sanger/45 (Greg Adams Email on September 2, 2014, Attachment Redline Standard Renewable In-System Non-Variable PPA at Section 4.6).

¹⁵⁰ *Id.*, showing comment.

¹⁵¹ CREA-NIPCC-REC/210, Sanger/45 (emphasis added) (Barbara Parr Email on October 3, 2014, Attachment Redline Standard Renewable In-System Non Variable PPA at Section 4.6).

¹⁵² *See, e.g., State v. Klein*, 352 Or 302, 309 (2012) (a statute’s context includes “related statutes”); *State v. Cloutier*, 351 Or 68, 98-99 (2011) (examining other sentencing statutes’ use of the word “maximum” to inform meaning of the word used in sentencing appellate review statute).

¹⁵³ *See Snow Mountain Pine, Ltd. v. Tecton Laminates Corp.*, 126 Or App 523, 528 (1994) (“When parties contemporaneously execute multiple agreements that address interrelated subjects, we are bound to construe them together as one contract to discern the parties’ intent.”).

¹⁵⁴ *See* DeLuca Decl., Ex. 1 (excerpts from PGE’s May 27, 2015 Compliance Filing in Docket No. UM 1610).

environmental attribute ownership.¹⁵⁵ The four non-renewable PPA forms do not contain this language, because environmental attributes are not transferred under the terms of these PPA forms.¹⁵⁶ The NewSun Parties contend, notwithstanding the other unambiguous terms of Schedule 201 and the PPA, that based on Section 4.5 they “reasonably believed” that the fixed-price period began at commercial operations.¹⁵⁷ But of course QFs that sign PPAs without the language in Section 4.5 would have no such belief.

Adopting NewSun’s position would create an inexplicable difference in the treatment of renewable and non-renewable PPAs. If the Commission adopted NewSun’s position, the 15-year fixed-price period would begin at COD for standard renewable PPAs, but the 15-year fixed-price period would begin at contract execution for standard non-renewable PPAs. There is no evidence that PGE or the Commission intended to treat renewable and non-renewable PPAs differently, given that PGE submitted and the Commission approved all eight PPA forms simultaneously and made no mention of any distinction between renewable and non-renewable PPAs. Thus, PGE’s addition of Section 4.5 to half of the forms, and the Commission’s approval of them, had nothing to do with the fixed-price period, and did nothing to alter the pre-existing terms that set contract execution as the triggering event for the fixed-price period.

C. The parties’ contracting history confirms that the 15-year period runs from contract execution because NewSun sought alterations to change the start date of this 15-year period, which PGE rejected.

During contract negotiations, PGE rejected NewSun’s proposed contract terms that would have started the fixed-price period at the Commercial Operation Date, and the NewSun Parties signed the PPAs without the changes requested. Oregon subscribes to the objective theory of contract.¹⁵⁸ In determining whether a contract exists and what its terms are, Oregon courts examine the objective manifestations of intent, as evidenced by the

¹⁵⁵ *Id.* at 16, 18-19, 22, and 25 (Standard Renewable PPAs at Section 4.5. The language appears in Section 4.6 for some PPA forms.).

¹⁵⁶ *Id.* at 4-13 (excerpts from standard, non-renewable PPAs describing “Delivery of Power” without mentioning environmental attributes in relation to Contract Price).

¹⁵⁷ *See* Answer at 5.

¹⁵⁸ *Real Estate Loan Fund Oregon, Ltd. v. Hevner*, 76 Or App 349, 354 (1985).

parties' communications and acts.¹⁵⁹ The offeror controls the terms of the offer and "the acceptance must coincide with and be in the same terms as the offer."¹⁶⁰ "If a new provision is suggested the answer is a mere counter-offer."¹⁶¹ When an offeree manifests its intent to accept the offer, and expresses no contrary intent in that manifestation, Oregon courts will enforce the contract on the terms posed by the offeror notwithstanding prior inconsistent positions during negotiations. For instance, where the offeror stated that its offer would expire at the end of the night, the offeree's acceptance that night was effective notwithstanding prior statements that the offeree would need several days to consider the offer.¹⁶² A secret intention not to agree to the terms of the contract has no effect if the parties' words and behavior clearly indicate agreement.¹⁶³

Applying the objective theory of contracts here, the undisputed evidence demonstrates that PGE only ever offered the NewSun Parties a PPA with a 20-year contract term and 15-year fixed price period, both of which ran from contract execution. Although NewSun attempted to negotiate PPAs that began both the 20-year term and the 15-year fixed-price period at commercial operations, PGE unequivocally rejected these proposed terms and defendants signed the PPAs anyway.

NewSun initially submitted altered PPA forms that set the end of each PPA's "Term" as 20 years from the Commercial Operation Date. PGE explained that the contract term "must run no more than 20 years from EXECUTION, not commercial operation."¹⁶⁴ In a series of follow-up emails a week later responding to the suggested PPA alterations, PGE stated it would not accept "a contract more than 20 years in length."¹⁶⁵ When NewSun then requested PPAs that would begin not just the total contract term, but also the

¹⁵⁹ *Id.*

¹⁶⁰ *Bridge City Family Med. Clinic, P.C. v. Kent & Johnson, LLP*, 270 Or App 115, 121 (2015) (citation omitted).

¹⁶¹ *Id.*

¹⁶² *Kaiser Found. Health Plan of the Nw. v. Doe*, 136 Or App 566, 572 (1995), *opinion mod on recon*, 138 Or App 428 (1996), *rev den*, 324 Or 394 (1996).

¹⁶³ *Nieminen v. Pitzer*, 281 Or 53, 57 (1978).

¹⁶⁴ New Sun Parties/111, Stephens/1 (October 21, 2015, Email from Bruce True to Jake Stephens) (emphasis in original).

¹⁶⁵ New Sun Parties/112, Stephens/1 (October 28, 2015, Email from Bruce True to Jake Stephens).

fixed-price period at commercial operations, PGE remained steadfast. PGE stated, “under the current form contract, PGE provides a 15 year fixed price term starting on the Effective Date,”¹⁶⁶ *i.e.* contract execution.

NewSun knew exactly what text had to be added to PGE’s standard PPAs for the 15-years of fixed prices to run from COD, because defendants found, and discussed with PGE, a signed PPA where the QF (OneEnergy Solar LLC) had altered the text of the PPA to provide that the 15-years of fixed prices runs from contract execution. NewSun’s counsel then sent a letter to PGE requesting specific text be added to the PPAs to mirror the text in the PPA with OneEnergy Solar LLC.¹⁶⁷ As described above, PGE refused to make changes to the NewSun PPAs and stated that “the 15 year fixed price term of PGE’s current standard contracts starts at execution.”¹⁶⁸ Defendants did not receive the changes they requested concerning the start of the 15-year fixed prices, and defendants then signed the 10 PPAs anyway.

In *Oregon Trail Electric Consumers Co-op, Inc. v. Co-Gen Co.*, during negotiations, a QF and a utility disputed which avoided costs table was applicable to a given PPA.¹⁶⁹ The utility eventually relented and incorporated the cost schedule favored by the QF with higher prices.¹⁷⁰ In later litigation before the Commission with a different QF, the Commission sided with the utility and determined that the lower-price schedule was appropriate.¹⁷¹ But the Court of Appeals determined that by signing the earlier PPA without litigating, the utility was bound by the terms of the PPA, not the terms it would have received had it sued prior to signing.¹⁷² The Court of Appeals reasoned that the utility “bypassed the administrative remedies it could have pursued” and therefore its “only remedies are those, if any, provided by the contract.”¹⁷³ Similarly, here, the NewSun

¹⁶⁶ New Sun Parties/118, Stephens/1 (November 20, 2015, Email from Bruce True to Jake Stephens).

¹⁶⁷ PGE/212, True/3 (December 3, 2015, Letter from Greg Adams to Denise Saunders)..

¹⁶⁸ PGE/214, True/2 (December 14, 2015, Letter from Denise Saunders to Greg Adams).

¹⁶⁹ *Oregon Trail Electric Consumers Co-op, Inc. v. Co-Gen Co.*, 168 Or App 466, 470-71 (2000).

¹⁷⁰ *Id.* at 471.

¹⁷¹ *See id.* (citing *Snow Mountain*, 84 Or App 590).

¹⁷² *Id.* at 471-72.

¹⁷³ *Id.* at 472.

Parties' arguments regarding Commission policies and the requirements of Order No. 05-584 are irrelevant. All defendants had access to an expedited dispute resolution process for disputes prior to contract execution regarding the terms of standard PURPA contracts.¹⁷⁴ Defendants bypassed that opportunity and are now bound by the PPAs they signed. Here, PGE unambiguously offered, and the NewSun Parties accepted, PPAs that began the 20-year contract term and 15-year fixed price period at contract execution.

Indeed, NewSun's representative during contract negotiations, Jake Stephens, admits in his testimony that he understood from these negotiations that "PGE was not going to agree to change its position regarding the fixed-price period and it was not going to move forward with execution of any PPA with a termination date more than twenty years after the contract was executed."¹⁷⁵ Stephens admits that he made the "strategic decision" to accept PGE's terms so that NewSun could lock in outdated fixed prices before a planned rate decrease. As Stephens states, "PGE's proposed out-of-cycle rate change was still pending, so I decided we would have to defer resolution of our disagreement with PGE in order to get the PPAs approved."¹⁷⁶ Stephens now contends that NewSun "did not put much stock in PGE's statements about the PPA term length, or what its contract forms meant," because it intended to adjudicate the issue later.¹⁷⁷ NewSun gave up on its attempt to convince PGE to agree to change the PPAs to provide for 15 years of fixed price from COD and, instead, signed the PPAs as PGE offered them.

The law does not permit NewSun to outwardly acquiesce to PGE's terms while silently plotting to file suit. "The law of contracts is not concerned with the parties' undisclosed intents and ideas. It gives heed only to their communications and overt acts."¹⁷⁸ Here, Stephens, on behalf of defendants, understood that "PGE was not going to

¹⁷⁴ *E.g.* Compl., Ex. 1 at 36 (Alfalfa Solar I LLC PPA's Schedule 201 at Sheet No. 201-24 (Dispute Resolution process)); *see* Docket No. 1610, Order No. 15-130, Appx. A at 3 (Apr. 16, 2015) (stipulating to and describing expedited process (based on Docket No. 1129, Order No. 07-360 at 9 (Aug. 20, 2007))); *see also id.* at 4 (adopting the stipulation in Appendix A).

¹⁷⁵ NewSun Parties/100, Stephens/27-28.

¹⁷⁶ *Id.* at 29.

¹⁷⁷ *Id.*

¹⁷⁸ *Wieck v. Hostetter*, 274 Or App 457, 471 (2015) (citation omitted).

agree to change its position regarding the fixed-price period,”¹⁷⁹ and signed unaltered PPA forms.

That extrinsic evidence of the circumstances of the parties at the time of contract execution shows that there was no ambiguity. PGE made a written offer—its standard PPA—that provided that the 15-years of fixed prices begins at contract execution. PGE orally and in writing confirmed that the offer was for the 15-years of fixed prices to begin at contract execution. The undisputed evidence shows that defendants knew what the offer was: fixed prices start at contract execution. The NewSun Parties also knew exactly what text needed to be changed to make the 15-year period start at COD, and they proposed that change. PGE rejected that change and again stated that its offer provided for the 15-year period to start at contract execution. Defendants, knowing what the offer was and what was needed to change the offer, and knowing that they failed in getting that change, signed the PPAs as-is. Defendants may not have liked the offer and may have wanted something different based on their prior industry dealings and their interpretation of Order No. 05-584, but that does not override the unambiguous words of the contract and the unambiguous explanation of the offer from PGE. There was no ambiguity as to the offer and the NewSun Parties accepted the offer.

V. CONCLUSION

The 15-year period of fixed prices in the NewSun Parties’ PPAs begins at contract execution. It is unambiguous that the PPA’s term is 20 years and that fixed prices apply only for the “initial 15” years of the PPA. The history of PGE’s standard PPA going back to 2005 is clear that PGE’s forms always provided that the 15-year period started at contract execution. The Commission in Docket No. UM 1805 stated that such a provision was acceptable up until 2017. During negotiations between the parties in 2015 and 2016, it is undisputed that defendants knew that the offer was for a PPA where the 15-years of fixed

//

¹⁷⁹ NewSun Parties/100, Stephens/27-28

prices began at contract execution. And when PGE rejected defendants' proposal to change text to make the 15-year period start from COD, defendants signed the PPAs anyway.

For those reasons as more fully described above, PGE respectfully requests that the Commission grant PGE's motion for summary judgment.

DATED this 29th day of January, 2019.

Respectfully submitted,

/s/ David White

David White, OSB #011382
Associate General Counsel
Portland General Electric Company
121 SW Salmon Street, 1WTC13
Portland, OR 97204
Tel: (503) 464-7701
Fax: (503) 464-2200
david.white@pgn.com

/s/ Jeffrey S. Lovinger

Jeffrey S. Lovinger, OSB #960147
Dallas S. DeLuca, OSB #072992
Markowitz Herbold PC
1211 SW Fifth Avenue, Suite 3000
Portland, OR 97204-3730
Tel: (503) 295-3085
Fax: (503) 323-9105
JeffLovinger@MarkowitzHerbold.com
DallasDeLuca@MarkowitzHerbold.com

January 29, 2019

Via Electronic Filing

Public Utility Commission of Oregon
Filing Center
201 High Street SE, Suite 100
Salem, Oregon 97301-3398

Re: UM 1931 - Portland General Electric Company v. Alfalfa Solar I LLC, et al.

Attention Filing Center:

Enclosed for filing in the above-named docket is the Declaration of Dallas DeLuca in Support of Portland General Electric Company's Motion for Summary Judgment.

Thank you for your assistance.

Very truly yours,



Jeffrey S. Lovinger

Enclosure

831124

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1931

PORTLAND GENERAL ELECTRIC
COMPANY,

Complainant,

v.

ALFALFA SOLAR I LLC, DAYTON
SOLAR I LLC, FORT ROCK SOLAR I LLC,
FORT ROCK SOLAR II LLC, FORT ROCK
SOLAR IV LLC, HARNEY SOLAR I LLC,
RILEY SOLAR I LLC, STARVATION
SOLAR I LLC, TYGH VALLEY SOLAR I
LLC, WASCO SOLAR I LLC,

Defendants.

**DECLARATION OF DALLAS
DELUCA IN SUPPORT OF
PORTLAND GENERAL
ELECTRIC COMPANY'S
MOTION FOR SUMMARY
JUDGMENT**

I, Dallas DeLuca declare:

1. I am complainant's attorney, and I make this declaration in support of complainant's Motion for Summary Judgment. The following statements are true and correct and, if called upon, I could competently testify to the facts averred herein.

2. Attached as **Exhibit 1** is a true and accurate copy of excerpts of PGE's May 27, 2015, compliance filing in Docket No. UM 1610, *Re Investigation Into Qualifying Facility Contracting and Pricing* (May 30, 2018).

//
//
//
//
//
//
//

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 29th day of January, 2019.

MARKOWITZ HERBOLD PC

By: */s/ Dallas S. DeLuca*

Dallas S. DeLuca, OSB #072992

830161



Portland General Electric Company
Legal Department
121 SW Salmon Street • Portland, Oregon 97204
503-464-7181 • Facsimile 503-464-2200

V. Denise Saunders
Associate General Counsel

May 27, 2015

Via Electronic Filing and U.S. Mail

Public Utility Commission of Oregon
Attn: Filing Center
3930 Fairview Industrial Drive SE
P.O. Box 1088
Salem, OR 97308-1088

RE: UM 1610 – Portland General Electric Company's Application in Compliance with
OPUC Order No. 15-130

In compliance with ORS 757.205 and OPUC Order No. 15-130 of Docket UM 1610, Portland General Electric Company ("PGE") hereby submits for filing an original and one copy as follows:

1. PGE's revised Schedule 201, Qualifying Facility (QF) Power Purchase Information for Qualifying Facilities 10 MW or Less. Also provided as a courtesy is a redlined version of Sheet Nos. 201-1 through Sheet Nos. 201-24.
2. PGE's revised standard QF power purchase agreements as identified below, in both clean and redline formats:
 - a. Standard Off-System Variable Power Purchase Agreement
 - b. Standard In-System Non-Variable Power Purchase Agreement
 - c. Standard Off-System Non-Variable Power Purchase Agreement
 - d. Standard In-System Variable Power Purchase Agreement
 - e. Standard Renewable Off-System Non-Variable Power Purchase Agreement
 - f. Standard Renewable Off-System Variable Power Purchase Agreement
 - g. Standard Renewable In-System Variable Power Purchase Agreement
 - h. Standard Renewable In-System Non-Variable Power Purchase Agreement
3. A table showing how the changes required by Order No. 15-130 were incorporated in PGE's power purchase agreements and Schedule 201.

Public Utility Commission of Oregon
UM 1610
May 27, 2015
Page 2

PGE respectfully requests an effective date of July 23, 2015 for the power purchase agreements and Schedule 201.

Please contact Denise Saunders at (503) 464-7181 or Rob Macfarlane at (503) 464-8954 with any questions pertaining to this filing.

Please direct all formal correspondence and requests to the following email address:
pge.opuc.filings@pgn.com.

Sincerely,

A handwritten signature in blue ink that reads "V. Denise Saunders". The signature is written in a cursive style.

V. Denise Saunders
Associate General Counsel

VDS:bp

Enclosures

STANDARD OFF-SYSTEM VARIABLE POWER PURCHASE AGREEMENT

THIS AGREEMENT, entered into this _____ day, _____
20____, is between _____ ("Seller")
and Portland General Electric Company ("PGE") (hereinafter each a "Party" or
collectively, "Parties").

RECITALS

Seller intends to construct, own, operate and maintain a _____
facility for the generation of electric power located in _____
County, _____ with a Nameplate Capacity Rating of _____
kilowatt ("kW"), as further described in Exhibit A ("Facility"); and

Seller intends to operate the Facility as a "Qualifying Facility," as such term is
defined in Section 3.1.3, below.

Seller shall sell and PGE shall purchase the entire Net Output, as such term is
defined in Section 1.21, below, from the Facility in accordance with the terms and
conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, the Parties mutually agree as follows:

SECTION 1: DEFINITIONS

When used in this Agreement, the following terms shall have the following
meanings:

1.1. "As-built Supplement" means the supplement to Exhibit A provided by
Seller in accordance with Section 4.3 following completion of construction of the Facility,
describing the Facility as actually built.

1.2. "Base Hours" is defined as the total number of hours in each Contract
Year (8,760 or 8,784 for leap year).

1.3. "Billing Period" means from the start of the first day of each calendar
month to the end of the last day of each calendar month.

1.4. "Cash Escrow" means an agreement by two parties to place money into
the custody of a third party for delivery to a grantee only after the fulfillment of the
conditions specified.

1.5. "Commercial Operation Date" means the date that the Facility is deemed
by PGE to be fully operational and reliable. PGE may, at its discretion require, among
other things, that all of the following events have occurred:

1.5.1. (facilities with nameplate under 500 kW exempt from following
requirement) PGE has received a certificate addressed to PGE from a Licensed
Professional Engineer ("LPE") acceptable to PGE in its reasonable judgment stating
that the Facility is able to generate electric power reliably in accordance with the terms

the Seller identifies as confidential except PGE will provide all such confidential information to the Public Utility Commission of Oregon upon the Commission's request.

SECTION 4: DELIVERY OF POWER AND PRICE

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

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

4.3. Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built. Seller shall not increase the Nameplate Capacity Rating above that specified in Exhibit A or increase the ability of the Facility to deliver Net Output in quantities in excess of the Net Dependable Capacity, or the Maximum Net Output as described in Section 3.1.11 above, through any means including, but not limited to, replacement, modification, or addition of existing equipment, except with prior written notice to PGE. In the event Seller increases the Nameplate Capacity Rating of the Facility to no more than 10,000 kW pursuant to this section, PGE shall pay the Contract Price for the additional delivered Net Output. In the event Seller increases the Nameplate Capacity Rating to greater than 10,000 kW, then Seller shall be required to enter into a new power purchase agreement for all delivered Net Output proportionally related to the increase of Nameplate Capacity above 10,000 kW.

4.4. Seller shall provide preschedules for all deliveries of energy hereunder, including identification of receiving and generating control areas, by 9:00:00 PPT on the last business day prior to the scheduled date of delivery. All energy shall be scheduled according to the most current North America Energy Reliability Corporation (NERC) and Western Electricity Coordinating Council (WECC) scheduling rules and practices. The Parties' respective representatives shall maintain hourly real-time schedule coordination; provided, however, that in the absence of such coordination, the hourly schedule established by the exchange of preschedules shall be considered final. Seller and PGE shall maintain records of hourly energy schedules for accounting and operating purposes. The final E-Tag shall be the controlling evidence of the Parties' schedule. All energy shall be prescheduled according to customary WECC scheduling practices. Seller shall make commercially reasonable efforts to schedule in any hour an amount equal to its expected Net Output for such hour. Seller shall maintain a minimum of two years records of Net Output and shall agree to allow PGE to have access to such records and to imbalance information kept by the Transmission Provider.

4.5. Seller may report under §1605(b) of the Energy Policy Act of 1992 or under any applicable program as belonging to Seller any of the Environmental Attributes produced with respect to the Facility, and PGE shall not report under such program that such Environmental Attributes belong to it.

STANDARD IN-SYSTEM NON-VARIABLE POWER PURCHASE AGREEMENT

THIS AGREEMENT, entered into this _____ day, _____
20____, is between _____ ("Seller") and Portland General
Electric Company ("PGE") (hereinafter each a "Party" or collectively, "Parties").

RECITALS

Seller intends to construct, own, operate and maintain a _____
facility for the generation of electric power located in _____
County, _____ with a Nameplate Capacity Rating of _____
kilowatt ("kW"), as further described in Exhibit B ("Facility"); and

Seller intends to operate the Facility as a "Qualifying Facility," as such term is
defined in Section 3.1.3, below.

Seller shall sell and PGE shall purchase the entire Net Output, as such term is
defined in Section 1.19, below, from the Facility in accordance with the terms and
conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, the Parties mutually agree as follows:

SECTION 1: DEFINITIONS

When used in this Agreement, the following terms shall have the following
meanings:

1.1. "As-built Supplement" means the supplement to Exhibit B provided by
Seller in accordance with Section 4.4 following completion of construction of the Facility,
describing the Facility as actually built.

1.2. "Billing Period" means a period between PGE's readings of its power
purchase billing meter at the Facility in the normal course of PGE's business. Such
periods may vary and may not coincide with calendar months, however, PGE shall use
best efforts to read the power purchase billing meter in 12 equally spaced periods per
year.

1.3. "Cash Escrow" means an agreement by two parties to place money into
the custody of a third party for delivery to a grantee only after the fulfillment of the
conditions specified.

1.4. "Commercial Operation Date" means the date that the Facility is deemed
by PGE to be fully operational and reliable. PGE may, at its discretion require, among
other things, that all of the following events have occurred:

3.1.9. Seller estimates that the average annual Net Output to be delivered by the Facility to PGE is _____ kilowatt-hours (“kWh”), which amount PGE will include in its resource planning.

3.1.10. Seller will deliver from the Facility to PGE at the Point of Delivery Net Output not to exceed a maximum of _____ kWh of Net Output during each Contract Year (“Maximum Net Output”).

3.1.11. By the Commercial Operation Date, Seller has entered into a Generation Interconnection Agreement for a term not less than the term of this Agreement.

3.1.12. PGE warrants that it has not within the past two (2) years been the debtor in any bankruptcy proceeding, and PGE is and will continue to be for the Term of this Agreement current on all of its financial obligations.

3.1.13. Seller warrants that (i) the Facility satisfies the eligibility requirements specified in the Definition of a Small Cogeneration Facility or Small Power Production Facility Eligible to Receive the Standard Rates and Standard PPA in PGE’s Schedule and (ii) Seller will not make any changes in its ownership, control or management during the term of this Agreement that would cause it to not be in compliance with the Definition of a Small Cogeneration Facility or Small Power Production Facility Eligible to Receive the Standard Rates and Standard PPA in PGE’s Schedule. Seller will provide, upon request by PGE not more frequently than every 36 months, such documentation and information as may be reasonably required to establish Seller’s continued compliance with such Definition. PGE agrees to take reasonable steps to maintain the confidentiality of any portion of the above described documentation and information that the Seller identifies as confidential except PGE will provide all such confidential information to the Commission upon the Commission’s request.

SECTION 4: DELIVERY OF POWER AND PRICE

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

4.2. Seller shall deliver to PGE from the Facility for each Contract Year Net Output equal to or greater than the Minimum Net Output (either (a) if Seller does not select the Alternative Minimum Amount as defined in Exhibit A of this Agreement, seventy-five percent (75%) of its average annual Net Output or (b) if selected by Seller, the Alternative Minimum Amount designated for each Contract Year), provided that such Minimum Net Output shall be reduced on a pro-rata basis for any periods during a Contract Year that the Facility was prevented from generating electricity for reasons of Force Majeure.

4.3. Seller agrees that if Seller does not deliver the Minimum Net Output each Contract Year, PGE will suffer losses equal to the Lost Energy Value. As damages for Seller’s failure to deliver the Minimum Net Output (subject to adjustment for reasons of Force Majeure as provided in Section 4.2) in any Contract Year, notwithstanding any

other provision of this Agreement, the purchase price payable by PGE for future deliveries shall be reduced until Lost Energy Value is recovered. PGE and Seller shall work together in good faith to establish the period, in monthly amounts (not more than 24 months), of such reduction so as to avoid Seller's default on its commercial or financing agreements necessary for its continued operation of the Facility. For QF Facilities sized at 100 kW or smaller, the provisions of this section shall not apply.

4.4. Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built. Seller shall not increase the Nameplate Capacity Rating above that specified in Exhibit B or increase the ability of the Facility to deliver Net Output in quantities in excess of the Net Dependable Capacity, or the Maximum Net Output as described in Section 3.1.10 above, through any means including, but not limited to, replacement, modification, or addition of existing equipment, except with prior written notice to PGE. In the event Seller increases the Nameplate Capacity Rating of the Facility to no more than 10,000 kW pursuant to this section, PGE shall pay the Contract Price for the additional delivered Net Output. In the event Seller increases the Nameplate Capacity Rating to greater than 10,000 kW, then Seller shall be required to enter into a new power purchase agreement for all delivered Net Output proportionally related to the increase of Nameplate Capacity above 10,000 kW.

4.5. To the extent not otherwise provided in the Generation Interconnection Agreement, all costs associated with the modifications to PGE's interconnection facilities or electric system occasioned by or related to the interconnection of the Facility with PGE's system, or any increase in generating capability of the Facility, or any increase of delivery of Net Dependable Capacity from the Facility, shall be borne by Seller.

4.6. Seller may report under §1605(b) of the Energy Policy Act of 1992 or under any applicable program as belonging to Seller any of the Environmental Attributes produced with respect to the Facility, and PGE shall not report under such program that such Environmental Attributes belong to it.

SECTION 5: OPERATION AND CONTROL

5.1. Seller shall operate and maintain the Facility in a safe manner in accordance with the Generation Interconnection Agreement, and Prudent Electrical Practices. PGE shall have no obligation to purchase Net Output from the Facility to the extent the interconnection of the Facility to PGE's electric system is disconnected, suspended or interrupted, in whole or in part, pursuant to the Generation Interconnection Agreement, or to the extent generation curtailment is required as a result of Seller's noncompliance with the Generation Interconnection Agreement. Seller is solely responsible for the operation and maintenance of the Facility. PGE shall not, by reason of its decision to inspect or not to inspect the Facility, or by any action or inaction taken with respect to any such inspection, assume or be held responsible for any liability or occurrence arising from the operation and maintenance by Seller of the Facility.

STANDARD OFF-SYSTEM NON-VARIABLE POWER PURCHASE AGREEMENT

THIS AGREEMENT, entered into this _____ day, _____
20_____, is between _____ ("Seller")
and Portland General Electric Company ("PGE") (hereinafter each a "Party" or
collectively, "Parties").

RECITALS

Seller intends to construct, own, operate and maintain a _____
facility for the generation of electric power located in _____
County, _____ with a Nameplate Capacity Rating of _____ kilowatt
("kW"), as further described in Exhibit B ("Facility"); and

Seller intends to operate the Facility as a "Qualifying Facility," as such term is
defined in Section 3.1.3, below.

Seller shall sell and PGE shall purchase the entire Net Output, as such term is
defined in Section 1.19, below, from the Facility in accordance with the terms and
conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, the Parties mutually agree as follows:

SECTION 1: DEFINITIONS

When used in this Agreement, the following terms shall have the following
meanings:

1.1. "As-built Supplement" means the supplement to Exhibit B provided by
Seller in accordance with Section 4.4 following completion of construction of the Facility,
describing the Facility as actually built.

1.2. "Billing Period" means from the start of the first day of each calendar
month to the end of the last day of each calendar month.

1.3. "Cash Escrow" means an agreement by two parties to place money into
the custody of a third party for delivery to a grantee only after the fulfillment of the
conditions specified.

1.4. "Commercial Operation Date" means the date that the Facility is deemed
by PGE to be fully operational and reliable. PGE may, at its discretion require, among
other things, that all of the following events have occurred:

1.4.1. (facilities with nameplate under 500 kW exempt from following
requirement) PGE has received a certificate addressed to PGE from a Licensed
Professional Engineer ("LPE") acceptable to PGE in its reasonable judgment stating
that the Facility is able to generate electric power reliably in amounts required by this
Agreement and in accordance with all other terms and conditions of this Agreement
(certifications required under this Section 1.4 can be provided by one or more LPEs);

3.1.6. Seller warrants that it will design and operate the Facility consistent with Prudent Electrical Practices.

3.1.7. Seller warrants that the Facility has a Nameplate Capacity Rating not greater than 10,000 kW.

3.1.8. Seller warrants that Net Dependable Capacity of the Facility is _____ kW.

3.1.9. Seller estimates that the average annual Net Output to be delivered by the Facility to PGE is _____ kilowatt-hours (“kWh”), which amount PGE will include in its resource planning.

3.1.10. Seller will schedule and deliver from the Facility to PGE at the Point of Delivery Net Output not to exceed a maximum of _____ kWh of Net Output during each Contract Year (“Maximum Net Output”). The cost of delivering energy from the Facility to PGE is the sole responsibility of the Seller.

3.1.11. By the Commercial Operation Date, Seller has entered into a Generation Interconnection Agreement for a term not less than the term of this Agreement.

3.1.12. PGE warrants that it has not within the past two (2) years been the debtor in any bankruptcy proceeding, and PGE is and will continue to be for the Term of this Agreement current on all of its financial obligations.

3.1.13. Seller warrants that (i) the Facility satisfies the eligibility requirements specified in the Definition of a Small Cogeneration Facility or Small Power Production Facility Eligible to Receive the Standard Rates and Standard PPA in PGE’s Schedule and (ii) Seller will not make any changes in its ownership, control or management during the term of this Agreement that would cause it to not be in compliance with the Definition of a Small Cogeneration Facility or Small Power Production Facility Eligible to Receive the Standard Rates and Standard PPA in PGE’s Schedule. Seller will provide, upon request by PGE not more frequently than every 36 months, such documentation and information as may be reasonably required to establish Seller’s continued compliance with such Definition. PGE agrees to take reasonable steps to maintain the confidentiality of any portion of the above described documentation and information that the Seller identifies as confidential except PGE will provide all such confidential information to the Commission upon the Commission’s request.

SECTION 4: DELIVERY OF POWER AND PRICE

4.1. Commencing on the Effective Date and continuing through the Term of this Agreement, Seller shall sell to PGE the entire Net Output from the Facility. Seller’s Net Output shall be scheduled and delivered to PGE at the Point of Delivery in accordance with Section 4.5. PGE shall pay Seller the Contract Price for all scheduled and delivered Net Output.

4.2. Seller shall schedule and deliver to PGE from the Facility for each Contract Year Net Output equal to or greater than the Minimum Net Output (either (a) if Seller does not select the Alternative Minimum Amount as defined in Exhibit A of this

Agreement, seventy-five percent (75%) of its average annual Net Output or (b) if selected by Seller, the Alternative Minimum Amount designated for each Contract Year), provided that such Minimum Net Output shall be reduced on a pro-rata basis for any periods during a Contract Year(s) that the Facility was prevented from generating electricity for reasons of Force Majeure.

4.3. Seller agrees that if Seller does not deliver the Minimum Net Output each Contract Year for reasons other than Transmission Curtailment, PGE will suffer losses equal to the Lost Energy Value. As damages for Seller's failure to deliver the Minimum Net Output (subject to adjustment for reasons of Force Majeure as provided in Section 4.2) in any Contract Year, notwithstanding any other provision of this Agreement the purchase price payable by PGE for future deliveries shall be reduced until Lost Energy Value is recovered. PGE and Seller shall work together in good faith to establish the period, in monthly amounts (not more than 24 months), of such reduction so as to avoid Seller's default on its commercial or financing agreements necessary for its continued operation of the Facility for QF Facilities sized at 100 kW or smaller, the provisions of this section shall not apply.

4.4. Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built. Seller shall not increase the Nameplate Capacity Rating above that specified in Exhibit B or increase the ability of the Facility to deliver Net Output in quantities in excess of the Net Dependable Capacity, or the Maximum Net Output as described in Section 3.1.10 above, through any means including, but not limited to, replacement, modification, or addition of existing equipment, except with prior written notice to PGE. In the event Seller increases the Nameplate Capacity Rating of the Facility to no more than 10,000 kW pursuant to this section, PGE shall pay the Contract Price for the additional delivered Net Output. In the event Seller increases the Nameplate Capacity Rating of the Facility to greater than 10,000 kW, then Seller shall be required to enter into a new power purchase agreement for all delivered Net Output proportionally related to the increase of Nameplate Capacity above 10,000 kW.

4.5. Seller shall provide preschedules for all deliveries of energy hereunder, including identification of receiving and generating control areas, by 9:00:00 PPT on the last business day prior to the scheduled date of delivery. All energy shall be scheduled according to the most current North America Energy Reliability Corporation (NERC) and Western Electricity Coordinating Council (WECC) scheduling rules and practices. The Parties' respective representatives shall maintain hourly real-time schedule coordination; provided, however, that in the absence of such coordination, the hourly schedule established by the exchange of preschedules shall be considered final. Seller and PGE shall maintain records of hourly energy schedules for accounting and operating purposes. The final E-Tag shall be the controlling evidence of the Parties' schedule. All energy shall be prescheduled according to customary WECC scheduling practices. Seller shall make commercially reasonable efforts to schedule in any hour an amount equal to its expected Net Output for such hour. Seller shall maintain a minimum

of two years records of Net Output and shall agree to allow PGE to have access to such records and to imbalance information kept by the Transmission Provider.

4.6. Seller may report under §1605(b) of the Energy Policy Act of 1992 or under any applicable program as belonging to Seller any of the Environmental Attributes produced with respect to the Facility, and PGE shall not report under such program that such Environmental Attributes belong to it.

SECTION 5: OPERATION AND CONTROL

5.1. Seller shall operate and maintain the Facility in a safe manner in accordance with the Generation Interconnection Agreement, and Prudent Electrical Practices. PGE shall have no obligation to purchase Net Output from the Facility to the extent the interconnection of the Facility or transmission to PGE's electric system is curtailed, disconnected, suspended or interrupted, in whole or in part. Seller is solely responsible for the operation and maintenance of the Facility. PGE shall not, by reason of its decision to inspect or not to inspect the Facility, or by any action or inaction taken with respect to any such inspection, assume or be held responsible for any liability or occurrence arising from the operation and maintenance by Seller of the Facility.

5.2. Seller agrees to provide sixty (60) days advance written notice of any scheduled maintenance that would require shut down of the Facility for any period of time.

5.3. If the Facility ceases operation for unscheduled maintenance, Seller immediately shall notify PGE of the necessity of such unscheduled maintenance that could affect the generation, scheduling or delivery of energy to PGE, the time when such maintenance has occurred or will occur, and the anticipated duration of such maintenance. Seller shall take all reasonable measures and exercise its best efforts to avoid unscheduled maintenance, to limit the duration of such unscheduled maintenance, and to perform unscheduled maintenance during Off-Peak hours.

SECTION 6: CREDITWORTHINESS

In the event Seller: a) is unable to represent or warrant as required by Section 3 that it has not been a debtor in any bankruptcy proceeding within the past two (2) years; b) becomes such a debtor during the Term; or c) is not or will not be current on all its financial obligations, Seller shall immediately notify PGE and shall promptly (and in no less than ten (10) days after notifying PGE) provide default security in an amount reasonably acceptable to PGE in one of the following forms: Senior Lien, Step in Rights, a Cash Escrow or Letter of Credit. The amount of such default security that shall be acceptable to PGE shall be equal to: (annual On Peak Hours) X (On Peak Price – Off Peak Price) X (Minimum Net Output / 8760). Notwithstanding the foregoing, in the event Seller is not current on construction related financial obligations, Seller shall notify PGE of such delinquency and PGE may, in its discretion, grant an exception to the requirements to provide default security if the QF has negotiated financial arrangements with the construction loan lender that mitigate Seller's financial risk to PGE.

STANDARD IN-SYSTEM VARIABLE POWER PURCHASE AGREEMENT

THIS AGREEMENT, entered into this _____ day, _____, 20____, is between _____ ("Seller") and Portland General Electric Company ("PGE") (hereinafter each a "Party" or collectively, "Parties").

RECITALS

Seller intends to construct, own, operate and maintain a _____ facility for the generation of electric power located in _____ County, _____ with a Nameplate Capacity Rating of _____ kilowatt ("kW"), as further described in Exhibit A ("Facility"); and

Seller intends to operate the Facility as a "Qualifying Facility," as such term is defined in Section 3.1.3, below.

Seller shall sell and PGE shall purchase the entire Net Output, as such term is defined in Section 1.21, below, from the Facility in accordance with the terms and conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, the Parties mutually agree as follows:

SECTION 1: DEFINITIONS

When used in this Agreement, the following terms shall have the following meanings:

1.1. "As-built Supplement" means the supplement to Exhibit A provided by Seller in accordance with Section 4.3 following completion of construction of the Facility, describing the Facility as actually built.

1.2. "Base Hours" is defined as the total number of hours in each Contract Year (8,760 or 8,784 for leap year)

1.3. "Billing Period" means a period between PGE's readings of its power purchase billing meter at the Facility in the normal course of PGE's business. Such periods may vary and may not coincide with calendar months, however PGE shall use best efforts to read the power purchase billing meter in 12 equally spaced periods per year.

1.4. "Cash Escrow" means an agreement by two parties to place money into the custody of a third party for delivery to a grantee only after the fulfillment of the conditions specified.

3.1.14. Seller warrants that (i) the Facility satisfies the eligibility requirements specified in the Definition of a Small Cogeneration Facility or Small Power Production Facility Eligible to Receive the Standard Rates and Standard PPA in PGE's Schedule and (ii) Seller will not make any changes in its ownership, control or management during the term of this Agreement that would cause it to not be in compliance with the Definition of a Small Cogeneration Facility or Small Power Production Facility Eligible to Receive the Standard Rates and Standard PPA in PGE's Schedule. Seller will provide, upon request by PGE not more frequently than every 36 months, such documentation and information as may be reasonably required to establish Seller's continued compliance with such Definition. PGE agrees to take reasonable steps to maintain the confidentiality of any portion of the above described documentation and information that the Seller identifies as confidential except PGE will provide all such confidential information to the Public Utility Commission of Oregon upon the Commission's request.

SECTION 4: DELIVERY OF POWER AND PRICE

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

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

4.3. Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built. Seller shall not increase the Nameplate Capacity Rating above that specified in Exhibit A or increase the ability of the Facility to deliver Net Output in quantities in excess of the Net Dependable Capacity, or the Maximum Net Output as described in Section 3.1.11 above, through any means including, but not limited to, replacement, modification, or addition of existing equipment, except with prior written notice to PGE. In the event Seller increases the Nameplate Capacity Rating of the Facility to no more than 10,000 kW pursuant to this section, PGE shall pay the Contract Price for the additional delivered Net Output. In the event Seller increases the Nameplate Capacity Rating to greater than 10,000 kW, then Seller shall be required to enter into a new power purchase agreement for all delivered Net Output proportionally related to the increase of Nameplate Capacity above 10,000 kW.

4.4. To the extent not otherwise provided in the Generation Interconnection Agreement, all costs associated with the modifications to PGE's interconnection facilities or electric system occasioned by or related to the interconnection of the Facility with PGE's system, or any increase in generating capability of the Facility, or any increase of delivery of Net Dependable Capacity from the Facility, shall be borne by Seller.

4.5. Seller may report under §1605(b) of the Energy Policy Act of 1992 or under any applicable program as belonging to Seller any of the Environmental Attributes produced with respect to the Facility, and PGE shall not report under such program that such Environmental Attributes belong to it.

**STANDARD RENEWABLE OFF-SYSTEM NON-VARIABLE POWER PURCHASE
AGREEMENT**

THIS AGREEMENT, entered into this _____ day, _____
20____, is between _____ ("Seller")
and Portland General Electric Company ("PGE") (hereinafter each a "Party" or
collectively, "Parties").

RECITALS

Seller intends to construct, own, operate and maintain a _____
facility for the generation of electric power located in _____
County, _____ with a Nameplate Capacity Rating of _____
kilowatt ("kW"), as further described in Exhibit B ("Facility"); and

Seller intends to operate the Facility as a "Qualifying Facility," as such term is
defined in Section 3.1.3, below.

Seller shall sell and PGE shall purchase the entire Net Output, as such term is
defined in Section 1.19, below, from the Facility in accordance with the terms and
conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, the Parties mutually agree as follows:

SECTION 1: DEFINITIONS

When used in this Agreement, the following terms shall have the following
meanings:

1.1. "As-built Supplement" means the supplement to Exhibit B provided by
Seller in accordance with Section 4.4 following completion of construction of the Facility,
describing the Facility as actually built.

1.2. "Billing Period" means from the start of the first day of each calendar
month to the end of the last day of each calendar month.

1.3. "Cash Escrow" means an agreement by two parties to place money into
the custody of a third party for delivery to a grantee only after the fulfillment of the
conditions specified.

1.4. "Commercial Operation Date" means the date that the Facility is deemed
by PGE to be fully operational and reliable. PGE may, at its discretion require, among
other things, that all of the following events have occurred:

1.4.1. (facilities with nameplate under 500 kW exempt from following
requirement) PGE has received a certificate addressed to PGE from a Licensed
Professional Engineer ("LPE") acceptable to PGE in its reasonable judgment stating
that the Facility is able to generate electric power reliably in amounts required by this

3.1.14. Seller warrants that it will comply with all requirements necessary for all Transferred RECs (as defined in Section 4.6) associated with Net Output to be issued, monitored, accounted for, and transferred by and through the Western Renewable Energy Generation System consistent with the provisions of OAR 330-160-0005 through OAR 330-160-0050. PGE warrants that it will reasonably cooperate in Seller's efforts to meet such requirements, including, for example serving as the qualified reporting entity for the Facility if the Facility is located in PGE's balancing authority.

SECTION 4: DELIVERY OF POWER, PRICE AND ENVIRONMENTAL ATTRIBUTES

4.1. Commencing on the Effective Date and continuing through the Term of this Agreement, Seller shall sell to PGE the entire Net Output from the Facility. Seller's Net Output shall be scheduled and delivered to PGE at the Point of Delivery in accordance with Section 4.5. PGE shall pay Seller the Contract Price for all scheduled and delivered Net Output.

4.2. Seller shall schedule and deliver to PGE from the Facility for each Contract Year Net Output equal to or greater than the Minimum Net Output (either (a) if Seller does not select the Alternative Minimum Amount as defined in Exhibit A of this Agreement, a minimum of seventy-five percent (75%) of its average annual Net Output or (b) if selected by Seller, the Alternative Minimum Amount), provided that such Minimum Net Output for the final Contract Year shall be reduced pro rata to reflect the Commercial Operation Date, and further provided that such Minimum Net Output shall be reduced on a pro-rata basis for any periods during a Contract Year that the Facility was prevented from generating electricity for reasons of Force Majeure.

4.3. Seller agrees that if Seller does not deliver the Minimum Net Output each Contract Year for reasons other than Transmission Curtailment, PGE will suffer losses equal to the Lost Energy Value. As damages for Seller's failure to deliver the Minimum Net Output (subject to adjustment for reasons of Force Majeure as provided in Section 4.2) in any Contract Year, notwithstanding any other provision of this Agreement the purchase price payable by PGE for future deliveries shall be reduced until Lost Energy Value is recovered. PGE and Seller shall work together in good faith to establish the period, in monthly amounts, of such reduction so as to avoid Seller's default on its commercial or financing agreements necessary for its continued operation of the Facility for QF Facilities sized at 100 kW or smaller, the provisions of this section shall not apply.

4.4. Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built. Seller shall not increase the Nameplate Capacity Rating above that specified in Exhibit B or increase the ability of the Facility to deliver Net Output in quantities in excess of the Net Dependable Capacity, or the Maximum Net Output as described in Section 3.1.10 above, through any means including, but not limited to, replacement, modification, or addition of existing equipment, except with prior written notice to PGE. In the event Seller increases the Nameplate Capacity Rating of the Facility to no more than 10,000 kW pursuant to this section, PGE shall pay the Contract Price for the additional delivered Net Output. In the

event Seller increases the Nameplate Capacity Rating of the Facility to greater than 10,000 kW, then Seller shall be required to enter into a new power purchase agreement for all delivered Net Output proportionally related to the increase of Nameplate Capacity above 10,000 kW.

4.5. Seller shall provide preschedules for all deliveries of energy hereunder, including identification of receiving and generating control areas, by 9:00:00 PPT on the last business day prior to the scheduled date of delivery. All energy shall be scheduled according to the most current North America Energy Reliability Corporation (NERC) and Western Electricity Coordinating Council (WECC) scheduling rules and practices. The Parties' respective representatives shall maintain hourly real-time schedule coordination; provided, however, that in the absence of such coordination, the hourly schedule established by the exchange of preschedules shall be considered final. Seller and PGE shall maintain records of hourly energy schedules for accounting and operating purposes. The final E-Tag shall be the controlling evidence of the Parties' schedule. All energy shall be prescheduled according to customer WECC scheduling practices. Seller shall make commercially reasonable efforts to schedule in any hour an amount equal to its expected Net Output for such hour. Seller shall maintain a minimum of two years records of Net Output and shall agree to allow PGE to have access to such records and to imbalance information kept by the Transmission Provider.

4.6. During the Renewable Resource Deficiency Period, Seller shall provide and PGE shall acquire the RPS Attributes for the Contract Years as specified in the Schedule and Seller shall retain ownership of all other Environmental Attributes (if any). During the Renewable Resource Sufficiency Period, and any period within the Term of this 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. The Contract Price includes full payment for the Net Output and any RPS Attributes transferred to PGE under this Agreement. With respect to Environmental Attributes not transferred to PGE under this Agreement ("Seller-Retained Environmental Attributes") Seller may report under §1605(b) of the Energy Policy Act of 1992 or under any applicable program as belonging to Seller any of the Seller-Retained Environmental Attributes, and PGE shall not report under such program that such Seller-Retained Environmental Attributes belong to it. With respect to RPS Attributes transferred to PGE under this Agreement ("Transferred RECs"), PGE may report under §1605(b) of the Energy Policy Act of 1992 or under any applicable program as belonging to it any of the Transferred RECs, and Seller shall not report under such program that such Transferred RECs belong to it.

SECTION 5: OPERATION AND CONTROL

5.1. Seller shall operate and maintain the Facility in a safe manner in accordance with the Generation Interconnection Agreement, and Prudent Electrical Practices. PGE shall have no obligation to purchase Net Output from the Facility to the extent the interconnection of the Facility or transmission to PGE's electric system is curtailed, disconnected, suspended or interrupted, in whole or in part. Seller is solely

STANDARD RENEWABLE OFF-SYSTEM VARIABLE POWER PURCHASE

AGREEMENT

THIS AGREEMENT, entered into this _____ day, _____ 20____, is between _____ ("Seller") and Portland General Electric Company ("PGE") (hereinafter each a "Party" or collectively, "Parties").

RECITALS

Seller intends to construct, own, operate and maintain a _____ facility for the generation of electric power located in _____ County, _____ with a Nameplate Capacity Rating of _____ kilowatt ("kW"), as further described in Exhibit A ("Facility"); and

Seller intends to operate the Facility as a "Qualifying Facility," as such term is defined in Section 3.1.3, below.

Seller shall sell and PGE shall purchase the entire Net Output, as such term is defined in Section 1.21, below, from the Facility in accordance with the terms and conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, the Parties mutually agree as follows:

SECTION 1: DEFINITIONS

When used in this Agreement, the following terms shall have the following meanings:

1.1. "As-built Supplement" means the supplement to Exhibit A provided by Seller in accordance with Section 4.3 following completion of construction of the Facility, describing the Facility as actually built.

1.2. "Base Hours" is defined as the total number of hours in each Contract Year (8,760 or 8,784 for leap year)

1.3. "Billing Period" means from the start of the first day of each calendar month to the end of the last day of each calendar month.

1.4. "Cash Escrow" means an agreement by two parties to place money into the custody of a third party for delivery to a grantee only after the fulfillment of the conditions specified.

through OAR 330-160-0050. PGE warrants that it will reasonably cooperate in Seller's efforts to meet such requirements, including, for example serving as the qualified reporting entity for the Facility if the Facility is located in PGE's balancing authority.

SECTION 4: DELIVERY OF POWER, PRICE AND ENVIRONMENTAL ATTRIBUTES

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

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

4.3. Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built. Seller shall not increase the Nameplate Capacity Rating above that specified in Exhibit A or increase the ability of the Facility to deliver Net Output in quantities in excess of the Net Dependable Capacity, or the Maximum Net Output as described in Section 3.1.11 above, through any means including, but not limited to, replacement, modification, or addition of existing equipment, except with prior written notice to PGE. In the event Seller increases the Nameplate Capacity Rating of the Facility to no more than 10,000 kW pursuant to this section, PGE shall pay the Contract Price for the additional delivered Net Output. In the event Seller increases the Nameplate Capacity Rating to greater than 10,000 kW, then Seller shall be required to enter into a new power purchase agreement for all delivered Net Output proportionally related to the increase of Nameplate Capacity above 10,000 kW.

4.4. Seller shall provide preschedules for all deliveries of energy hereunder, including identification of receiving and generating control areas, by 9:00:00 PPT on the last business day prior to the scheduled date of delivery. All energy shall be scheduled according to the most current North America Energy Reliability Corporation (NERC) and Western Electricity Coordinating Council (WECC) scheduling rules and practices. The Parties' respective representatives shall maintain hourly real-time schedule coordination; provided, however, that in the absence of such coordination, the hourly schedule established by the exchange of preschedules shall be considered final. Seller and PGE shall maintain records of hourly energy schedules for accounting and operating purposes. The final E-Tag shall be the controlling evidence of the Parties' schedule. All energy shall be prescheduled according to customary WECC scheduling practices. Seller shall make commercially reasonable efforts to schedule in any hour an amount equal to its expected Net Output for such hour. Seller shall maintain a minimum of two years records of Net Output and shall agree to allow PGE to have access to such records and to imbalance information kept by the Transmission Provider.

4.5. During the Renewable Resource Deficiency Period, Seller shall provide and PGE shall acquire the RPS Attributes for the Contract Years as specified in the Schedule and Seller shall retain ownership of all other Environmental Attributes (if any). During the Renewable Resource Sufficiency Period, and any period within the Term of

this 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. The Contract Price includes full payment for the Net Output and any RPS Attributes transferred to PGE under this Agreement. With respect to Environmental Attributes not transferred to PGE under this Agreement ("Seller-Retained Environmental Attributes") Seller may report under §1605(b) of the Energy Policy Act of 1992 or under any applicable program as belonging to Seller any of the Seller-Retained Environmental Attributes, and PGE shall not report under such program that such Seller-Retained Environmental Attributes belong to it. With respect to RPS Attributes transferred to PGE under this Agreement ("Transferred RECs"), PGE may report under §1605(b) of the Energy Policy Act of 1992 or under any applicable program as belonging to it any of the Transferred RECs, and Seller shall not report under such program that such Transferred RECs belong to it.

SECTION 5: OPERATION AND CONTROL

5.1. Seller shall operate and maintain the Facility in a safe manner in accordance with the Generation Interconnection Agreement, and Prudent Electrical Practices. PGE shall have no obligation to purchase Net Output from the Facility to the extent the interconnection of the Facility to PGE's electric system is disconnected, suspended or interrupted, in whole or in part, pursuant to the Generation Interconnection Agreement, or to the extent generation curtailment is required as a result of Seller's noncompliance with the Generation Interconnection Agreement. Seller is solely responsible for the operation and maintenance of the Facility. PGE shall not, by reason of its decision to inspect or not to inspect the Facility, or by any action or inaction taken with respect to any such inspection, assume or be held responsible for any liability or occurrence arising from the operation and maintenance by Seller of the Facility.

5.2. Seller agrees to provide sixty (60) days advance written notice of any scheduled maintenance that would require shut down of the Facility for any period of time.

5.3. If the Facility ceases operation for unscheduled maintenance, Seller immediately shall notify PGE of the necessity of such unscheduled maintenance, the time when such maintenance has occurred or will occur, and the anticipated duration of such maintenance. Seller shall take all reasonable measures and exercise its best efforts to avoid unscheduled maintenance, to limit the duration of such unscheduled maintenance, and to perform unscheduled maintenance during Off-Peak hours.

SECTION 6: CREDITWORTHINESS

In the event Seller: a) is unable to represent or warrant as required by Section 3 that it has not been a debtor in any bankruptcy proceeding within the past two (2) years; b) becomes such a debtor during the Term; or c) is not or will not be current on all its financial obligations, Seller shall immediately notify PGE and shall promptly (and in no less than 10 days after notifying PGE) provide default security in an amount reasonably

STANDARD RENEWABLE IN-SYSTEM VARIABLE POWER PURCHASE

AGREEMENT

THIS AGREEMENT, entered into this _____ day, _____ 20____, is between _____ ("Seller") and Portland General Electric Company ("PGE") (hereinafter each a "Party" or collectively, "Parties").

RECITALS

Seller intends to construct, own, operate and maintain a _____ facility for the generation of electric power located in _____ County, _____ with a Nameplate Capacity Rating of _____ kilowatt ("kW"), as further described in Exhibit A ("Facility"); and

Seller intends to operate the Facility as a "Qualifying Facility," as such term is defined in Section 3.1.3, below.

Seller shall sell and PGE shall purchase the entire Net Output, as such term is defined in Section 1.21, below, from the Facility in accordance with the terms and conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, the Parties mutually agree as follows:

SECTION 1: DEFINITIONS

When used in this Agreement, the following terms shall have the following meanings:

1.1. "As-built Supplement" means the supplement to Exhibit A provided by Seller in accordance with Section 4.3 following completion of construction of the Facility, describing the Facility as actually built.

1.2. "Base Hours" is defined as the total number of hours in each Contract Year (8,760 or 8,784 for leap year).

1.3. "Billing Period" means a period between PGE's readings of its power purchase billing meter at the Facility in the normal course of PGE's business. Such periods may vary and may not coincide with calendar months; however, PGE shall use best efforts to read the power purchase billing meter in 12 equally spaced periods per year.

3.1.12. By the Commercial Operation Date, Seller has entered into a Generation Interconnection Agreement for a term not less than the term of this Agreement.

3.1.13. PGE warrants that it has not within the past two (2) years been the debtor in any bankruptcy proceeding, and PGE is and will continue to be for the Term of this Agreement current on all of its financial obligations.

3.1.14. Seller warrants that (i) the Facility satisfies the eligibility requirements specified in the Definition of a Small Cogeneration Facility or Small Power Production Facility Eligible to Receive the Standard Renewable Rates and Standard Renewable PPA in PGE's Schedule and (ii) Seller will not make any changes in its ownership, control or management during the term of this Agreement that would cause it to not be in compliance with the Definition of a Small Cogeneration Facility or Small Power Production Facility Eligible to Receive the Standard Renewable Rates and Standard Renewable PPA in PGE's Schedule. Seller will provide, upon request by PGE not more frequently than every 36 months, such documentation and information as may be reasonably required to establish Seller's continued compliance with such Definition. PGE agrees to take reasonable steps to maintain the confidentiality of any portion of the above described documentation and information that the Seller identifies as confidential except PGE will provide all such confidential information to the Public Utility Commission of Oregon upon the Commission's request.

3.1.15. Seller warrants that it will comply with all requirements necessary for all Transferred RECs (as defined in Section 4.5) associated with Net Output to be issued, monitored, accounted for, and transferred by and through the Western Renewable Energy Generation System consistent with the provisions of OAR 330-160-0005 through OAR 330-160-0050. PGE warrants that it will reasonably cooperate in Seller's efforts to meet such requirements, including, for example serving as the qualified reporting entity for the Facility if the Facility is located in PGE's balancing authority.

SECTION 4: DELIVERY OF POWER, PRICE AND ENVIRONMENTAL ATTRIBUTES

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

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

4.3. Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built. Seller shall not increase the Nameplate Capacity Rating above that specified in Exhibit A or increase the ability of the Facility to deliver Net Output in quantities in excess of the Net Dependable Capacity, or the Maximum Net Output as described in Section 3.1.11 above, through any means including, but not limited to, replacement, modification, or addition of existing equipment, except with prior written notice to PGE. In the event Seller increases the Nameplate Capacity Rating of the Facility to no more than 10,000 kW

pursuant to this section, PGE shall pay the Contract Price for the additional delivered Net Output. In the event Seller increases the Nameplate Capacity Rating to greater than 10,000 kW, then Seller shall be required to enter into a new power purchase agreement for all delivered Net Output proportionally related to the increase of Nameplate Capacity above 10,000 kW.

4.4. To the extent not otherwise provided in the Generation Interconnection Agreement, all costs associated with the modifications to PGE's interconnection facilities or electric system occasioned by or related to the interconnection of the Facility with PGE's system, or any increase in generating capability of the Facility, or any increase of delivery of Net Dependable Capacity from the Facility, shall be borne by Seller.

4.5. During the Renewable Resource Deficiency Period, Seller shall provide and PGE shall acquire the RPS Attributes for the Contract Years as specified in the Schedule and Seller shall retain ownership of all other Environmental Attributes (if any). During the Renewable Resource Sufficiency Period, and any period within the Term of this 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. The Contract Price includes full payment for the Net Output and any RPS Attributes transferred to PGE under this Agreement. With respect to Environmental Attributes not transferred to PGE under this Agreement ("Seller-Retained Environmental Attributes") Seller may report under §1605(b) of the Energy Policy Act of 1992 or under any applicable program as belonging to Seller any of the Seller-Retained Environmental Attributes, and PGE shall not report under such program that such Seller-Retained Environmental Attributes belong to it. With respect to RPS Attributes transferred to PGE under this Agreement ("Transferred RECs"), PGE may report under §1605(b) of the Energy Policy Act of 1992 or under any applicable program as belonging to it any of the Transferred RECs, and Seller shall not report under such program that such Transferred RECs belong to it.

SECTION 5: OPERATION AND CONTROL

5.1. Seller shall operate and maintain the Facility in a safe manner in accordance with the Generation Interconnection Agreement, and Prudent Electrical Practices. PGE shall have no obligation to purchase Net Output from the Facility to the extent the interconnection of the Facility to PGE's electric system is disconnected, suspended or interrupted, in whole or in part, pursuant to the Generation Interconnection Agreement, or to the extent generation curtailment is required as a result of Seller's noncompliance with the Generation Interconnection Agreement. Seller is solely responsible for the operation and maintenance of the Facility. PGE shall not, by reason of its decision to inspect or not to inspect the Facility, or by any action or inaction taken with respect to any such inspection, assume or be held responsible for any liability or occurrence arising from the operation and maintenance by Seller of the Facility.

**STANDARD RENEWABLE IN-SYSTEM NON-VARIABLE POWER PURCHASE
AGREEMENT**

THIS AGREEMENT, entered into this _____ day, _____
20____, is between _____ ("Seller") and Portland
General Electric Company ("PGE") (hereinafter each a "Party" or collectively, "Parties").

RECITALS

Seller intends to construct, own, operate and maintain a _____
facility for the generation of electric power located in _____ County, _____
with a Nameplate Capacity Rating of _____ kilowatt ("kW"), as further described in
Exhibit B ("Facility"); and

Seller intends to operate the Facility as a "Qualifying Facility," as such term is
defined in Section 3.1.3, below.

Seller shall sell and PGE shall purchase the entire Net Output, as such term is
defined in Section 1.19, below, from the Facility in accordance with the terms and
conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, the Parties mutually agree as follows:

SECTION 1: DEFINITIONS

When used in this Agreement, the following terms shall have the following
meanings:

1.1. "As-built Supplement" means the supplement to Exhibit B provided by
Seller in accordance with Section 4.4 following completion of construction of the Facility,
describing the Facility as actually built.

1.2. "Billing Period" means a period between PGE's readings of its power
purchase billing meter at the Facility in the normal course of PGE's business. Such
periods may vary and may not coincide with calendar months, however, PGE shall use
best efforts to read the power purchase billing meter in 12 equally spaced periods per
year.

1.3. "Cash Escrow" means an agreement by two parties to place money into
the custody of a third party for delivery to a grantee only after the fulfillment of the
conditions specified.

1.4. "Commercial Operation Date" means the date that the Facility is deemed
by PGE to be fully operational and reliable. PGE may, at its discretion, require, among
other things, that all of the following events have occurred:

1.4.1. (facilities with nameplate under 500 kW exempt from following
requirement) PGE has received a certificate addressed to PGE from a Licensed

3.1.7. Seller warrants that the Facility has a Nameplate Capacity Rating not greater than 10,000 kW.

3.1.8. Seller warrants that Net Dependable Capacity of the Facility is _____ kW.

3.1.9. Seller estimates that the average annual Net Output to be delivered by the Facility to PGE is _____ kilowatt-hours ("kWh"), which amount PGE will include in its resource planning.

3.1.10. Seller will deliver from the Facility to PGE at the Point of Delivery Net Output not to exceed a maximum of _____ kWh of Net Output during each Contract Year ("Maximum Net Output").

3.1.11. By the Commercial Operation Date, Seller has entered into a Generation Interconnection Agreement for a term not less than the term of this Agreement.

3.1.12. PGE warrants that it has not within the past two (2) years been the debtor in any bankruptcy proceeding, and PGE is and will continue to be for the Term of this Agreement current on all of its financial obligations.

3.1.13. Seller warrants that the Facility satisfies the eligibility requirements specified in the Definition of a Small Cogeneration Facility or Small Power Production Facility Eligible to Receive the Standard Renewable Rates and Standard Renewable PPA in PGE's Schedule and Seller will not make any changes in its ownership, control or management during the term of this Agreement that would cause it to not be in compliance with the Definition of a Small Cogeneration Facility or Small Power Production Facility Eligible to Receive the Standard Renewable Rates and Standard Renewable PPA in PGE's Schedule. Seller will provide, upon request by PGE not more frequently than every 36 months, such documentation and information as may be reasonably required to establish Seller's continued compliance with such Definition. PGE agrees to take reasonable steps to maintain the confidentiality of any portion of the above described documentation and information that the Seller identifies as confidential except PGE will provide all such confidential information to the Commission upon the Commission's request.

3.1.14. Seller warrants that it will comply with all requirements necessary for all Transferred RECs (as defined in Section 4.6) associated with Net Output to be issued, monitored, accounted for, and transferred by and through the Western Renewable Energy Generation System consistent with the provisions of OAR 330-160-0005 through OAR 330-160-0050. PGE warrants that it will reasonably cooperate in Seller's efforts to meet such requirements, including, for example serving as the qualified reporting entity for the Facility if the Facility is located in PGE's balancing authority.

SECTION 4: DELIVERY OF POWER, PRICE AND RPS ATTRIBUTES

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

4.2. Seller shall deliver to PGE from the Facility for each Contract Year Net Output equal to or greater than the Minimum Net Output (either (a) if Seller does not select the Alternative Minimum Amount as defined in Exhibit A of this Agreement, seventy-five percent (75%) of its average annual Net Output or (b) if selected by Seller, the Alternative Minimum Amount designated for each Contract Year), provided that such Minimum Net Output shall be reduced on a pro-rata basis for any periods during a Contract Year that the Facility was prevented from generating electricity for reasons of Force Majeure.

4.3. Seller agrees that if Seller does not deliver the Minimum Net Output each Contract Year, PGE will suffer losses equal to the Lost Energy Value. As damages for Seller's failure to deliver the Minimum Net Output (subject to adjustment for reasons of Force Majeure as provided in Section 4.2) in any Contract Year, notwithstanding any other provision of this Agreement, the purchase price payable by PGE for future deliveries shall be reduced until Lost Energy Value is recovered. PGE and Seller shall work together in good faith to establish the period, in monthly amounts (not more than 24 months), of such reduction so as to avoid Seller's default on its commercial or financing agreements necessary for its continued operation of the Facility. For QF Facilities sized at 100 kW or smaller, the provisions of this section shall not apply.

4.4. Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built. Seller shall not increase the Nameplate Capacity Rating above that specified in Exhibit B or increase the ability of the Facility to deliver Net Output in quantities in excess of the Net Dependable Capacity, or the Maximum Net Output as described in Section 3.1.10 above, through any means including, but not limited to, replacement, modification, or addition of existing equipment, except with prior written notice to PGE. In the event Seller increases the Nameplate Capacity Rating of the Facility to no more than 10,000 kW pursuant to this section, PGE shall pay the Contract Price for the additional delivered Net Output. In the event Seller increases the Nameplate Capacity Rating to greater than 10,000 kW, then Seller shall be required to enter into a new power purchase agreement for all delivered Net Output proportionally related to the increase of Nameplate Capacity above 10,000 kW.

4.5. To the extent not otherwise provided in the Generation Interconnection Agreement, all costs associated with the modifications to PGE's interconnection facilities or electric system occasioned by or related to the interconnection of the Facility with PGE's system, or any increase in generating capability of the Facility, or any increase of delivery of Net Dependable Capacity from the Facility, shall be borne by Seller.

4.6. During the Renewable Resource Deficiency Period, Seller shall provide and PGE shall acquire the RPS Attributes for the Contract Years as specified in the Schedule and Seller shall retain ownership of all other Environmental Attributes (if any). During the Renewable Resource Sufficiency Period, and any period within the Term of this Agreement after completion of the first fifteen (15) years after the Commercial Operation Date, Seller shall retain all Environmental Attributes in accordance with the