BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY,	)	
Complainant,	)	**DEFENDANTS' RESPONSE TO PORTLAND GENERAL ELECTRIC COMPANY'S MOTION FOR SUMMARY JUDGMENT**
v.	)	
ALFALFA SOLAR I LLC, et al.,	)	
Defendants.	)	

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INTRODUCTION AND SUMMARY

Alfalfa Solar I LLC ("Alfalfa"), Dayton Solar I LLC ("Dayton"), Fort Rock Solar I LLC ("Fort Rock I"), Fort Rock Solar II LLC ("Fort Rock II"), Fort Rock Solar IV LLC ("Fort Rock IV"), Harney Solar I LLC ("Harney"), Riley Solar I LLC ("Riley"), Starvation Solar I LLC ("Starvation"), Tygh Valley Solar I LLC ("Tygh Valley"), and Wasco Solar I LLC ("Wasco") (collectively, "Defendants" or the "NewSun Parties") hereby submit their response to Portland General Electric Company's ("PGE") Motion for Summary Judgement ("Motion"). The Public Utility Commission of Oregon (the "OPUC" or "Commission") should deny PGE's Motion.

The NewSun Parties demonstrated in their Motion for Summary Judgment why their power purchase agreements (the "NewSun PPAs") require PGE to pay the applicable Qualifying Facility ("QF") the fixed-price On-Peak and Off-Peak rates in Tables 6a and 6b of Schedule 201 for fifteen years after the Commercial Operation Date. Those arguments defeat PGE's Motion, which misconstrues the Commission's orders regarding the fixed-price period, misapplies contract law, and misreads the summary judgment evidence. Among other unsound principles PGE seeks to establish, PGE asserts that it has the authority to change the meaning of a Commission policy and a standard contract solely through PGE's incorrect assertions to a prospective QF before execution of the contract form. PGE further hopes to establish that a QF is bound by PGE's interpretation of contract forms the QF did not sign. PGE's arguments are without any basis in law or fact, and the Commission should therefore reject them.

ARGUMENT

I. PGE Continues to Misread Order No. 05-584 and the Regulatory Policy Giving Rise to the Contracts at Issue Since 2005

An analysis of the meaning of standard contracts in Oregon must begin with the regulatory context to understand the policy giving rise to the contract. In Order No. 05-584, the Commission first articulated its longstanding policy that utilities must offer fifteen years of fixed prices commencing when a QF becomes operational and is delivering power to the utility. *In re Investigation Related to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 19-20 (May 13, 2005). Accordingly, the NewSun Parties contend in their motion for summary judgment that an analysis of the context of the NewSun PPAs must begin with Order No. 05-584.[1] *NewSun Parties' Motion* at 6-11, 26-28.

While PGE appears to agree that it is the starting point of a contextual analysis (s*ee PGE's Motion* at 19-20), PGE continues to misinterpret Order No. 05-584. Despite the Commission's unambiguous statement in Order No. 18-079 that, ever since it issued Order No. 05-584, the Commission's policy always has been that the fifteen years of fixed prices commences when the QF becomes operational, PGE continues to contend that "Order No. 05-584 did not require a particular triggering event for the beginning of the 15-year term of fixed prices." *Id.* at 20. To reach this conclusion, PGE willfully ignores Order No. 18-079 and offers an interpretation of language in Order No. 17-256 that is completely inconsistent with the Commission's subsequent clarification of Order No. 17-256.

[1]The NewSun Parties' motion for summary judgment is referred to herein as the "NewSun Parties' Motion."

In Order No. 17-256, the Commission "clarif[ied] [its] policy in Order No. 05-584 to explicitly require standard contracts, on a going-forward basis, to provide for 15 years of fixed prices that commence when the QF transmits power to the utility." *Northwest and Intermountain Power Producers Coalition v. Portland General Electric Co.* (*hereafter* "*NIPPC I*"), Docket No. UM 1805, Order No. 17-256, at 4 (July 13, 2017). In so doing, the Commission stated that it "did not specify [in Order No. 05-584] the date on which th[e] 15-year term begins." *Id.* at 3. PGE latches onto this statement to suggest that "the Commission was clear that the 2005 order did not include … a requirement" that the fifteen-year term should commence when the QF becomes operational. *PGE's Motion* at 20. This, of course, cannot be squared with the Commission's explanation in Order No. 18-079 that its decision in UM 1805 did not "constitute[] the adoption of a 'new policy[;]'" rather, it "simply … affirm[ed] the [Commission's] policy with respect to the commencement date for the 15-year period of fixed prices." *Northwest and Intermountain Power Producers Coalition v. Portland General Electric Co.* (*hereafter* "*NIPPC III*"), Docket No. UM 1805, Order No. 18-079, at 3 (Mar 5, 2018). In other words, however PGE may wish to understand Order No. 05-584, the Commission's longstanding policy, as embodied in Order No. 05-584, is that "the 15-year term of fixed prices commences when the QF transmits power to the utility." *Northwest and Intermountain Power Producers Coalition v. Portland General Electric Co.* (*hereafter* "*NIPPC II*"), Docket No. UM 1805, Order No. 17-465 at 4 (Nov 13, 2017) (quoting Order No. 17-256). PGE cannot change that through assertions to the contrary.

Perhaps understanding that conceding the obvious is fatal to its case, PGE goes even further and suggests that the Commission must have used the word "term" in Order No. 05-584 to mean the period commencing when a QF executes a standard contract because "there was no

discussion of a second definition of the word 'term' to mean post-COD energy production." *PGE's Motion* at 4. PGE is wrong. The Commission expressly stated in Order No. 18-079 that it always intended the fifteen-year term of fixed prices to commence when the QF transmits power to the utility. Having found that most QF developers would need an executed PPA with a fifteen-year fixed-price term just to obtain financing to complete development, the Commission obviously cannot have meant for that term to begin when a standard contract is executed. It also is clear based on their respective implementations of Order No. 05-584 that Idaho Power and PacifiCorp always understood that the "term" the Commission referred to in Order No. 05-584 commenced when the QF begins transmitting power, not on execution. This understanding is further confirmed by undisputed evidence in the record demonstrating that, like Idaho Power and PacifiCorp, industry participants would have understood the Commission's use of the word "term" in Order No. 05-584 to describe the period during which a QF is operating and delivering power. *NewSun Parties' Motion* at 34-37.

PGE further attempts to subvert the importance of the Commission's policy-setting function by suggesting that if a utility intends the fifteen-year fixed-price term to begin on any date other than contract execution, such utility must include express language to that effect in its standard contract forms. *PGE's Motion* at 18. The inference from PGE's contention is that the default presumption should be that the fifteen-year fixed-price term begins at execution. This is exactly the opposite of how a standard contract form should be interpreted when the Commission has adopted a policy directly addressing the issue in question. Under Oregon law, the Commission's policy controls absent unambiguously clear language to the contrary. *NewSun Parties' Motion* at 26-29. Therefore, the default interpretation *must* be that PGE's executed

standard contract forms are consistent with this Commission's longstanding policy that the fifteen-year fixed-price period commences when the QF begins transmitting power to PGE.

II. PGE's Interpretation of the NewSun PPAs Is Out of Context and Incorrect

PGE misreads the provisions of the NewSun PPAs. Nothing in the NewSun Parties' completed and executed contract forms or Schedule 201 unambiguously states that the fixed-price period ends fifteen years immediately after the Effective Date, as PGE attempted to have the forms state before withdrawing such language in a stakeholder process. PGE admits that its interpretation requires the Commission to ignore express language in Section 4.5 of the PPAs. But PGE tries to minimize the problem as a mere "redundancy" that can be overlooked because, according to PGE, the NewSun Parties' interpretation renders several provisions of the agreements meaningless. *PGE's Motion* at 24-25. This argument is unavailing.

A. The NewSun Parties' Interpretation Does Not Render Any Provision Meaningless

Most importantly, PGE identifies no provisions of the NewSun PPAs that are rendered meaningless under the NewSun Parties' interpretation.

1. Schedule 201's statement that fixes prices "available for a maximum term of 15 years" is not meaningless

First, PGE argues the NewSun Parties' interpretation would render the word "available" meaningless in the phrase in Schedule 201 that states that the renewable fixed price option is "'available for a maximum term of 15 years.'" *See PGE's Motion* at 14 (quoting Schedule 201 at 12).[2] According to PGE, the fixed prices are capable of being used starting at contract

[2]PGE Exhibit 101, containing Alfalfa's PPA and Schedule 201, may be relied on for references to the provisions of the NewSun PPAs and the applicable Schedule 201 in this brief, unless otherwise noted.

execution and thus requiring those prices to be paid for longer than fifteen years immediately after contract execution would render the word "available" meaningless. Yet PGE acknowledges that the word "available" means "capable of use for the accomplishment of a purpose." *Id.* (citing *Webster's Third New Int'l Dictionary* 150 (unabridged ed 2002)). The fixed prices are not "capable of use for accomplishment of their purpose" until the QF begins delivering power to PGE because the NewSun PPAs do not require PGE to pay the relevant NewSun Party any price prior to that time. As the Commission itself determined in UM 1805, "[p]rices paid to a QF are only meaningful when a QF is operational and delivering power to the utility." *NIPPC I*, Order No. 17-256, at 4. Thus, "to provide a QF the full benefit of the fixed price requirement, the 15-year term must commence on the date of power delivery." *Id.*

PGE's own UM 1805 compliance filing that was intended to explicitly clarify that the fifteen-year fixed-price period commences on the scheduled Commercial Operation Date also states in its Schedule 201 that the Renewable Fixed Price Option "is *available* for a maximum term of 15 years." PGE/108, Macfarlane/60 (emphasis added). Therefore, the existence of this clause in the Schedule 201 applicable to the NewSun PPAs does not establish that the fixed-price period ends fifteen years immediately after execution.

2. Schedule 201's references to the twenty-year term is not meaningless

Next, PGE argues that the NewSun Parties' argument would allow for an overall "term" of over twenty years, rendering the provisions of Schedule 201 speaking to the available contract term length meaningless. *PGE's Motion* at 15-16. This argument has several flaws.

First, the NewSun PPAs each contain a Termination Date in Section 2.3 that occurs after completion of sixteen Contract Years, which will occur within twenty years of the Effective Date. Therefore, the length of the overall term hypothetically possible under Schedule 201 is not

relevant to the meaning of the NewSun PPAs as completed and executed by the parties. As with many other provisions of Schedule 201, such as pricing options that the NewSun Parties did not select, the description of the twenty-year term does not apply to the NewSun PPAs.

In any case, the NewSun Parties' interpretation does not render Schedule 201's description of the twenty-year term meaningless. As explained in unrebutted expert testimony of three different witnesses with many decades of experience, an ordinary industry participant would understand the words used in PGE's Schedule 201 to mean that PGE will execute a contract that contains a term of twenty years after operations. *Defendants and Intervenors' Joint Statement of Undisputed Additional Facts* (*hereafter* "*Defendants' Undisputed Facts*") at ¶¶ 49-54, 83-85, 87 (Jan. 25, 2019). The unrebutted evidence also demonstrates that Idaho Power and PacifiCorp's QF tariffs used nearly identical phrases as PGE's Schedule 201 — including "term," "contract length," and "years" — to describe the twenty-year term as the period of time after operations or expected operations. *Id.* at ¶ 53 (quoting CREA-NIPPC-REC/100, Lowe/8-13).

PGE misquotes Schedule 201 in an effort to support its argument. Specifically, PGE argues that Schedule 201 states "that the total 'Term of [the] *Agreement*' is 'not to exceed 20 years.'" *PGE's Motion* at 15 (quoting Schedule 201 at 24) (emphasis in PGE's brief). By doing so, PGE suggests that the first letter in the word "term" is capitalized in Schedule 201, when it is not. PGE then relies on the definition in Section 1.38 of the standard contract form for the word "Term," (with a capital "T") which is defined to commence on the Effective Date. But in the quoted section of Schedule 201, the word "term" is simply part of a heading where all letters are capitalized as follows:

TERM OF AGREEMENT

Not less than one year and not to exceed 20 years.

Schedule 201 at 24 (capitalization and bold in Schedule 201). This is similar language to that used in the Idaho Power and PacifiCorp tariffs to describe the twenty-year period of time after operations or expected operations. For example, PacifiCorp's Oregon tariff includes a statement that the utility offers fixed prices for a "contract term of up to 15 years and prices under a longer term contract (up to 20 years)" with market prices thereafter. *See* CREA-NIPPC-REC/100, Lowe/10 (quoting PacifiCorp tariff).

PGE also argues the failure to capitalize the word "term" throughout Schedule 201 is not important, and the word "term" must have the same meaning in Schedule 201 as in Section 1.38 of the standard contract. *PGE's Motion* at 15-16. According to PGE, it is irrelevant when a party does not capitalize a defined term in a contract, a sweeping proposition for which PGE points to a single decision, *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, 254 Or App 24, 29, 295 P3d 62 (2012), *aff'd*, 355 Or 286 (2014). However, in *Sunset Presbyterian Church*, the issue did not turn on whether the defined words were capitalized or not. *Id.* at 28-29. Therefore, that decision does not stand for the sweeping proposition PGE asserts and has no relevance here — especially where it is common in the industry to use the words at issue in a generalized sense to mean something different from the capitalized definition in PGE's contract form.

Furthermore, as noted above, PGE itself still uses the lowercase word "term" in its post-UM 1805 Schedule 201 without intending it to have same meaning as the capitalized word "Term" in the contract form. PGE's post-UM 1805 Schedule 201 continues to state the Renewable Fixed Price Option is "available for a maximum *term* of 15 years." PGE/108,

Macfarlane/60 (emphasis added). Similarly, it still states the Standard Fixed Price Option is "available for a maximum *term* of 15 years." *Id.* at 52 (emphasis added).

Notably, the post-UM 1805 Schedule 201 even uses the lower case word "term" to describe the twenty-year period after expected operation where it states, "The agreement will have a term of up to 20 years as selected by the QF and memorialized in the PPA." *Id.* at 49 (underline noting changes in compliance filing). Section 1.38 of the post-UM 1805 standard contract form still defines the capitalized word "Term" to be the period beginning on the Effective Date. *Id.* at 78. The post-UM 1805 standard contract clarifies that the "Term" may last up to twenty years after the scheduled Commercial Operation Date. *Id.* at 79 (Section 2.3). But the fact remains that even PGE uses the lowercase word "term" in the post-UM 1805 Schedule 201 in the generalized sense to describe the period beginning after expected operations, not the period beginning immediately after execution. That is, of course, because this use is consistent with common industry usage of the phrase.

In sum, PGE's reliance on the word "term" in Schedule 201 as applicable the NewSun PPAs is misplaced.

3. The price for test energy is not meaningless

PGE next argues that the NewSun Parties interpretation would render meaningless the price available for any test energy delivered before full Commercial Operation. *PGE's Motion* at 16-17. However, Schedule 201 only requires PGE to pay the lower *Off-Peak* prices in Table 6b for all Net Output delivered by the NewSun Parties prior to Commercial Operation of the Facility. Schedule 201 at 4. Such lower price still has meaning as the reduced price for test energy even if PGE must pay the full On-Peak and Off-Peak prices for fifteen years after the Commercial Operation Date.

As unrebutted testimony establishes, it is normal in a power purchase agreement "for new generation to have some period prior to commercial operations pertaining to the pricing, sale, and delivery of test energy from the newly built facility." NewSun Parties/100, Stephens/36. That is because "the facility has to be built first and operations have to be tested before it gets commissioned as fully operational. The facility isn't reliable before then, though the energy does have some value, so usually that test energy has some lower price." *Id.* But the Facility is not entitled to the full avoided cost rates until it is fully operational. In the case of the NewSun PPAs, Schedule 201 sets that lower price as the Off-Peak fixed prices in Table 6b, even for energy delivered in On-Peak hours that would be entitled to the much higher prices in Table 6a if delivered after the Commercial Operation Date. *Id.* at 36-37; Schedule 201 at 4. Thus, while the Off-Peak prices in Table 6b are fixed in the sense that they will not change, the Off-Peak fixed prices paid for test energy are far lower than the On-Peak fixed prices set forth in Table 6a. These reduced payments for test energy cannot logically be considered part of the fifteen-year period of fixed prices at full avoided cost rates required by the Commission and Schedule 201.

The Commission has itself noted this point, explaining, "Standard contracts, whether prepared by PGE, Idaho Power or PacifiCorp, all contain QF performance benchmark event dates that must be achieved before the QF can offer power to the utility." *NIPPC I*, Order No. 17-256 at 4. That being the case, "[t]he 15-year period of fixed prices is, of necessity, tied to these benchmarks. Prices paid to a QF are only meaningful when a QF is operational and delivering power to the utility." *Id.* Despite this basic industry understanding and the Commission's intent, PGE's argument would result in no QF ever being paid the full avoided cost rates for fifteen years. That is so because it will always take some amount of time between execution of a contract and establishment of the requirements for Commercial Operation in

Section 1.5, after which PGE will first pay the full On-Peak and Off-Peak prices in Tables 6a and 6b. NewSun Parties/100, Stephens/36-38. Thus, PGE's interpretation of its contract forms and Schedule 201 would deprive every single QF of its entitlement to a full fifteen years of fixed-price payments at the full avoided cost rates for on-peak and off-peak power.

Additionally, PGE fails to explain how the use of the Off-Peak fixed prices for test energy is meaningless under the NewSun Parties' interpretation of the fifteen-year period. PGE's post-UM 1805 Schedule 201 still uses the Off-Peak fixed prices as the price paid for test energy even though all parties agree the Renewable Fixed Price Option in that Schedule 201 "is available for a maximum term of 15 years" that begins on the scheduled Commercial Operation Date. PGE/108, Macfarlane/52, 60. The Off-Peak fixed prices are simply a reduced price for test energy that PGE has used both before and after UM 1805. That selection has no impact on the other provisions of the NewSun PPAs that require PGE to pay the full avoided costs reflected in the On-Peak and Off-Peak prices in Tables 6a and 6b for fifteen years after the Commercial Operation Date.

4. The delay damages calculation is not meaningless

Finally, PGE incorrectly argues that Sections 1.28 and 1.35 regarding "Start-Up Lost Energy Value" would be superfluous if PGE must pay the fixed prices for fifteen years after the Commercial Operation Date because those sections make the Contract Prices relevant before operation. *PGE's Motion* at 17. PGE's argument is misplaced. Those provisions regarding delay damages are required by a Commission-approved stipulation. The stipulation established that in the event of a delay in a QF reaching Commercial Operation, PGE may not terminate for one year, but the QF must pay damages "equal to the positive difference between the utility's replacement power costs less the prices in the standard contract during the period of

default . . . ." *In re Pub. Util. Comm'n of Or. Staff Investigation Into Qualifying Facility Contracting and Pricing*, Docket No UM 1610, Order No. 15-130, at 2 (April 16, 2015). Sections 1.28, 1.35, and 8.2 of the NewSun PPAs use the applicable fixed-price rate tables to calculate and assess to the Seller the amount of damages, if any, owed for its failure to deliver power at the Contract Price during the delay period.[3] These provisions are in no way rendered irrelevant if PGE must pay fixed prices for fifteen years after the Commercial Operation Date.

B. PGE's Interpretation Would Require Reformation of Section 4.5

As the NewSun Parties demonstrated in their opening brief, Section 4.5 of the NewSun PPAs, when read in conjunction with Schedule 201, unambiguously establishes that PGE must pay the renewable fixed prices for fifteen years *after* the Commercial Operation Date. This result is supported by the regulatory context of these provisions, (*NewSun Parties' Motion* at 29-32), the text of the provisions, (*id.* at 14-16, 39-44), and even the extrinsic evidence of development of the underlying contract form where PGE agreed to this precise arrangement to secure non-opposition to the renewable contract form. *Id.* at 55.

Despite the plain meaning of Section 4.5, PGE argues that the change to market prices and the QF's ownership of RPS Attributes begins fifteen years after the Effective Date. PGE asserts Section 4.5's statement that "the QF retains the Environmental Attributes 'after completion of the first fifteen (15) years after the Commercial Operation Date' *is redundant.*" *PGE's Motion* at 24-25 (emphasis added). That is so, according to PGE, because "Schedule 201 already states that the QF retains the Environmental Attributes for all years after the 'initial 15'

[3]As required by the stipulation, Idaho Power and PacifiCorp's standard contracts have similar provisions that rely on the contract prices to calculated delay-default damages. *See, e.g.,* CREA-NIPPC-REC/101, Lowe/33-34 (PacifiCorp's PPA at §§ 11.1.5, 11.2.2, & 11.4.2).

years following contract execution." *Id.* Thus, under PGE's newly presented theory, the second sentence of Section 4.5 speaks only to a subset of the period of time that the QF will own RPS Attributes and is thus unnecessary.

PGE's own argument is fatal to its position. Courts must construe a contract to avoid rendering any provision contradictory to other provisions. *New Zealand Ins. Co. v. Griffith Rubber Mills*, 270 Or 71, 75, 526 P2d 567 (1974). However, PGE's interpretation leads to a direct contradiction with, and would require reformation of, Section 4.5. A court "may not reform a contract unless the plaintiff proves that the writing does not express the real agreement of the parties." *Ono v. Coos County*, 113 Or App 53, 55, 831 P2d 66 (1992). Section 4.5 contains at least two express provisions that would have to be reformed to accept PGE's position, and its redundancy argument does not resolve this problem.

First, Section 4.5 states in its first sentence when PGE will own the RPS Attributes. It states: "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)." NewSun PPAs at § 4.5 (emphasis added). Because Contract Years end on the anniversary of the Commercial Operation Date, the first sentence in Section 4.5 establishes that PGE will own the RPS Attributes beginning on January 1, 2020, up until an anniversary of the Commercial Operation Date. The second sentence of Section 4.5 confirms this by establishing when the QF will own the RPS Attributes. It provides: "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." *Id.* Thus, this second sentence addresses the years not addressed in the first

sentence, and it confirms that the QF owns the RPS Attributes from the onset of the first energy sales through the end of 2019, and any time "after completion of the first fifteen (15) years after the Commercial Operation Date." *Id*.

There is no ambiguity on these points. If PGE were correct that the QF will actually begin owning the RPS Attributes fifteen years *after the Effective Date*, each of the first two sentences of Section 4.5, independently and read together, would contradict that arrangement. The only way to reach PGE's preferred result is to reform the agreements by striking expressly defined words and adding different expressly defined words. But PGE has not presented any argument that the elements for such reformation are met here.

PGE also incorrectly argues that Section 4.5's express language using defined words on these points should be ignored in favor of PGE's out-of-context and atypical interpretation of Schedule 201. In support of that argument, PGE emphasizes the phrase: "*in accordance with the Schedule*" from the second sentence of Section 4.5. *PGE's Motion* at 26 (quoting NewSun PPAs at § 4.5) (emphasis in PGE's brief). However, Section 4.5's reference to the Schedule is necessary solely because the Definitions in the contract form itself do not define the Renewable Resource Sufficiency Period and Renewable Resource Deficiency Period. NewSun PPAs at Definitions.[4] Those phrases are *only* defined in Schedule 201 — in this case with a demarcation date of January 1, 2020. Schedule 201 at 23. Thus, Section 4.5 refers to the Schedule to determine that demarcation date. And it makes sense for the standard contract form to refer to the Schedule for the demarcation of the sufficiency and deficiency periods because those dates

[4]PGE asserts that, during the stakeholder process to develop the contract form and Schedule 201, PGE added the phrase "in accordance with the Schedule" to Section 4.5 after the edits made by CREA. *PGE's Motion* at 26. But that is wrong. The edits proposed by CREA for Section 4.5/4.6 also included reference to the Schedule. CREA-NIPPC-REC/209, Sanger/45.

will change each time PGE changes its avoided cost rates. Placing those dates in the Schedule, instead of the standard contract form itself, prevents the need to amend the standard contract form every time PGE updates its avoided cost rates.

PGE also incorrectly argues that Section 4.5 has nothing to do with the price applicable during any years. But PGE's argument ignores that Section 4.5 directly states, "The Contract Price includes full payment for the Net Output and any RPS Attributes transferred to PGE under this Agreement." NewSun PPAs at § 4.5. This sentence appears immediately after Section 4.5's first two sentences establish which party owns the RPS Attributes during each time period of the contract, all of which is consistent with Schedule 201's explanation that the price paid is tied to ownership of RPS Attributes. *NewSun Parties' Motion* at 14-16 (containing detailed quotations of Schedule 201 at 3, 12 & 23). PGE's assertion that Section 4.5 does not mention or have any relevance to the Contract Price is meritless.

Moreover, PGE misreads the authority it cites to argue its interpretation only results in an insignificant redundancy in Section 4.5. Specifically, PGE relies on a decision regarding *statutory* interpretation, *not* contractual interpretation. *PGE's Motion* at 24-25 (citing *Thomas Creek Lumber & Log Co. v. Dep't of Revenue*, 344 Or 131, 178 P3d 217 (2008)). In *Thomas Creek Lumber & Log Co.*, the court concluded that two subsections of a statute relied on an interest calculation in another statutory section for the purpose of calculating interest owing on taxes. A redundancy existed because only one of those two subsections contained an express reference to the statutory section containing the interest calculation. *Id.* at 136-38. However, both subsections referred to, and relied upon, the exact same interest calculation. *Id.* In contrast, PGE's argument results in Section 4.5 stating that the QF owns the RPS Attributes "fifteen (15) years after the Commercial Operation Date," NewSun PPAs at § 4.5, when, according to PGE,

the QF actually begins owning the RPS Attributes at least three years earlier than fifteen years after the Commercial Operation Date. That is not a redundancy. It is an express statement on the same subject that leads to a different result. Additionally, in *Thomas Creek Lumber & Log Co.*, the minor redundancy was only overlooked because: (i) the other interpretation "impermissibly 'omit[s] what has been inserted[,]'" and (ii) it renders another statutory provision "entirely without effect, contrary to another rule of statutory construction." *Id.* at 137 (quoting ORS 174.010). In contrast, here, PGE identifies no legitimate problems with the NewSun Parties' interpretation of the agreements.

C. PGE's Interpretation Selectively Relies on Out-of-Context Snippets of the Contract Form and Schedule 201

PGE also incorrectly argues that PGE will pay the fixed avoided cost prices to the NewSun Parties prior to operation of the applicable Facility. *PGE's Motion* at 13-14.

PGE's brief omits the fact that the NewSun PPAs only require PGE to pay for *delivered* Net Output. PGE argues that "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.'" *Id.* at 13 (quoting NewSun PPAs at § 4.1). However, Section 4.1 actually states: "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*." (emphasis added to words omitted by PGE's brief). Likewise, Section 4.2 states: "PGE shall pay Seller the Contract Price for all *delivered Net Output*." (emphasis added). Because the PPAs only require PGE to pay the Contract Price *after* the operation of the Facility when Net Output is *delivered* to PGE, PGE's suggestion that it will pay a Contract Price to a NewSun Party years prior to that time is incorrect.

PGE next selectively quotes to Schedule 201, asserting: "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.'" *PGE's Motion* at 14 (quoting Schedule 201 at 12). However, this "critical" quotation is incomplete. The *entire* sentence from Schedule 201, including the language PGE omitted through the use of ellipses, states: "Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price *and will retain all Environmental Attributes generated by the facility* for all years up to five in excess of the initial 15." Schedule 201 at 12 (emphasis added to words omitted by PGE). That omitted language is of course the language which, read in conjunction with Section 4.5 of the contract form, demonstrates PGE must pay fixed prices for fifteen years after the Commercial Operation Date.

PGE's interpretation also requires the Commission to infer definitions that do not exist in Schedule 201. PGE suggests that Schedule 201 defines the "Standard Power Purchase Agreement" and the "PPA," as those words are used in the Schedule, as beginning on the Effective Date. *See PGE's Motion* at 14 (citing Schedule 201 at 1 & 12). From that incorrect premise, PGE asserts the "initial 15" years of the "PPA" discussed later in the Schedule describing the beginning of market-based pricing and the QF's ownership of all Environmental Attributes must end fifteen years after the Effective Date. *Id.* However, there is no definition in Schedule 201 supporting PGE's position. Indeed, the words "Effective Date" are not contained in Schedule 201. The first paragraph of the Schedule, under the heading "PURPOSE", simply uses the abbreviation "PPA" for the words "Standard Power Purchase Agreement." Schedule 201 at 1. Nothing in the Schedule expressly limits the maximum term of fixed prices to the fifteen years immediately after the Effective Date.

PGE further asks the Commission to infer that Schedule 201's fixed-price period ends fifteen years immediately after the "Effective Date" because Schedule 201 does not specifically state that the fixed price term is available for fifteen Contract Years. *PGE's Motion* at 18. But Schedule 201 uses the same generalized language as other Oregon utilities' tariffs, and it does *not* state that the "maximum term of 15 years" of fixed pricing ends fifteen years immediately after the Effective Date. Indeed, PGE proposed such language for use in Schedule 201 and the PPA itself, but withdrew the proposal because the OPUC Staff stated that language would be a substantive change from the status quo. *Defendants' Undisputed Facts* at ¶¶ 57-58, 60-70 (citing CREA-NIPPC-REC/204, Sanger/1-2, 6). PGE cannot now properly seek the same result it *withdrew* to secure Commission approval of the Schedule and standard contract forms.

In sum, the provisions of the NewSun PPAs that PGE cites do not establish that the fixed-price period ends fifteen years immediately after execution.

III. PGE's "Legislative History" Arguments Are Misplaced

Apparently understanding that its interpretation of the NewSun PPAs is weak, PGE focuses much of its argument on interpretations of contract forms that the NewSun Parties did not execute. *PGE's Motion* at 19-24. PGE characterizes its prior contract forms, especially those developed in 2005, as relevant "legislative history" of the executed NewSun PPAs. However, PGE's argument fails for numerous reasons.

A. PGE Disavowed Reliance on Its Contract Forms From 2005

PGE's brief places too much weight on PGE's standard contract form developed in 2005, which was modified slightly in 2007 (hereafter the "2005 Standard Contract Form"). *See* PGE Exhibit 102 (containing the 2005 Standard Contract Form). The threshold problem with PGE's reliance on this form is that it is not the agreement executed by the NewSun Parties, and PGE

representatives expressly disavowed the relevance of PGE's previously offered contract forms. *See NewSun Parties' Motion* at 57-58 (discussing this point). PGE cannot now invoke the provisions of a contract form that it affirmatively stated to the NewSun Parties was irrelevant to the 2015 Standard Renewable Contract Form.[5]

Relying on *Batzer Const., Inc. v. Boyer*, 204 Or App 309, 320, 129 P3d 773 (2006), PGE also incorrectly argues that the 2005 Standard Contract Form is a prior draft of the NewSun PPAs. *PGE's Motion* at 19 & n 108. *Batzer* involved prior drafts that were exchanged by the contracting parties, and therefore has no relevance to the facts here where the parties did not exchange the 2005 Standard Contract Form. 204 Or App at 320-21.

Moreover, the 2005 Standard Contract Form contains entirely different provisions with respect to the issue in dispute. After Phase I of Docket No. UM 1610, PGE deleted the entire Section 5 of the 2005 Standard Contract Form. PGE/106, Macfarlane/100. That section described the Contract Price as a price that PGE asserts was only fixed for fifteen years after the Effective Date. PGE also deleted language in Section 2.3 of the form that stated the Termination date should be a date "up to 20 years from the Effective Date." *See id.* at 97 (containing a redline version of the revisions filed in December 2014). Those deletions were not replaced with any language in the contract form at issue here or in Schedule 201 that expressly states the fixed-price term ends fifteen years immediately after the Effective Date, or any language that states the overall contract term must end twenty years after the Effective Date. PGE/106. The 2005

[5]This brief refers to PGE's standard contract approved for use in Order No. 15-289 and executed by the NewSun Parties as the "2015 Standard Renewable Contract Form." That form, as filed with the Commission, is contained in the record at PGE/107, Macfarlane/28-49.

Standard Contract Form also contained none of the language at issue in this proceeding regarding ownership of RPS Attributes.

PGE's reliance on its 2005 standard contract forms fails. The NewSun Parties are not (and legally could not be) bound by a contract form that has different terms on the points in dispute, was never exchanged between the parties, and that PGE expressly disclaimed reliance on to the NewSun Parties.

B. The NewSun PPAs Are Not a Statute and PGE's 2005 Contract Form Is Not a Prior Versions of a Statute

PGE's reliance on the 2005 Standard Contract Form also incorrectly analogizes the PGE-drafted contract form to a statute or other governmental directive. The Commission's *orders* have significance for purposes of understanding the context and underlying legal policies incorporated by law into the NewSun PPAs. *See NewSun Parties' Motion* at 26-29 (setting forth applicable law). But PGE's contract forms were not drafted by the Commission and are not the equivalent of an expression of Commission policy.

PGE cites decisions holding that an insurance policy is interpreted similar to a statute where the insurer is required by statute to include certain terms in the insurance policy. *See PGE's Motion* at 11 & n 58 (citing *Fox v. Country Mut. Ins. Co.*, 327 Or 500, 506, 964 P2d 997 (1998) and *Schmidt v. Underwriters At Lloyds Of London*, 191 Or App 340, 343, 82 P3d 649 (2004)). But PGE misreads these decisions. The holding of these decisions is that "[b]ecause [the insurance company] must satisfy that statutory coverage obligation, the answer to the issue that the parties raise turns on the proper interpretation of" the statute "rather than the parties' contractual intention." *Fox*, 327 Or at 506. Thus, the courts interpret the *statute* to determine the insurance coverage incorporated by law into the insurance policy. None of these insurance cases

hold that the *insurance company-drafted policy* becomes the statutory directive or in any way informs the underlying governmental policy — especially where insurance policy contradicts the governmental directive. An insurance company's policies are not statutes. Similarly, PGE's contract forms are not Commission orders.

PGE nevertheless asserts that because the Commission "approved" PGE's 2005 Standard Contract Form that allegedly measured the fifteen-year period from execution, the Commission must have had a policy that did not require the fifteen-year period to begin at operations. *PGE's Motion* at 19-21. Thus, PGE asks this Commission to assume that in "approving" PGE's 2005 Standard Contract Form, the Commissioners in 2005 and 2007 had the same understanding of the contract form as PGE asserts now and consciously approved of PGE's interpretation as the embodiment of Commission policy. From that incorrect premise, PGE further asserts that future parties to PGE's subsequently offered contract forms are therefore bound by the meaning PGE imputes to the 2005 Standard Contract Form. There is no basis for any of these assertions.

PGE's brief merely provides PGE's own interpretation of the 2005 Standard Contract Form, and it cites no Commission order endorsing, or acknowledging any understanding of, PGE's argument that it could implement the fifteen-year term and the twenty-year term drastically differently from the other two utilities. No such order exists.

The premise of PGE's argument overstates the scrutiny that this generation of contract forms received. In Order No. 05-584, the Commission stated it "expect[ed] each standard contract form to contain terms and conditions that are consistent with the resolution of issues in this order or past orders[,]" and that the Commission's "Staff will review each standard contract form and work with each utility to ensure the compliance of submitted standard contract forms." *In re Investigation Related to Electric Utility Purchases from Qualifying Facilities*, Order No.

05-584 at 41. But the Commission decided it would not review or approve individually completed and executed standard contracts. *Id.* at 55-56. The filings were not necessarily scrutinized by the Commissioners and other stakeholders. Moreover, without careful scrutiny and industry experience negotiating power purchase agreements, it is unlikely anyone would notice PGE's treatment of the issue — particularly since the language in PGE's Schedule 201 was consistent with the language of the Idaho Power and PacifiCorp tariffs on the same point.

Not surprisingly, therefore, the Commission's orders "approving" PGE's standard contracts do not establish that PGE's interpretation of its own contract form reflects the Commissioners' views of Commission policy. PGE's lay witness, Robert Macfarlane, testifies that "in Order No. 05-899 issued on August 9, 2005, the Commission approved all three utilities filings[,]" including PGE's 2005 Standard Contract Form. PGE/100, Macfarlane/17. Macfarlane is wrong. Order No. 05-899 merely allowed the 2005 Standard Contract Form to go into effect for any QF willing to execute it while the Commission Staff investigated the filing. *In re Idaho Power Co., Pacific Power and Light, and Portland General Elec. Co.*, Docket No. UM 1129, Order No. 05-899 (Aug. 9, 2005).

The Commission's Order No. 07-065 is the only order to state it approved the 2005 Standard Contract Form. *In re Investigation Related to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 07-065 (Feb. 27, 2007). But that order was merely a cursory, one-page document that noted that the Commission's Staff recommended approval of PGE's standard contract and Schedule 201 after PGE agreed to make a limited number of unidentified revisions, and no other party voiced any objections. *Id*. The order does not discuss the fifteen-year term or the twenty-year term. *Id.* Later in 2007, PGE filed additional changes to its standard contract forms, and the Commission simply "accepted" the filing without

even issuing an order. Advice No. 07-27. That was all of the orders approving PGE's standard contract forms until after Phase I of Docket No. UM 1610 in December 2014.

In sum, there is no evidence the Commission was even aware of PGE's treatment of the fifteen-year and twenty-year terms mandated by Order No. 05-584 and certainly no Commission order stating that PGE's treatment reflected the Commission's intent in Order No. 05-584.

C. PGE's Contract Forms from 2005 Do Not Support PGE's Arguments

PGE's reliance on its 2005 Standard Contract Form fails for the additional reason that the evidence related to that form is inconsistent with PGE's theory presented in this case. The 2005 Standard Contract Form contradicts PGE's overall theory of Order No. 05-584 — which was that PGE complied by offering fixed prices for fifteen years after execution.

PGE states that Section 5 of that standard contract form "required the QF to select a market-based pricing option 'for all Contract Years in excess of 15 until the remainder of Term.'" *PGE's Motion* at 21 (quoting Section 5 of PPA). But the definition of the phrase "Contract Year" in the same contract form is defined in relevant part as "each 12-month period *commencing . . . on January 1* and . . . falling at least partially in the Term of this Agreement." PGE/102, Macfarlane/21 (emphasis added). Based on these two provisions, the fifteen-year period of fixed prices begins running *on January 1st* of the calendar year that the parties execute the contract, *not* on the date the parties execute the contract. When PGE's "execution" theory is read in the context of the 2005 Standard Contract Form, the only way a QF could obtain fifteen years of fixed prices would be to execute the contract on January 1st. For example, if the contract were executed on July 1, the two provisions cited by PGE on the form would provide the QF with fourteen years and six months of fixed prices after execution. If, as PGE argues, the

2005 Standard Contract Form reflects Commission policy, then it turns out the Commission's policy offers QFs *less than fifteen years* of fixed prices after execution.

In reality, the Commission's acceptance of PGE's 2005 Standard Contract Form merely demonstrates that the Commission and interested stakeholders either did not notice the flaws in those forms, or they believed PGE would act in good faith to correct the issue with individual QFs who requested it do so. *See* ORS 42.270 (written words prevail over contradictory words of a printed form contract). And PGE did in fact execute contracts that clarified that PGE would pay the fixed prices for fifteen years after the Commercial Operation Date. First, the record contains an executed version of the 2007 version of PGE's standard contract with One Energy Oregon Solar LLC, which selected the following options in the blank spaces in Section 5:

> 5.1 X Fixed Price (*for the first 15 years following the Commercial Operation Date*)
>
> 5.2 X Deadband Index Gas Price (for the 16th year following the Commercial Operation Date and continuing until the end of Term)

CREA-NIPPC-REC/103, Lowe/8 (emphasis added).

Likewise, PGE's executed a contract form with PaTu Wind Farm, LLC provided in Section 5, in relevant part: "If Seller chooses the option in Section 5.1 [for the fixed price option], it must mark below a single second option from Section 5.2, 5.3, or 5.4 for all Contract Years in excess of 15 until the remainder of the Term." PGE/213, True/9. In turn, the executed agreement defined "Contract Year" as "each twelve (12) month period commencing upon the Commercial Operation Date falling at least partially in the Term of this Agreement." *Id.* at 2. By the plain terms, the fixed prices in both the OneEnergy and PaTu PPAs applied for fifteen years after the Commercial Operation Date. The PaTu PPA also contained a termination date

inserted into the blank space in Section 2.3 that was twenty years after the scheduled Commercial Operation Date. *Id.* at 1, 6. Both agreements directly contradict PGE's contentions.

Moreover, the OPUC Staff expressly stated to PGE on January 31, 2013, that the OPUC Staff did not understand the 2015 Standard Contract Form's Schedule 201 to curtail the fixed prices fifteen years immediately after the Effective Date. *Defendants' Undisputed Facts* at ¶¶ 57-58, 60-65. OPUC Staff required PGE to remove its proposed changes that would have stated that, which PGE agreed to do. *Id.* at ¶¶ 60-70. Thus, if PGE's 2005 Standard Contract Form limited the fixed price term to the fifteen years immediately after the Effective Date, that was unknown to the OPUC Staff until at least January 31, 2013.

In short, there is no evidence the Commission consciously adopted a policy that PGE may curtail fixed-price payments fifteen years after execution of the standard contract, and PGE's reliance on the 2005 Standard Contract Form is misplaced for that additional reason.

D. PGE's 2015 Non-Renewable Standard Contract Form Is Irrelevant

In addition to relying on the 2005 Standard Contract Form, PGE argues that the forms offered to non-renewable QFs in 2015 control the meaning of the NewSun PPAs. *PGE's Motion* at 26-27. The sole authority PGE cites for this proposition is *Snow Mountain Pine v. Tecton Laminates Corp.*, 126 Or App 523, 528, 869 P2d 369 (1994). But that case merely establishes that "[w]hen parties contemporaneously execute multiple agreements that address interrelated subjects, we are bound to construe them together as one contract to discern the parties' intent." *Id.* (emphasis added). In *Snow Mountain Pine*, the two agreements executed at the same time also stated that they constituted the agreement between the parties. *Id.* Importantly, in *Snow Mountain*, the agreements were between the *same* parties. Here, PGE relies on agreements offered to *other* parties, not agreements PGE executed with the NewSun Parties.

Simply put, the NewSun Parties are not bound by the meaning of forms they did not sign. This is a case about the NewSun PPAs, not PGE's other contract forms. PGE argues that the forms offered to non-renewable QFs in this timeframe did not contain the language in Section 4.5 of the NewSun PPAs and Schedule 201 linking ownership of RPS Attributes to the price paid. But the fact that another form may not contain the same type of unambiguous clarity as the NewSun PPAs has no relevance to the outcome here.

IV. PGE's Reliance on the NewSun Parties' "Negotiations" Prior to Execution of the Standard Contract Form Is Misplaced

Before the first of the NewSun PPAs were signed, the parties had a series of oral and written communications regarding the fifteen-year term of fixed prices. *All Parties' Statement of Undisputed Facts* at ¶¶ 3-17 (Jan. 25, 2019). However, these communications do not support PGE's Motion.

First, this extrinsic evidence of the parties' intent is only relevant if the Commission determines the NewSun PPAs are ambiguous. *See Yogman v. Parrott*, 325 Or 358, 363, 937 P2d 1019 (1997) (holding that *"[i]f a contract is ambiguous*, the trier of fact will ascertain the intent of the parties and construe the contract consistent with the intent of the parties" by reviewing extrinsic evidence (internal quotation omitted, emphasis added)). PGE asserts that the extrinsic evidence is relevant to understand the "circumstances" of the agreements. *PGE's Motion* at 31. But as the Ninth Circuit has explained, "the consensus among Oregon courts is that they are opposed to considering extrinsic evidence to determine the parties' intent unless an ambiguity is apparent from the four corners of the document." *Webb v. Nat'l Union Fire Ins. Co.*, 207 F3d 579, 582 (9th Cir 2000); *see also Edwards v. Times Mirror Co.*, 102 Or App 440, 445, 795 P2d

564 (1990) ("[i]n determining whether an agreement is ambiguous, we are limited to the four corners of the document") (internal quotation omitted).

In any event, the circumstances under which the contracts were formed in this case have nothing to do with extrinsic communications between the parties because the parties simply completed form agreements by filling in the blanks without modification to the substantive provisions. The Commission has explained, "Standard contracts have pre-established rates, terms and conditions that an eligible QF can elect without any negotiation with the purchasing utility." *In re Investigation Related to Electric Utility Purchases from Qualifying Facilities*, Order No. 05-584 at 12. The Commission found "market barriers can render certain QF projects uneconomic to get off the ground if an individual contract must be negotiated." *Id.* at 16. Thus, "[s]tandard contracts are designed to eliminate negotiations and to thereby remove transaction costs." *Id.* Further, "[i]t is inappropriate to request that standard contracts be subject to potential negotiation to address project-specific characteristics." *Id.* at 39. In this context, the extrinsic evidence is simply irrelevant because the form's standard terms were not subject to negotiation.

While PGE correctly recites black letter contract law regarding offer and acceptance, the fatal flaw in its argument is PGE's premise that its interpretation of the 2015 Standard Renewable Contract Form is correct and the NewSun Parties' interpretation is incorrect. For the reasons discussed above and in the NewSun Parties' Motion, PGE is wrong. PGE's 2015 Standard Renewable Contract Form does not provide, unambiguously or otherwise, that the fifteen-year fixed price period commences at execution. The "offer" PGE made to the NewSun Parties is the terms contained in the form contract which exists to implement Commission policy — not what PGE said about its interpretation of those terms or the policy. Indeed, the NewSun PPAs contain an integration clause that provides: "This Agreement supersedes all prior

agreements, proposals, representations, negotiations, discussions or letters, whether oral or in writing, regarding PGE's purchase of Net Output from the Facility." NewSun PPAs at § 19.1. Because PGE misinterprets the executed agreements and the Commission's underlying policy, PGE's statements to the NewSun Parties about PGE's purported understanding is irrelevant. In other words, as a legal matter, nothing PGE told the NewSun Parties about PGE's interpretation of its form contracts alters the plain meaning of the NewSun PPAs.

PGE also mischaracterizes the communications. Contrary to PGE's portrayal of these communications, the NewSun Parties never acquiesced to PGE's interpretation of the 2015 Standard Renewable Contract Form.

If parties disagree about the meaning of a term of a contract, one parties' interpretation of the term controls only if the other party hid its interpretation of the term. *Restatement (Second) of Contracts* § 201(2) (when parties "attach[] different meanings to a promise or agreement …[,] the meaning attached by one of them" controls only if "that party did not know [and had no reason to know] of any different meaning attached by the other, and the other knew [or had reason to know] the meaning attached by the first party"). That is not the case here. As PGE stipulated, both PGE and the NewSun Parties signed the NewSun PPAs knowing that the other party had a different understanding of the applicability of the fifteen-year term. *All Parties' Statement of Undisputed Facts* at ¶ 17.

Indeed, the record establishes that, as soon as the NewSun Parties' representative, Jacob Stephens, was informed of PGE's interpretation of when the fifteen-year term of fixed prices begins, he immediately and unequivocally told PGE that he disagreed with its interpretation. *Defendants' Statement of Undisputed Facts* at ¶¶ 11-41. PGE's assertion that Stephens eventually "accept[ed] PGE's terms" is misleading. *PGE's Motion* at 30. Stephens, on behalf of

the NewSun Parties, ultimately accepted the terms of PGE's 2015 Standard Renewable Contract Form with a Termination Date after completion of sixteen years after the Commercial Operation Date as opposed to his initially requested Termination Date of twenty years after the Commercial Operation Date. But he never accepted PGE's stated interpretation of those contract forms with respect to the fifteen-year term of fixed prices. To the contrary, he plainly expressed his *disagreement* with PGE's interpretation. He even did so in writing in the email that sent the final version of the contract language the parties eventually used for all ten PPAs. *Defendants' Statement of Undisputed Facts* at ¶¶ 34-36. In response to receiving that email expressing disagreement on the fixed-price term, PGE executed the contract. NewSun Parties/100, Stephens/31.

The NewSun Parties' letter to PGE's attorney was not a concession that PGE's interpretation was correct. The letter expressly stated that "PGE's standard contract clearly allows the small QF to elect to sell for 20 years after date of commercial operation, and to receive the fixed avoided cost rates for the first 15 contract years after commercial operation." PGE/212, True/3. The NewSun Parties sought clarification through completion of the form's blank spaces to establish a twenty-year term after the Commercial Operation Date, including five years of Mid-C Prices, which they had requested PGE provide by agreeing to a Termination Date in Section 2.3 after completion of twenty Contract Years. *Id.* at 4; NewSun Parties/100, Stephens/16.

While it soon became apparent that PGE would not provide a contract with a full twenty-year term after operations, the NewSun Parties never conceded that PGE's interpretation of the contract form or Schedule 201 was correct. Nor did the NewSun Parties indicate they would abide by PGE's interpretation on the fifteen-year term. PGE's Bruce True agrees with this point,

testifying that he did not know of any instance where the NewSun Parties expressed agreement to PGE's position on the fifteen-year term. PGE/200, True/5. Unlike the overall contract length which is controlled by how the blank space in Section 2.3 is completed for the Termination Date, the fifteen-year fixed-price term is not controlled by completion of any blank spaces on the form. The matter in dispute is controlled solely by the meaning of the words on the form and the Commission's underlying policy. The NewSun Parties do not ask the Commission to revise the executed agreements to provide the full twenty-year term with five years of Mid-C Index Prices, and therefore their decision to forego their attempt to obtain the twenty-year term is irrelevant.

PGE incorrectly contends that the NewSun Parties are stuck with PGE's interpretation of when the fifteen-year term of fixed prices commences because they "bypassed th[e] opportunity" to raise the issue with the Commission prior to signing the PPAs. *PGE's Motion* at 30. In fact, both parties understood that the other party disagreed with its interpretation of when the fifteen-year term of fixed prices would begin, and neither party raised the issue with the Commission prior to signing the PPAs.

Moreover, PGE cites no legal authority for the proposition that the NewSun Parties' somehow are stuck with PGE's interpretation. That is because there is no such authority. There is no rule, and there should be no rule, that a QF must file a complaint against a utility solely to determine whether the utility's professed interpretation of a standard contract form is wrong. Such a rule would allow a utility to force a QF to delay entering into a standard contract, and to incur potentially significant pre-contract execution litigation expenses, simply by asserting an interpretation of its standard contract that the utility knows will be unacceptable to the QF.

V. PGE's Reliance on the Economic Impact of the NewSun Parties' Interpretation Is Inappropriate and Irrelevant

Unable to present any valid contractual arguments, PGE argues at the outset of its brief that the Commission should adopt PGE's interpretation because of the alleged cost to PGE's customers if the NewSun Parties prevail. *PGE's Motion* at 3. This argument is highly inappropriate and completely irrelevant.[6]

Under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), once the rates are set in an executed contract, the contract's interpretation is governed by contract law, not financial impact to the purchasing utility. *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F3d 129, 139 (3d Cir 1998). The Commission's decision may not lawfully be motivated by PGE's allegations of financial impact. *See, e.g.,* 16 USC § 824a-3(e)(1);18 CFR § 292.602(c)(1); *Independent Energy Producers Assoc., Inc. v. California Public Utilities Commission*, 36 F3d 848, 857-58 (9th Cir 1994) (reversing state commission action where the "underlying motivation behind the [state commission's] program is to lower the rates set in appellees' standard offer contracts because they are higher than the Utilities' current avoided costs").

The prohibition against subjecting QFs to ongoing ratemaking considerations is necessary to provide QFs with certainty that the contract's long-term rates will not be subjected to reductions due to changed circumstances. This is one of the bedrock principles of PURPA upon which QF financing is based. "Courts uniformly have held that state regulators cannot intervene in the public interest and modify the prices fixed by a cogeneration contract . . . , and to imply

[6]The NewSun Parties moved to strike PGE's evidence on this point from the record and requested that Administrative Law Judge Allan Arlow certify his denial of that motion for resolution by the Commissioners. At the time of filing this brief, that matter remains unresolved.

that authority would undermine the long-term cogeneration contracts that Congress sought to encourage." *Oregon Trail Electric Consumers Cooperative, Inc. v. Co-Gen Company*, 168 Or App 466, 482, 7 P3d 594 (2000); *see also Freehold Cogeneration Assoc., L.P v. Bd. of Reg. Com'rs of State of N.J.*, 44 F3d 1178, 1193-94 (3rd Cir 1995) (explaining, "we cannot disregard the impact on cogeneration financing if a purchase power agreement is at any time in the future subject to the arbitrary reconsideration by a state utility regulatory body").

PGE's suggestion that the Commission should illegally act out of motivation to protect PGE's ratepayers is nothing more than an argument that the Commission may do indirectly — through contract "interpretation" — what it is expressly forbid from doing directly. The Commission should reject PGE's inappropriate argument.

CONCLUSION

For the reasons explained herein, the Commission should issue an order determining that the NewSun PPAs require PGE to pay the applicable QF the fixed-price On-Peak and Off-Peak rates in Tables 6a and 6b of Schedule 201 for fifteen years after the Commercial Operation Date.

DATED this 15th day of February 2019.

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