BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

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

I. INTRODUCTION

Pursuant to OAR 860-001-0420, ORCP 47 and Administrative Law Judge ("ALJ") Allan Arlow's November 19, 2018 ruling, intervenors Northwest and Intermountain Power Producers Coalition ("NIPPC"), Renewable Energy Coalition (the "Coalition" or "REC"), and Community Renewable Energy Association ("CREA") (collectively, the "Intervenors" or "Industry Trade Associations"), hereby respectfully submit this Response to Portland General Electric Company ("PGE") and defendants Alfalfa Solar I LLC ("Alfalfa"), Dayton Solar I LLC ("Dayton"), Fort Rock Solar I LLC ("Fort Rock I"), Fort Rock Solar II LLC ("Fort Rock II"), Fort Rock Solar IV LLC ("Fort Rock IV"), Harney Solar I LLC ("Harney"), Riley Solar I LLC ("Riley"), Starvation Solar I LLC ("Starvation"), Tygh Valley Solar I LLC ("Tygh Valley"), and Wasco Solar I LLC ("Wasco") (collectively, the "Defendants" or "NewSun Parties") Cross-Motions

for Summary Judgment. For the reasons explained in the NewSun Parties' Motion for Summary Judgment, Industry Trade Associations' Motion for Summary Judgment, and for the reasons articulated herein, the Oregon Public Utility Commission ("Commission") should issue an order finding that the NewSun power purchase agreements ("PPAs") require PGE to pay the fixed prices contained in Tables 6a and 6b of the applicable Schedule 201 for fifteen years after the Commercial Operation Date.

The Commission can resolve this case by simply finding that the PPAs unambiguously provide for fifteen years of fixed prices commencing on the Commercial Operation Date. If the Commission finds that there is an ambiguity in the contract, it should not allow PGE to affect the meaning of its standard contracts simply by telling qualifying facilities ("QFs") how PGE interprets the contract and it should not require that all current and prior forms of all of PGE's standard PPAs be examined in order to interpret the language contained in one version of its standard PPA.

If the Commission rules in favor of PGE, it is likely to have far-reaching impacts on the industry. Projects in Oregon will be less financeable because of the greater uncertainty in the market and the shorter term of fixed-prices. Stakeholders will not be able to rely on Commission orders, rules, and tariffs because a utility could simply change the terms of those Commission directives by communicating an inconsistent interpretation to its counter-party. There will be more litigation over QF contracts before they even execute an agreement because the Commission will have given the utilities' a green light to change the meaning of their PPAs by simply communicating their preferred meaning to potential counter-parties. There will be increased transaction costs for

negotiating and entering into PPAs because QFs will need to review and consider all current and prior standard PPA forms. Finally, there will be increased process, costs, and burden on the Commission, trade associations, QFs and ratepayers to closely monitor all utility filings for any possible revisions that could potentially be interpreted inconsistently with a Commission directive and to litigate individual contract disputes over disputed terms before the PPAs are even signed. Of course, this is for a 17-blanks "fill-in-the-blank" standard form contract.

In PGE's world, PGE is the drafter, the implementer, and the interpreter of its standard PPAs. It gets to draft the language that goes into those PPAs, which under PGE's view are akin to statutes or regulations. Then PGE implements those PPAs and is a party to the agreement with its own interests adverse to its counter-party. And finally, PGE gets to be the interpreter of its standard PPA by simply telling its counter-parties prior to signing how PGE will implement it. Basically, PGE gets to be all three branches of government: it makes the rules, implements the rules, and interprets the rules. The QF will never win under this scenario. PGE's "interpretation" offered to the QF prior to contract execution simply cannot and should not control the meaning of the contract to which PGE is an unwilling party.

PGE seems to forget that it is a regulated entity that must abide by the instructions of its regulator and cannot change the meaning of the Commission's directives by simply implementing them in a different manner or offering its own interpretation. The fact that the Commission directive at issue here results in an enforceable contract, does not give PGE the latitude to change its term by *offering* a different meaning (as someone might do

in a non-PURPA negotiated agreement that is voluntarily entered into). If PGE is permitted, in this case, to control how it is regulated by offering its "interpretations" of Commission directives to its counter-parties, then it would severely undermine the Commission authority and other stakeholders would not be able to rely on the Commission's orders.

PGE's actions related to the fifteen year fixed price term have already significantly harmed independent power producer and qualifying facility development in Oregon. The issue was first brought to the Commission in 2016 and despite three rulings in favor of QFs, PGE persists in its efforts. This delay means that some projects that would otherwise have been built may not be built. This would happen because these projects cannot currently obtain financing due to financers' assumptions that there could only be 12-13 years of fixed prices. On top of the possibility of fewer years, there are more onerous land use restrictions, the imposition of solar tariffs, the expiration of investment tax credits, stalled interconnection agreements, and other upward cost pressures. Developers that need 15 years of fixed prices are either taking a big risk by moving forward with the projects, or waiting for the outcome of this case to decide whether to invest their capital in Oregon and hoping that other cost pressures or risks (e.g., expiring land use permits) do not close the door on their ability to be constructed. In other words, the clock may be running (or may have already run) out on many QFs' ability to obtain financing to be constructed.

Upon reviewing PGE's Motion for Summary Judgment and the creative (and almost spurious legal arguments), the Industry Trade Associations are convinced that

PGE is litigating this case in order to kill development regardless of whether it wins or loses. Every day of uncertainty and delay benefits PGE's shareholders and increases the chances that more projects will be unable to be built, even if the Commission rules in NewSun's favor.

Indeed, in cases such as this, which demonstrate the utilities' ability to abuse QF counterparties through Commission process, the Commission should consider sending a clear message to utilities that this abuse will no longer be permitted, in order to discourage these acts. PGE's actions diminish market competition options available to ratepayers, waste Commission and trade group resources, and undermine the Commission itself. The Commission should, in cases like this, consider granting those QFs prevailing in such disputes compensatory relief, such as automatic commensurate extensions of their Commercial Operation Dates, recovery of legal costs from utility shareholders, disallowance of PGE's legal and administrative costs associated from rate recovery, and additional payments to Commission for administration of the proceeding.

Finally, the Industry Trade Associations encourage the Commission to carefully read this brief and compare the (lack of) legitimacy of PGE's fundamental position with the months and years of litigation over what should be a relatively simple and straight forward question originally raised in 2016 in Docket UM 1805: Does the term begin on the date that the contract is executed or upon the date that the QF begins to deliver its net output to the utility? Not only should the Commission rule in NewSun's favor, but should do so in a way that protects QFs from PGE's continued and ongoing misuse of the contracting process.

II. RELEVANT CONTEXT

Electric utilities do not voluntarily purchase power from QFs but rather are required to under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). PURPA was enacted to encourage cogeneration and small power production by requiring utilities to purchase power from those facilities at the same cost the utility would avoid if it purchased its own power or generated it itself.[1]

PURPA protects the ratepayers by lowering costs. PURPA also sets a cost for the market to beat (which is the utility's avoided cost), and then the development community relies upon its innovation, industriousness and creativity to build projects at lower costs. Many fail but those that succeed build new generation at lower costs than the utility's avoided costs. This then creates a virtuous circle in which those financed and built QFs have driven costs down in the market, which in turn puts pressure on the utility to acquire or purchase lower cost resources driving down avoided cost rates. Without this process and other competitive pressures, a monopsony utility will be the entity building and owning the generation at higher costs protected from the forces of competition.

Under Oregon's mini-PURPA, the Commission uses standard contacts to "eliminate negotiations" and "remove transaction costs" in light of market barriers that

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[1] 16 USC § 824a-3(a); *see also* 18 CFR §§ 292.301 to 292.308 (subpart C of FERC's regulations); *Small Power Prod. and Cogeneration Facilities; Regulations Implementing Sec. 210 of the Pub. Util. Reg. Pol. Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214 at 12,217-30 (Feb. 25, 1980).

make it difficult for a QF to negotiate a PPA with the utility such as "asymmetric information and an unlevel playing field."[2] The standard contract is meant to create a "standard set of rates, terms and conditions that govern a utility's purchase of electrical power from QFs."[3] This standardization gives the QF certainty and predictability, as well as the QF's financiers and other business partners who read and rely on the PPAs. The Commission declined to adopt a single model standard contract for all utilities, but rather required that each utility should draft its own standard contract rates, terms and conditions consistent with the Commission's decisions.[4]

Relevant to this case, the Commission was persuaded that avoided costs should not be fixed beyond 15 years and so required fixed prices for only the first 15 years of a 20-year term, with market pricing for the final five years of the contract.[5] The Commission concluded that the "contract term length minimally necessary to ensure that most QF projects can be financed should be the maximum term for standard contracts," and in reaching this conclusion relied on the testimony of parties concerning the length of fixed prices that would be adequate to finance a project.[6] Therefore, the contract term was adopted with an eye towards making projects financeable and it settled upon 15 years of fixed prices, with the final 5 years at market prices for an overall term of 20 years.

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2 *In Re Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 16 (May 13, 2005).

3 *Id.* at 12.

4 *Id.* at 41.

5 *Id.* at 20.

6 *Id.*at 19.

Industry understanding supports and is consistent with the Commission's direction to provide 15 years of fixed prices. The "term" of a PPA is commonly referred to in the industry to describe the period during which a facility begins operating and delivering power.[7] Both PacifiCorp and Idaho Power Company correctly apply the Commission's directive consistent with this industry understanding as commencing when the QF achieves operation or is expected to achieve operation.[8] The industry understanding is further supported by Staff's opposition to PGE's attempt in 2014 to change its schedule to state that the 15 years of fixed prices would be available "*immediately following the effective date*" noting that such a change was a substantive change.[9] Further, in May 2016, PGE involved itself in a docket related to Idaho Power asserting that the Commission's policy does not require that the 15 years be measured from the date of operation, but in response, the Commission clarified that the price to be paid "during the first 15-year period following commercial operation, is the rate that existed at the time of signing."[10]

Eventually, the Industry Trade Associations filed their complaint in Docket No. UM 1805 bring an end to PGE's improper implementation. The Commission "affirmed

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7 CREA-NIPPC-REC/100, Lowe/3.

8 *See* PGE/103, Macfarlane/38 (containing Ex. F, Schedule No. 37 at 2); CREA-NIPPC-REC/100, Lowe/12.

9 CREA-NIPPC-REC/200, Sanger/8 (emphasis in original).

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

and made explicit [its] policy adopted in Order No. 05-584: 'Prices paid to a QF are only meaningful when a QF is operational and delivering power to a utility. Therefore, . . . the 15-year term must commence on the date of power delivery"[11] and ordered PGE to make its forms unambiguous on the issue of when the 15-year term commences.[12] However, the Commission also clarified that it did not interpret any executed contracts or standard contract forms in reaching its decision.[13] As a result, PGE continued to assert that its prior executed standard contracts only provide for 15 years of fixed prices from execution. This is despite PGE's own statements to the NewSun Parties that the Commission's intent is relevant to the interpretation of the PPA[14] and despite the Commission's explicit clarification of its intent in 05-584.

III. ARGUMENT

Here, the Commission should not allow PGE to so defiantly undermine the Commission's orders and should find that PGE is required to implement the NewSun PPAs in compliance with their express meaning as read in the context of the above industry understanding: that they provide for 15-years of fixed prices starting at the Commercial Operation Date.

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11 *NIPPC, CREA, and The Coalition v. PGE,* Docket No. UM 1805, Order No. 18-079 at 3 (Mar. 5, 2018) (quoting Docket No. UM 1805, Order No. 17-256).

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

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

14 PGE/214, True/1-2 ("[T]he Commission intended that the term of the standard contracts should not exceed 20 years… [t]he Commission clearly did not intend to guarantee every project 15 years. . . of fixed prices.").

A. PGE's "*Offer*" of its Own Interpretation of its Standard PPA Does Not Control the Meaning of That PPA

Under Commission policy, PGE's interpretation of its standard PPA is irrelevant to the actual meaning of the contract. PGE cannot modify the terms of its standard contract by *offering* to a QF an interpretation of that standard contract, especially where that interpretation is inconsistent with Commission policy and the text of the contract. The standard contracts approved by the Commission "shall be considered initial offers," and "[a] QF or electric utility which signs an initial offer may not modify such offer until the term of the resulting contract expires."[15]

PGE asserts that it "unambiguously *offered*, and the NewSun Parties *accepted*, PPAs that began the 20-year contract term and 15-year fixed price period at contract execution."[16] In reaching this conclusion, PGE relies on the extrinsic evidence of the communications between the parties prior to and leading up to the contract's execution.[17] In those communications, PGE asserted that Order No. 05-584 "makes it clear that the Commission intended that the term of the standard contracts should not exceed 20 years," and that "[t]he Commission clearly did not intend to guarantee every project 15 years of fixed prices."[18]

What PGE fails to consider is the unique nature of a standard contract which incorporates Commission directives, is standardized, and acts as itself an "initial offer."

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15 Docket No. UM 1129, Order No. 05-584 at 59.
16 PGE's Motion for Summary Judgment at 30 (Jan. 29, 2019) (emphasis added).
17 *Id.* at 31.
18 PGE/214, True/1-2.

Traditional contract rules of *offer* and *acceptance* do not give PGE control over the meaning of contract terms in its standard PPAs by simply *offering* its interpretation to a QF prior to execution of the PPA. As the Commission articulated in Order No 05-584, the standard PPAs shall be considered initial offers.[19] While there are several "blanks" in the standard PPA that need to be filled-in with project-specific information, those blanks do not control the meaning of the standard terms and conditions for which the Commission offered specific direction. In fact, the Commission anticipated that even on terms where the Commission stated its policy, the terms may not be "identically worded across all standard contract forms, so long as the *meaning of each term is consistent* with the [Commission's] present or past decisions."[20] Therefore, those standardized provisions must have a consistent meaning, and PGE does not have the authority to control the meaning through mere assertions of its own preferred meaning.

This is especially important in the PURPA contracting context because utilities do not voluntarily enter PURPA PPAs. If a utility does not want to enter into the contract, it will do anything within its power to prevent those contracts from being executed. With the power to control the meaning of their PPAs by simply making *offers* of their interpretation, utilities could force the QF to either accept that interpretation or endure expensive and drawn-out litigation. By doing so, the utility undermines any Commission directive by implementing the PPAs inconsistent with that directive, or effectively prevents new QFs from entering PPAs because the QF does not have the time, the budget

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[19] Docket No. UM 1129, Order No. 05-584 at 59.

[20] *Id.* at 41 (emphasis added).

and unlimited ratepayer dollars to endure the expensive and drawn-out litigation. Stakeholders would no longer be able to rely on Commission orders and would be forced to take the utility's word on what the contract means unless they want to endure the risk of litigation.

This may also result in more attempts by the utilities to draft standard contract provisions that leave just enough grey area for the utility to assert an interpretation that is inconsistent with the Commission directive. This means that the Commission and other stakeholders would need to more closely monitor every change to a PPA or avoided cost schedule and review it in the context of every other Commission policy decision. Such extensive review would be a burden to the Commission, Industry Trade Associations, QFs, and ratepayers.

Further, PGE's position undermines the Commission's authority to a much broader extent. PGE recognizes that the standard PPAs "have the force of regulation under [the Commission's] implementation of PURPA."[21] If the Commission allows PGE, in this case, to control the meaning of that standard PPA by simply asserting its own interpretation, then PGE will effectively be given free range to affect the meaning of any other Commission regulation, order, tariff or other policy directive by simply asserting its interpretation.

PGE has it backwards. PGE is not the regulator but the regulated. The nature of the regulated utility market is that the regulated utilities do not have complete freedom to

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[21] PGE's Motion for Summary Judgment at 11 (quoting Order 18-174 at 4).

negotiate contracts where the Commission has directed them to use specific terms, and like any other person, PGE also is required to comply with existing law. By allowing PGE's *offer* of a 15-year from execution fixed-price term to control the meaning of the PPA, the Commission will undermine its own authority to order the utilities to use specific terms in their PPAs and its broader authority to direct the utilities generally through regulation. Further, if the standard terms of a PPA do in-fact have the force of regulation, it would be an absurd outcome to let one party to a dispute control the meaning of that regulation by simply asserting its interpretation to the other party. This deprives the party of its right to have its case heard by an unbiased decision-maker. Therefore, the Commission should refuse to allow PGE's *offer* of its interpretation prior to contract execution to control the outcome of this case.

B. PGE's Prior Versions of its Standard PPAs Have No Relevance to the Meaning of Executed PPAs

Prior versions of PGE's standard PPA are not relevant to the meaning of the executed contracts because it would defy the very purpose of standard contracts, to eliminate transaction costs, and because unlike a negotiated contract, the parties do not voluntarily negotiate the terms. PGE asserts that under both principles of statutory interpretation and contract interpretation, the Commission should review all prior versions of PGE's standard PPAs to determine the intent of the NewSun PPAs.[22]

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[22] PGE's Motion for Summary Judgment at 10-12.

Prior contract drafts are only relevant in negotiated agreements (and not for standard terms in standard offer contracts) because it can show the evolution (or non-evolution) of the parties' collective understanding.[23] There is no evolution of the terms in a standard offer contract; the standard offer contract is the "initial offer," and it is accepted by signing it. There is no back and forth negotiation of the standard terms and so the prior versions of the PPA would not have any bearing the collective understanding of the parties. The parties may go back and forth to fill in the blanks, but the standard provisions of the contract remain the same. The meaning of those provisions does not change because of some prior version of the PPA.

Further, it is not appropriate to examine prior versions of a standard PPA in the same way prior versions of a statute are examined under statutory interpretation. The goal of a standard PPA is to eliminate negotiations and transaction costs. The Commission determined that market barriers existed that make it difficult for a QF to negotiate a PPA with the utility such as "asymmetric information and an unlevel playing field."[24] However, the standard contract creates a "standard set of rates, terms and conditions" that help level the playing field.[25] If the Commission now determines that all prior PPA forms are relevant to the interpretation of one executed contract, then PGE will again have the upper hand and the advantage of having participated in every one of those prior drafts, while the QF does not. Such a ruling would frustrate the purpose of a

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23 *See Batzer Const., Inc. v. Boyer*, 204 Or App 309, 321 (2006) (discussing which ideas the parties rejected at each draft).

24 Docket No. UM 1129, Order No. 05-584 at 16.

25 *Id.* at 12.

standard PPA because each QF will be required to review and understand each prior PPA form and will likely incur immense transaction costs in doing so.

The practical impacts of opening up all prior contracts for interpretation if there is a dispute in one contract defies general principles of contract law and has the potential to open up extensive multi-party litigation. QFs would no longer be able to rely on the express terms within the four corners of the contract, which defies general principle of contract law that "[a] completely integrated writing supersedes or discharges all prior agreements, written or oral, within the scope of the complete integration."[26] Further, if the Commission finds that it must render a decision on any or all prior versions of the standard PPA in order to reach a resolution on this simple issue in this case, then the Commission opens up the same can of worms it sought to avoid in UM 1805 by not interpreting or reviewing any prior standard contract form. Every QF with an executed contract would be affected by that decision without an opportunity to meaningfully participate in the case. This could potentially result in a huge multi-party case in which every QF (or every QF that can afford it) will intervene and assert its rights to have its contract interpreted according to the terms of that contract. As such, the Commission should not examine all prior standard PPA forms in order to preserve the rights afforded to QFs in their executed PPAs.

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[26] *Abercrombie v. Hayden Corp.*, 320 Or 279, 289 (1994).

C. The Commission's Policies Do Not Require a QF to File a Complaint Prior to Executing its PPA to Obtain Commission Resolution of Disputed Terms

A QF is not required to file a complaint prior to executing its PPA in order to obtain a Commission resolution of disputed provisions. PGE asserts that NewSun has missed its opportunity to seek Commission clarification over the meaning of the PPA because NewSun did not file a complaint prior to executing the PPA.[27] PGE's argument is completely unworkable in light of the Commissions standard for QFs forming legally enforceable obligations and in light of PGE's own inconsistent and constantly evolving positions regarding when and how QFs should file Complaints.

Under the Commission's rules, a legally enforceable obligation is created when a QF signs an executable contract.[28] The Commission also acknowledged that "problems may delay or obstruct progress towards a final draft of executable contract, such as failure by a utility to provide a QF with required information or documents on a timely basis."[29]

PGE's positions on how this standard is applied have been in constant evolution. Pointing to this language, PGE has previously asserted that a QF "must proceed through the [Schedule] 201 process and reach the point where it is entitled to an executable PPA

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27 PGE's Motion for Summary Judgment at 30.

28 *In Re Public Utility Commission of Oregon Investigation into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 16-174 at 27 (May 13, 2016).

29 *Id.*

before it can establish a [legally enforceable obligation]."[30] In the same breath, PGE also asserted that where a QF proceeds through that process and reaches the stage of an executable PPA, the QF will lose its right to assert that a legally enforceable obligation occurred at an earlier point in time unless it "signed the executable PPA *under protest* indicating that it was reserving its right to seek the earlier, higher rates."[31]

In light of the Commission's standards and PGE's impending rate decrease, the NewSun Parties did just that. They proceeded through the Schedule 201 process and acquired executable PPAs. They signed those executable PPAs prior to PGE's rate change, and they signed the PPAs *under protest* asserting that their interpretation of the standard PPA was for 15-years of fixed prices from the Commercial Operation Date.[32]

In response, PGE now asserts that the NewSun Parties should not have executed those PPAs but should have filed a complaint to obtain a resolution of that issue before signing. Hypothetically, if the NewSun Parties followed the process PGE suggests, the practical impact is that the NewSun Parties would be strapped in lengthy litigation without any assurance as to the avoided cost price that applies to their contracts. By instead signing the PPA, the QF will have some assurance as to the most important term of the contract: the rate. PGE wants to have it both ways. No matter what a QF does, PGE will assert that it should have done to opposite.

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30 *Bottlenose Solar, LLC v. PGE*, Docket No. UM 1877, PGE's Response in Opposition to Complainants' Motion for Leave to File a Supplemental Response at 8 (Sept. 28, 2018).

31 *Id.* at 9 (emphasis added).

32 Defendants' and Intervenors' Joint Statement of Additional Undisputed Facts at ¶¶ 34-36 (Jan. 25, 2019).

The Commission's rules do not require that complaints be filed prior to executing the contracts and the Commission should not require it. PGE will assert all sorts of interpretations to its standard PPAs and as articulated above, it will force QFs to either accept that interpretation or litigate the dispute. Due to PGE's constantly evolving position on when complaints are filed, any QF that chooses to file a complaint prior to executing its PPA will then be required to overcome PGE's claim that it should have first proceeded through the Schedule 201 process and obtained an executable PPA before it filed its Complaint. The QF cannot win. The QF must file a complaint over disputed terms prior to executing the PPA, but must also wait until after the executable PPA is provided and sign it under protest before asserting a right to earlier rates. PGE's positions are inappropriate and obstruct the QF's access to justice, and the Commission should not allow it.

Further, there is no basis to assume, as PGE suggests, that the NewSun Parties should have filed a complaint before executing their contracts. As Mr. Stephens testifies, he had ample reason to believe that PGE's assertions to him regarding its purported position were simply an attempt to deter him form signing the standard contracts in the first place.[33] Given that the dispute in question is controlled by the language on the contract form and not the manner in which the blank spaces are completed, and that PGE was willing to execute the form containing a Termination Date that would allow for a full fifteen years of fixed prices after the Commercial Operation Date, it is not clear what

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[33] *Id.* Defendants' Statement of Undisputed Facts at ¶ 37.

allegation could be leveled against PGE in such a complaint regarding the fifteen-year fixed-price issue before execution. QFs do not need to file a complaint solely to clarify PGE's incorrect statements during the contracting process. Nor should they be required to do so for the reasons already explained. And the fact that they opted not to has absolutely no effect on the meaning of the contract they executed.

Moreover, as the NewSun Parties' filings in Docket No. UM 1805 explained, the NewSun Parties did not perceive there to be any ambiguity in their PPAs on the point in dispute.[34] The NewSun Parties state that they therefore had monitored that proceeding and determined that, while it regarded the Commission's policy on the fifteen-year term, they did not perceive the Commission to be directly interpreting their PPAs.[35] It was only upon reviewing the Commission's first order (Order No. 17-256), that the NewSun Parties, along with many other QFs with executed contracts, became understandably concerned with the contradictory language in the order that stated it was interpreting PGE's previously offered forms.[36] After that order was issued, it was unclear whether the Commission had interpreted *all* of PGE's executed standard contracts in PGE's favor.[37] At that point, an issue that previously seemed to be a non-issue that PGE created to deter QFs from executing contracts, became a *major problem* for all such QFs, including the NewSun Parties, who now needed explicit Commission clarification on the

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34 *NIPPC, CREA, and The Coalition v. PGE,* Docket No. UM 1805, Joint Petition to Intervene Out of Time of NewSun Parties at ¶ 7 (Sept. 8, 2017).
35 *Id.* at ¶ 8.
36 *Id.* at ¶ 9.
37 *Id.* at ¶ 11.

point to provide the certainty need to move forward.[38] From that point forward, the NewSun Parties have obviously been diligent in resolving the issue.

IV. CONCLUSION

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

Dated this 15th day of February 2019.

Respectfully submitted,

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[38] *Id.*