IN THE COURT OF APPEALS OF THE STATE OF OREGON

NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, COMMUNITY RENEWABLE ENERGY ASSOCIATION, RENEWABLE ENERGY COALITION, and THE PUBLIC UTILITY COMMISSION OF OREGON,
Respondents,

v.

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner.

Public Utility Commission of Oregon
UM1805

A167707

RESPONDENTS NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS, COMMUNITY RENEWABLE ENERGY ASSOCIATION, AND RENEWABLE ENERGY COALITION'S ANSWERING BRIEF

Petition for Judicial Review of the Final Order
Of the Public Utility Commission of Oregon

Steven C. Berman, OSB No. 951769
Keil M. Mueller, OSB No. 085535
Nadia H. Dahab, OSB No. 125630
Stoll Stoll Berne Lokting & Shlachter P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
(503) 227-1600
sberman@stollberne.com
kmueller@stollberne.com
ndahab@stollberne.com

Attorneys for Respondents Northwest and Intermountain Power Producers, Community Renewable Energy Association, and Renewable Energy Coalition

Irion A. Sanger, OSB No. 003750
Sanger Law PC
1117 SE 53rd Avenue
Portland, OR 97215
(503) 756-7533
irion@sanger-law.com

Attorneys for Respondents Northwest and Intermountain Power Producers, Community Renewable Energy Association, and Renewable Energy Coalition

[attorney information cont'd on next page]

February 2019

Keith L. Kutler, OSB No. 852626
DOJ Appellate Division
1162 Court Street NE
Salem, OR 97301
(503) 378-4402
keith.kutler@doj.state.or.us

Attorneys for Oregon Public Utility Commission

Anna M. Joyce, OSB No. 013112
Dallas S. DeLuca, OSB No. 072992
Anit K. Jindal, OSB No. 171086
Markowitz Herbold PC
1211 SW 5th Avenue, Suite 3000
Portland, OR 97204
(503) 295-3085
annajoyce@markowitzherbold.com
dallasdeluca@markowitzherbold.com
anitjindal@markowitzherbold.com

Attorneys for Petitioner Portland General Electric Company

`

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

Federal and state law require the Oregon Public Utility Commission (PUC) to ensure that Petitioner on Review Portland General Electric Company (PGE) offers to purchase the electric output of certain qualifying energy facilities under certain contract terms. One of those terms governs the period during which the prices paid under those contracts must be fixed—in 2005, the PUC found that a 15-year fixed-price term was necessary to incentivize investment in new qualifying energy facilities by providing potential energy investors reasonable certainty as to their expected return on investment. Under the PUC's 2005 policy, that 15-year term begins on the date that the qualifying energy facility becomes operational.

Despite that 2005 policy, PGE recently began insisting that its contracts provided for a 15-year fixed-price term beginning on the date the power purchase agreement is executed, not on the date that the qualifying energy facility becomes operational. This petition for judicial review stems from a series of recent PUC orders clarifying the PUC's 2005 policy and ordering PGE to comply with that policy going forward.

STATEMENT OF THE CASE

Respondents on Review Northwest and Intermountain Power Producers Coalition, the Community Renewable Energy Association, and the Renewable Energy Coalition (collectively, "Complainants") accept PGE's statement of the nature of the action, basis for appellate jurisdiction, and timeliness of the petition for review.

I. Nature of the Judgment

PGE petitions for judicial review of three PUC orders: Order No. 17-256, Order No. 17-465, and Order No. 18-079. The PUC's final order, Order No. 18-079, denied PGE's request for rehearing or reconsideration and request to amend Order No. 17-465, which amended and clarified Order No. 17-256. In Order No. 17-256, the PUC explained a policy that it had announced in a 2005 order, Order No. 05-584, which requires that "standard contracts, on a going-forward basis, * * * provide for 15 years of fixed prices that commence when the QF transmits power to the utility." ER 4. In Order No. 17-465, the PUC amended Order No. 17-256 to make clear that neither order "address[ed] any existing executed contracts or PGE's current or existing standard contracts." ER 9.[1]

---

[1] The PUC's amended order makes clear that it did not, in fact, "conclud[e] that PGE did not violate any statute, rule, or Commission order by offering standard contracts that included a 15-year period of fixed prices beginning on the contract's execution date, rather than on the date that the QF begins to transmit power." Opening Br. at 2–3.

II. Statement of Agency Jurisdiction

The PUC had jurisdiction under ORS 756.500 to issue the underlying orders.

QUESTIONS PRESENTED ON REVIEW

Complainants offer the following questions presented for this Court's review:

1. Is this petition for review moot because PGE failed to seek review of subsequent PUC Orders approving its compliance filings, or because after the underlying orders were issued the PUC adopted administrative rules containing the same 15-year fixed-price term reflected in the orders on review?

2. Are the PUC's orders on review, which conclude that the PUC's policy, adopted in Order No. 05-584, was intended to provide 15 years of payments at fixed prices to the qualifying facilities after operation of the facility, supported by substantial reason?

3. Assuming, for the sake of argument, that the PUC announced a new policy in these proceedings, does the mere fact that these proceedings were commenced under ORS 756.500, rather than on the PUC's "own motion" under ORS 756.515, preclude it from doing so?

SUMMARY OF ARGUMENT

The PUC correctly construed its 2005 policy—announced in Order No. 05-584—to require that the 15-year fixed-price term applicable to power purchase agreements with qualifying energy facilities begins on the date the qualifying facility becomes operational.

This Court should dismiss PGE's petition for review because it is moot. While this petition for review has been pending, the PUC promulgated administrative rules adopting the 15-year fixed-price term with which PGE now takes issue. Because of those new administrative rules, no order from this Court will have any practical effect on PGE. *State v. Jessup*, 228 Or App 222, 223–24, 206 P3d 1122 (2009) (holding that a controversy becomes moot when a court's exercise of authority would no longer have a practical effect on the rights of the parties).

Even if it is not moot, the Court should affirm the agency's decision because it is supported by substantial reason. The PUC offered a reasonable and rational explanation of its conclusion, offering an interpretation of its own policy that is consistent with the context in which that policy was made. *BWK, Inc. v. Dep't of Admin. Servs.*, 231 Or App 214, 229, 218 P3d 156 (2004) (rational explanation); *see also Westfall v. State ex rel. Dep't of Corr.*, 355 Or 144, 165, 324 P3d 440 (2014) (agency's interpretation of its policy must not be inconsistent with "the policy in its context or with any other source of law").

STATEMENT OF FACTS

This dispute arises from the PUC's implementation of the mandatory purchase provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA") and related state law.

I. Overview of PURPA

Congress enacted PURPA to address the energy crisis of the 1970s. *See generally* Pub L No 95-617, 92 Stat 3117 (1978). At the time that PURPA was enacted, Congress believed that increased development of nontraditional energy production facilities—*e.g.*, cogeneration or small power production facilities—"would reduce the demand for traditional fossil fuels." *FERC v. Mississippi*, 456 US 742, 750–51, 102 S Ct 2126, 72 L Ed 2d 532 (1982). It also recognized, however, that traditional electric utilities, as lone purchasers of electric energy in a market with many potential producers, "were reluctant to purchase power from [such] nontraditional facilities," and that financial burdens on those nontraditional facilities further discouraged their development. *Id.*[2]

[2] The disincentive for traditional energy utilities to do so is evident here in Oregon. The PUC itself has confirmed that Oregon's public utilities have an economic disincentive to enter into power purchase agreements with independent power producers, QFs or otherwise. For instance, the PUC has explained, "[U]nder cost of service regulation, a utility's 'profit' is the opportunity to earn a return on the rate base and by purchasing a [power purchase agreements] in lieu of building a power plant, it is foregoing the potential to earn some amount of profit." Order No. 11-001, at 5 (internal quotation marks omitted).

Section 210 of PURPA addresses Congress's concerns by encouraging the development of certain nontraditional facilities, known under PURPA as so-called "qualifying facilities" ("QFs"),[3] while also ensuring that utilities that purchase energy from QFs pay no more than their avoided costs in doing so. *Id.* at 751; *see also* 16 USC §§ 796(17), (18). Congress charged the Federal Energy Regulatory Commission (FERC) with implementing that congressional command. 16 USC § 824a-3(a) (directing FERC to promulgate regulations "to encourage cogeneration and small power production," including regulations that "require electric utilities to offer to * * * purchase electric energy from such facilities").[4]

FERC's regulations therefore require utilities to enter into contracts to purchase energy and capacity from QFs.[5] The regulations further mandate that

---

[3] QFs include (1) small power production facilities (up to 80 megawatts) that use renewable hydro, wind, solar, biomass, waste, or geothermal resources; and (2) cogeneration facilities of any size that sequentially produce electricity and another form of useful thermal energy (such as heat or steam). *Mississippi*, 456 at 750 n 11; *see also* 16 USC §§ 796(17), (18).

[4] *See also* 18 CFR §§ 292.301–292.308 (Subpart C of FERC's regulations); *Small Power Prod. & Cogeneration Facilities; Regulations Implementing Sec. 210 of the Pub. Util. Reg. Pol. Act of 1978*, 45 Fed Reg 12,214, 12,217-30 (Feb 25, 1980).

[5] Section 292.304(d)(2) provides two contractual pricing options:

utilities pay QFs a fixed price (or a rate, *e.g.*, in dollars per MWh)—that is, a price set at the utility's "full avoided cost," or the marginal cost the utility otherwise would pay to acquire energy and capacity. *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 US 402, 406, 413–17, 103 S Ct 1921, 76 L Ed 2d 22 (1983); 18 CFR §§ 292.101(b)(6), 292.304(b).

The right to long-term, fixed prices is critically important to QFs and central to this dispute. As Congress itself recognized, "'[C]ogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis-a-vis the sale of power to the utility.'" *Am. Paper Inst.*, 461 US at 414 (quoting HR Conf Rep No 95-1750, at 97–98 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7797, 7831–32). Unlike traditional utilities, which are legally entitled to charge end-use

---

> Each qualifying facility shall have the option * * * [t]o provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the *rates for such purchases shall, at the option of the qualifying facility * * * be based on* * * * (i) The avoided costs calculated at the time of delivery; or (ii) The *avoided costs calculated at the time the obligation is incurred*.

18 CFR § 292.304(d)(2) (emphasis added). FERC explained that subpart (d)(2)(i) allows the QF to opt to contract "to receive the avoided costs determined at the time of delivery." 45 Fed Reg at 12,224. But subpart (d)(2)(ii) "enables a qualifying facility to establish a *fixed contract price* for its energy and capacity at the outset of its obligation." *Id.* (emphasis added). Such fixed-price rates will be lawful even if the fixed-price rate turns out, due to changed circumstances, to be different from the utility's actual avoided costs at the time of delivery. 18 CFR § 292.304(b)(5).

customers all prudently incurred costs of electric service, a QF's "'risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable.'" *Id.*

FERC recognized that its regulations therefore must provide prospective developers and QF owners with the option to enter into long-term contracts at predictable rates. 45 Fed Reg at 12,224. "Given this 'need for certainty with regard to return on investment,' coupled with Congress' directive that the [FERC] 'encourage' QFs," FERC has explained that "a legally enforceable obligation [for the purchase of power from a QF] should be long enough to allow QFs reasonable opportunities to attract capital from potential investors." *Windham Solar LLC*, 157 FERC ¶ 61,134, at 4–5 (Nov 22, 2016) (quoting 16 USC § 824a-3(a)) (internal footnotes omitted). Its regulations thus require fixed-price rates for a period of years that is sufficient to support financing of new QFs. Put somewhat differently, FERC's regulations impose fixed prices to incentivize investment in new facilities by providing investors in the facility with reasonable "certainty" as to "the expected return on a potential investment before construction of a facility." *JD Wind 1, LLC*, 130 FERC ¶ 61,127, at 10 (Feb 19, 2010) (internal quotation marks omitted).

II. The PUC's Order No. 05-584

PURPA requires that the states implement FERC's regulations—including the requirement of fixed prices for a period that is long enough to

support financing—for each electric utility for which it has ratemaking authority. 16 USC § 824a-3(f); *Mississippi*, 456 US at 751, 759–61; *see also Snow Mtn. Pine Co. v. Maudlin*, 84 Or App 590, 593–94, 734 P2d 1366 (1987) (describing Oregon's regulatory framework). In Oregon, the PUC is charged with implementing FERC's PURPA regulations for public utilities, including PGE. *See* ORS 758.505–758.990. Oregon law also independently restates the fixed-price requirement in 18 CFR § 292.304(d)(2)(2)(ii). *See* ORS 758.525(2)(b); *Snow Mountain Pine Co.*, 84 Or App at 599–601.

In 2005, PUC comprehensively revamped its implementation of PURPA's mandatory purchase provisions, including the term of fixed pricing utilities must offer to QFs. *See* Order No. 05-584, at 19–20 (May 13, 2005).[6] Consistent with PURPA, the PUC's stated goal at that time was "to encourage the economically efficient development of * * * qualifying facilities, while protecting ratepayers by ensuring that utilities pay rates equal to that which they would have incurred in lieu of purchasing QF power." Order 05-584, at 1.[7]

---

[6] PGE includes excerpts of Order No. 05-584 in its Appendix. The full order can be found on the PUC docket at https://apps.puc.state.or.us/orders/2005ords/05-584.pdf

[7] After detailing its history of PURPA implementation, the PUC affirmed, "[O]ur intent with regard to implementation of PURPA remains the same as first articulated in 1981. We seek to provide maximum incentives for the development of QFs of *all* sizes, while ensuring that ratepayers remain indifferent to QF power by having utilities pay not more than their avoided costs." Order No. 05-584, at 11.

The result of the PUC's comprehensive overhaul was Order No. 05-584, the scope of which underlies this dispute.

Through Order No. 05-584, the PUC concluded that utilities must offer standardized contracts that provide QFs fixed prices for 15 years. Order No. 05-584, at 20. Consistent with FERC's regulatory directive, the PUC explained that "it is necessary to ensure that the terms of the standard contract facilitate appropriate financing for a QF project." Order No. 05-584, at 19. The PUC was concerned that a utility's forecasted avoided costs could diverge from its actual avoided costs at the time the QF delivers energy—thus, its "fundamental objective" in Order No. 05-584 was "to establish a maximum standard contract term that enables eligible QFs to obtain adequate financing, but limits the possible divergence of standard contract rates from actual avoided costs." Order No. 05-584, at 19. Accordingly, the PUC found that "the contract term length minimally necessary to ensure that most QF projects can be financed should be the maximum term for standard contracts." Order No. 05-584, at 19.

The PUC ultimately determined that the "maximum term of a standard contract should be raised to 20 years," and that "prices should be fixed for only the first 15 years of the 20-year term." Order No. 05-584, at 20. The last five years of the contract would contain market-based pricing that would depend on

market conditions at the time of delivery of power in those years. *Id.*[8] In Order No. 05-584, the PUC did not discuss the date on which the 15- and 20-year terms would commence, other than to state that these terms were intended to be the minimum lengths necessary for financing unbuilt facilities.

The PUC ordered each utility to file its own standard contract forms. Order No. 05-584 at 41. The PUC stated that 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 PUC's staff, rather than the Commission itself, would "review each standard contract form and work with each utility to ensure the compliance of submitted standard contract forms." Order No. 05-584 at 41, 55–56.

---

[8] The PUC chose the 15-year fixed-price term because the evidence demonstrated that was the minimal length of predictable, fixed-price revenue that would be needed to support financing of renewable energy facilities. In so doing, the PUC relied primarily on the Oregon Department of Energy's (ODOE) testimony and its experience as the financier of State Energy Loan Program (SELP) projects as evidence of the financing prospects for QFs. Order No. 05-584, at 18. The ODOE's evidence included "past representations by the ODOE that 15 years is a sufficient financing period for some QF projects, and that certain QF project developers have requested 15-year loans in the recent past," and a 2003 letter "from the loan program manager for ODOE's SELP to the PUC that indicates 15 years was a usual term for QF contracts." Order No. 05-584, at 18. "The letter stated: 'As a lender, it is important to have a power purchase contract that equals the loan term, usually fifteen years.'" Order No. 05-584, at 18 n 34.

III. Proceedings Underlying this Petition for Review

Complainants initiated these proceedings to challenge PGE's unusual interpretation of Order No. 05-584. In their complaint, Complainants explained that the PUC's "policy is that 15 years of fixed pricing commences when the QF achieves operation," and the PUC had "adopted the policy because it has determined that the minimum period of fixed revenue necessary for QF financing is 15 years." SER 1–2. The complaint explained that, despite the intent of the PUC's 2005 policy, PGE had begun insisting that its standard contracts required the 15-year fixed-price term to begin when the power purchase agreement is executed, not when the qualifying energy facility becomes operational. Complainants alleged that PGE's interpretation would "shorte[n] the period a QF is paid known prices by the amount of time after execution required to achieve commercial operation—typically up to three years." SER 3. Under PGE's interpretation, "QFs will not be able to obtain 15 years of fixed pricing, the minimum amount that the Commission has determined that most QFs need to obtain financing." SER 3. Complainants sought the following relief:

> (1) an order directing that PGE "cease and desist" from acting inconsistently with the PUC's policy requiring 15 years of fixed prices after the QF's operation;
>
> (2) a declaration that PGE's standard contract requires payment by PGE at fixed prices for 15 years after the QF's operation;

> (3) *alternatively*, an order that PGE must file revised standard contracts clearly offering 15 years of fixed prices after the operation of the facility; and
>
> (4) "any other such relief" that the PUC "deems necessary."

SER 16.

In its Answer, PGE asserted that offering a 15-year fixed-price term that commenced when the facility begins operation would contradict PGE's PUC-approved standard contract forms, PGE's Schedule 201 tariff that is appended to its standard contract, the "the resolution on page 20 of Order No. 05-584" and other unspecified PUC orders. PGE would construe Order No 05-584 to require a 15-year fixed-price term that commences on the date the contract is executed. Opening Br. at 11–14.

IV. PUC's Orders on Review

The PUC rejected PGE's interpretation of Order No. 05-584. The PUC explained that "[p]rices paid to a QF are only meaningful when a QF is operational and delivering power to the utility." ER 4. "[T]o provide a QF the full benefit of the fixed price requirement, the 15-year term must commence on the date of power delivery." ER 4. PUC therefore "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." ER 4. But because the PUC had approved

PGE's previously available standard contract forms, the PUC found PGE could not have been in violation of the policy with respect to those forms. ER 3.

Complainants sought clarification and reconsideration only to the extent that the PUC's decision could be construed to apply to executed standard contracts or formerly available contract forms.[9] On Complainant's motion, the PUC issued a second order, Order No. 17-456. ER 6–10. In that order, the PUC clarified that it "neither examined nor addressed the specific terms and conditions of any past QF contract," and stated that its decision did "not address any existing executed contracts or PGE's current or existing standard contracts." ER 9. To make that clear, Order No. 17-465 explicitly amended the wording the PUC had used in Order No. 17-256. ER 9.

PGE then moved for rehearing, criticizing the PUC's reasoning in Order No. 17-465 and insisting that the PUC interpret PGE's contract forms. On PGE's motion, the PUC issued its third and final order, Order No. 18-079. In that order, the PUC explained that its decision did not "constitute[e] the adoption of a 'new policy.' Rather, * * * [the Commission's] decision was simply to affirm the policy with respect to the commencement date for the 15-

---

[9] This was a point about which both Complainants and PGE previously had expressed concern due the absence of counterparties to such contracts in the proceeding. Indeed, several QF parties with executed contracts moved to intervene after issuance of Order No. 17-256 out of concern that it contained language that could be understood to interpret their executed contracts. SER 19–27.

year period of fixed prices." ER 13. This "policy, which had been reflected explicitly in standard contract forms for PacifiCorp and Idaho Power Company, had been, up until the filing of PGE's most recent standard contracts, neither a source of controversy nor litigation by either a QF or a utility." ER 13.[10] The PUC also rejected PGE's request to interpret its existing contract forms in the absence of PGE's contractual counterparties. ER 13–14.

STANDARD OF REVIEW

This Court reviews the PUC's orders "to determine whether the PUC correctly applied the applicable law, whether there is substantial evidence to support its findings, and whether it acted within the scope of its discretion." *Gearhart v. PUC*, 255 Or App 58, 60, 299 P3d 533 (2013), *aff'd*, 356 Or 216 (2014). In doing so, the Court should not "second guess the PUC's policy decisions, nor [should the Court] reweigh its balancing of the interests involved." *Id.* at 86. The Court reviews the conclusions the PUC draws from its findings for substantial reason; "[f]or an agency order to be supported by substantial reason, the agency must provide a rational explanation of how the

---

[10] Idaho Power and PacifiCorp's treatment of the 15-year fixed-price term in their standard contracts is slightly different. However, the salient point is those utilities offered a 15-year fixed-price term that commences either at beginning of commercial operations or scheduled beginning of operations, in either case up to three years or more after execution of the standard contract. *See* SER 28–31.

facts found lead to the legal conclusions on which the order is based." *BWK, Inc.*, 231 Or App at 229.

ARGUMENT

The PUC correctly construed its 2005 policy—announced in Order No. 05-584—to require that the 15-year fixed-price term applicable to power purchase agreements with qualifying energy facilities begins on the date the facility becomes operational. For the reasons explained below, this Court should either dismiss as moot PGE's petition for judicial review or affirm the agency's underlying orders.

I. PGE's Petition for Judicial Review is Moot.

A case becomes moot when the court's exercise of authority would no longer have some practical effect on the rights of the parties. *Jessup*, 228 Or App at 223–24. Where a party challenges the procedures an agency uses to adopt a policy, the challenge becomes moot after the agency lawfully adopts an administrative rule on the subject. *See Confederated Tribes of Siletz Indians v. Fish & Wildlife Comm'n*, 244 Or App 535, 537 n 2, 260 P3d 705 (2011) (subsequent adoption of permanent rule renders moot a contention that temporary rule was adopted without compliance with applicable rulemaking procedures); *Smith v. Or. Dep't of Corr.*, 101 Or App 539, 541 n 1, 792 P2d 109 (1990) (same).

PGE's petition for judicial review is moot. After PGE filed its petition for review, the PUC completed a rulemaking that explicitly adopted into its administrative rules the very policy PGE now challenges. *See* Order No. 18-422 (Oct 29, 2018). The PUC's new rule, OAR 860-029-0120(3), provides,

> "Qualifying facilities have the unilateral right to select a purchase term of up to 20 years for a power purchase agreement. Qualifying facilities electing to sell firm output at fixed-prices have the unilateral right to a fixed-price term of up to 15 years."

Under the new rules, the phrase "fixed-rate term" means:

> "for qualifying facilities electing to sell firm energy or firm capacity or both, the period of a power purchase agreement during which the public utility pays the qualifying facility avoided cost rates determined either at the time of contracting or at the time of delivery."

OAR 860-029-0010(16).[11] The phrase "purchase term" means

> "the period of a power purchase agreement during which the qualifying facility is selling its output to the public utility."

OAR 860-029-0010(26). The orders accompanying those rules make clear their intent: "to clarify [that] the 20-year term of a contract generally does not start

---

[11] "Fixed-price term" and "fixed-rate term" have the same meaning under the PUC's rules. OAR 860-029-0010(28); Or. Sec'y of State, *Notice of Proposed Rulemaking*, at 4 (July 26, 2018), *available at* https://edocs.puc.state.or.us/efdocs/HCB/ar593hcb1535.pdf (equating fixed-rate term to the contract period "during which fixed prices are paid").

on the effective date of the contract." *See* Order No. 18-272, app A, at 7 (July 18, 2018).[12]

In light of the PUC's new rule, further contested-case procedures on remand cannot provide PGE with the relief that it seeks. "Whether or not an agency is *required* to adopt rules, when it has authority to adopt them and does so, it must follow them." *Harsh Inv. Corp. v. State ex rel. State Housing Div*., 88 Or App 151, 157, 744 P2d 588 (1987); *see also Reforestation Gen. Contractors, Inc. v. Nat'l Council on Comp. Ins.*, 127 Or App 153, 164, 872 P2d 423, *adh'd to on recons.*, 130 Or App 615, 883 P2d 865 (1994) (holding that administrative rules control over policies not adopted through rulemaking). To have any practical effect on the parties to this dispute, then, this Court would need to set aside *not* the underlying orders, but the newly promulgated administrative rules, and order PUC to reinitiate its rulemaking procedures. But PGE does not ask, and has never asked, for that sort of relief.

II. The PUC's Orders Are Supported by Substantial Reason.

The PUC correctly interpreted its own policy—the policy announced in Order No. 05-584—to require that the 15-year term of fixed prices in QF power

---

[12] The PUC's notice of proposed rulemaking further explains that it sought to "ad[d] a definition of 'fixed rate term' to clarify that a term of contract during which fixed prices are paid exists, [and] adding definition for 'purchase term' to clarify the term of purchase starts when qualifying facility begins selling its output to the public utility (rather than on effective date of contract) * * *." Or Sec'y of State, *Notice of Proposed Rulemaking*, at 3 (July 26, 2018).

purchase agreements must begin on the date the QF becomes operational. Based on that interpretation, the PUC permissibly concluded that PGE must ensure its standard contracts comply with that policy. The PUC's conclusion provided the "rational explanation" that the Oregon Administrative Procedure Act demands. *BWK, Inc.*, 231 Or App at 229. Because that is so, this Court is not at liberty to reverse.

It is well within the PUC's delegated authority to adopt or interpret a policy in the context of a contested case hearing. *See* ORS 183.355(6) ("[I]f an agency, in disposing of a contested case, announces in its decision the adopt of a general policy applicable to the case and subsequent cases of like nature[,] the agency may rely upon the decision in disposition of later cases."); *see also Homestyle Direct, LLC v. Dep't of Human Servs.*, 354 Or 253, 266, 311 P3d 487 (2013) ("[T]he APA provides that agencies are authorized to adopt general policies that otherwise qualifies as 'rules' during contested case proceedings * * * ."). The policy at issue here—and the PUC's interpretation of that policy—falls within the scope of its delegated authority. The PUC first announced the policy after a lengthy deliberative process, and it must now be assumed to understand fully the policy's intended meaning. *See Gage v. City of Portland*, 319 Or 308, 315–17, 877 P2d 1187 (1994). The Court must affirm the PUC's interpretation of its policy "if [interpretation is] plausible and not

inconsistent with the policy in its context or with any other source of law." *Westfall*, 355 Or at 165.

PGE contends that the PUC misconstrued Order No. 05-584—specifically, that Order's use of the phrase "first 15 years of a 20-year term." PUC Order No. 05-584, at 20. PGE takes particular issue with the PUC's interpretation of the word "term," suggesting that "[a] contract 'term' generally means the period in which the contract is in effect, not some later milestone." Opening Br. at 25.[13] But PGE takes industry-specific terms of art completely out of context, failing to acknowledge the background against which Order No. 05-584 must be construed.

Public utility commission decisions across the country, as well as Idaho Power and PacifiCorp's *own Oregon PURPA tariffs*—make clear that the word "term," as it is used in reference to power purchase agreements, generally refers to the period of years after the facility becomes operational. SER 32–40, 41–42, 43–46. Indeed, the most important period of years in any power *purchase* agreement is the period of years during which the utility is *actually purchasing* power. The PUC's interpretation of Order No. 05-584 is consistent with that

---

[13] Notably, the dictionary definition that PGE cites does not command that interpretation. *See* Opening Br. at 25 (citing *Webster's Third New Int'l Dictionary* (unabridged ed 2002) for the proposition that "term" means "the time for which something lasts").

generally accepted understanding, and consistent with the meaning the word "term" has been given in other jurisdictions.

The PUC, in its underlying orders, explained that "[s]tandard 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." ER 4. Logically, "[t]he 15-year period of fixed prices is, of necessity, tied to these benchmarks." ER 4. Indeed, "[p]rices paid to a QF are only meaningful when a QF is operational and delivering power to the utility." ER 4. Accordingly, "to provide a QF the full benefit of the fixed price requirement, the 15-year term must commence on the date of power delivery." ER 4. And in its third order, the PUC explained that its decision in that respect did not "constitute[e] the adoption of a 'new policy'"; "[r]ather, * * * [its] decision was simply to affirm the policy with respect to the commencement date for the 15-year period of fixed prices." ER 13. This "policy, which had been reflected explicitly in standard contract forms for PacifiCorp and Idaho Power Company, had been, up until the filing of PGE's most recent standard contracts, neither a source of controversy nor litigation by either a QF or a utility." ER 13.[14]

---

[14] Indeed, in Order No. 05-584, the PUC demonstrated that it understood that the standard contract would necessarily be executed before the period of delivery of power where the pricing terms would begin. The PUC explained, "A standard contract for a QF project under development will typically specify an operational date for the QF. On that date, the parties anticipate the QF will

PGE offers no legitimate response to that understanding, and thus provides no basis on which to second guess the PUC's otherwise permissible interpretation of an industry-specific term of art.[15] And it fails *entirely* to explain how the PUC's interpretation is implausible or contrary to some other source of law. Indeed, by PGE's own admission, the other two Oregon utilities—since 2005—have construed the word "term" consistently with the PUC's interpretation, vastly undercutting any argument that PGE might make as to the plausibility of that interpretation.[16]

---

begin power deliveries for which it will be compensated." PUC Order No. 05-584, at 46. Accordingly, the PUC adopted specific policies for delay-default security. *Id.* at 46–47. This is consistent with the explanation in Order No. 17-256 that the 15 years of fixed-price payments can only begin after the QF achieves benchmark for successful operation. ER 4.

[15] The sole case that PGE cites, *Keystone RV Co-Thor Industries v. Erickson*, 277 Or App 631, 637, 373 P3d 1122 (2016), did not address an agency interpretation of its own policy or rule. It is therefore irrelevant.

[16] What is more, PGE's own interpretation of Order No. 05-584 would render the order inconsistent with some other source of law. As noted above, FERC has explained that the fixed-price term offered under 18 CFR § 292.304(d)(2)(ii) "should be long enough to allow QFs reasonable opportunities to attract capital from potential investors." *Windham Solar LLC*, 157 FERC ¶ 61,134, at 6–8. Consistent with that guidance, the PUC found in Order No. 05-584 that a 15-year fixed-price term is the shortest period reasonably necessary to support most QFs' financing of an unbuilt facility. If the 15-year fixed-price term was to begin on the date of execution of the power purchase agreement, the QF would be deprived of the maximum term of fixed prices and predictable revenue that Order No. 05-584 found necessary for financing.

The PUC's interpretation is consistent with both PURPA's regulatory background and the generally understood context in which power purchase agreements operate. Its order clarifying that interpretation more than suffices as a "rational explanation" under the Oregon APA. *See BWK, Inc.*, 231 Or App at 229.

III. The PUC Never Endorsed PGE's Position on the 15-Year Term.

PGE also argues that PUC has previously endorsed PGE's interpretation of Order No. 05-584. But PGE fails to point to a single PUC order that does so. None exists.

A. The PUC did not endorse PGE's arguments regarding the 15-year fixed-price period in accepting PGE's standard contract forms.

PGE first posits that because the PUC approved PGE's prior contracts that allegedly "measured the 15-year period from execution," the PUC must have had a policy that did not require the 15-year period to begin at operations. PGE's Opening Br. at 31. But PGE's brief provides only PGE's own interpretation of its contract forms; it cites to no PUC order endorsing or approving that interpretation. PGE essentially asks this Court to assume that by "approving" PGE's proposed contract form, the PUC both construed the contract form as PGE apparently had intended and approved of PGE's construction as consistent with PUC's policy. There is no basis for that conclusion.

Indeed, the PUC orders "approving" PGE's standard contracts facially do not support PGE's arguments. PUC Order No. 07-065 was a one-page order noting that the PUC's staff recommended approval of PGE's standard contract after PGE agreed to certain unidentified revisions, and no other party filed any objections. PUC Order No. 07-065 (Feb 27, 2007). The order does not discuss the provisions of PGE's initially filed standard contract forms that addressed the contract term or the term of fixed prices, and it certainly does not "approve" or endorse the arguments PGE now makes.

Later in 2007, PGE made additional changes to its standard contract forms, which the PUC "accepted" without even issuing an order. *See* Advice No. 07-27, Schedule 201 Qualifying Facility Power Purchase Information Update (Nov 1, 2007), *available at* https://apps.puc.state.or.us/edockets/docket.asp?DocketID=14412. That procedure was consistent with the PUC's statement in Order No. 05-584 that PUC staff—not the PUC itself—would review each utility's standard contract forms. Order No. 05-584, at 41. It did not amount to PUC approval of PGE's interpretation of the fixed-price term requirement.

B. Order Nos. 16-129 and 16-174 do not support PGE's arguments.

Nor do PUC Order Nos. 16-129 and 16-174 support PGE's position. With respect to Order No. 16-129, PGE relies on the portion of the order that states the PUC's policy "'provides for 20-year contracts, with prices fixed at

avoided cost rates in place *at the time of signing* remaining in effect for a 15-year period, and indexed pricing [*i.e.*, market prices] for the remaining five years.'" PGE's Opening Br. at 12 (quoting Order No. 16-129) (emphasis by PGE). But PGE fails to mention, remarkably, that the PUC promptly clarified that order, explaining that its use of the phrase "'in place at the time of signing' in Order No. 16-129 meant only that the fixed avoided cost rate to be paid during the first 15-year period following commercial operation, is the rate that existed at the time of signing." PUC Order No. 16-175, at 2. In that second order, the PUC also acknowledged that PGE's standard contract was different from those of Idaho Power and PacifiCorp but explicitly declined PGE's invitation to clarify that "the 15-year period is measured from the date the contract is executed[.]" *Id.* The PUC declined even to construe PGE's standard contract, and did not resolve whether PGE's contract was consistent with Commission policy.

Order No. 16-174 likewise offers little support for PGE's arguments. *See* PGE's Opening Br. at 14. Order No. 16-174 simply restates the policy in the same terms as it is stated in Order No. 05-584—adding nothing to the analysis regarding when the 15-year and 20-year periods were intended to begin and end.

IV. Even If the PUC Announced a New Policy, It Acted Within Its Discretion in Doing So.

Finally, PGE argues—without citing any decisional law to support its point—that the PUC may not adopt a new policy through a complaint proceeding initiated by ORS 756.500. *See* Opening Br. at 34 ("ORS 756.500 does not permit the Commission to create new policy."). PGE is wrong.

PGE offers no basis—in law or in logic—for the "important distinction" that it draws between ORS 756.500, the PUC's complaint statute, and ORS 756.515, the PUC's "own motion" statute. *See Pac. Nw. Bell Tele. Co. v. Eachus*, 320 Or 557, 565, 888 P2d 562 (1995) (so describing ORS 756.515). And presumably, it cannot—by their statutory text, ORS 756.500 and ORS 756.515 reflect the Oregon legislature's "meticulously mandat[ed] equal treatment." *Id.*; *see also id.* ("[I]t is clear that the legislature intended utilities brought before the PUC in 'own motion' cases to be given the same procedural opportunities as utilities brought before the PUC by 'complaint.'").

PUC's "complaint" statute, ORS 756.500, textually, is quite broad: it permits complaints to be filed "against any person whose business or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or regulation of which is conferred on the commission." ORS 756.500(1). The complainant, in the complaint, may seek any "relief to which the complainant claims the complainant is entitled," ORS 756.500(3), and nothing in the provision's text limits the remedy or the form of order the PUC

may issue in resolving the grounds alleged therein. *See* ORS 756.500(1)–(5). The statute does not, as PGE contends, limit the PUC's authority to address only past violations of legal duties or prohibit the PUC from construing or implementing its policies. *See* Opening Br. at 33–34.[17]

To the extent that PGE suggests that the PUC may act only through its investigative "own motion" statute, ORS 756.515, it is also wrong. Neither provision limits the other—indeed, as noted above, the "own motion" statute results in the very same procedures as those afforded in the PUC's complaint proceedings. *See* ORS 756.515(2), (3) ("[P]roceedings shall be had and conducted in reference to the matters investigated in like manner as though complaint had been filed with the commission relative thereto."). The same hearing provisions apply to both complaints and investigations. *See* ORS 756.518(1). Thus, PGE's demand for an "investigation" leads to the very same procedure PGE was already afforded below—which gave PGE a full opportunity to submit evidence into the record.[18]

---

[17] The statutory text is disjunctive, allowing a complaint where the complainant states "all grounds of complaint on which the complainant seeks relief *or* the violation of any law claimed to have been committed by the defendant * * * ." ORS 756.500(3) (emphasis added).

[18] That result is also consistent with the procedures contemplated under PURPA. PURPA requires FERC to promulgate mandatory purchase regulations and directs that "each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority." 16 USC § 824a-3(f)(1). FERC has provided state utility commissions "latitude in determining

PGE essentially argues that the PUC must conduct a full-blown rulemaking process to construe policy that was implemented after a full-blown, multi-year rulemaking process. That is not how the administrative process is designed to work.

CONCLUSION

The court should affirm the PUC's orders or dismiss the petition for judicial review.

DATED this 19th day of February, 2019.

STOLL STOLL BERNE LOKTING & SHLACHTER PC

By: s/Nadia H. Dahab
Steven C. Berman, OSB No. 951769
Keil M. Mueller, OSB No. 085535
Nadia H. Dahab, OSB No. 125630

209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Email: sberman@stollberne.com
kmueller@stollberne.com
ndahab@stollberne.com

---

the manner in which [FERC's] regulations are to be implemented." *Mississippi*, 456 US at 751. "[A] state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." *Id.* The "statute and the implementing regulations simply require the [state regulatory] authorities to adjudicate disputes arising under the statute." *Id.* at 759. The federal scheme therefore delegates such procedural matters to the discretion of the state agency.

Irion A. Sanger, OSB No. 003750
Sanger Law PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: (503) 756-7533
Email: irion@sanger-law.com

Attorneys for Respondents Northwest and Intermountain Power Producers, Community Renewable Energy Association, and Renewable Energy Coalition

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 6,754.

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

DATED this 19th day of February, 2019.

STOLL STOLL BERNE LOKTING & SHLACHTER PC

By: s/Nadia H. Dahab
Steven C. Berman, OSB No. 951769
Keil M. Mueller, OSB No. 085535
Nadia H. Dahab, OSB No. 125630

209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Email: sberman@stollberne.com
kmueller@stollberne.com
ndahab@stollberne.com

Attorneys for Respondents Northwest and Intermountain Power Producers, Community Renewable Energy Association, and Renewable Energy Coalition

INDEX TO SUPPLEMENTAL EXCERPT OF RECORD

SER-1

UM1805

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION; COMMUNITY RENEWABLE ENERGY ASSOCIATION; and RENEWABLE ENERGY COALITION, Complainants,	)	DOCKET NO. ___
v.	)	COMPLAINT
PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	)	

RECEIVED

DEC 06 2016

Public Utility Commission of Oregon
Administrative Hearings Division

I. INTRODUCTION

This is a complaint ("Complaint") filed by Northwest and Intermountain Power Producers Coalition ("NIPPC"), Community Renewable Energy Association ("CREA"), and Renewable Energy Coalition ("Coalition") (collectively, "Complainants") with the Public Utility Commission of Oregon (the "Commission") pursuant to Oregon Revised Statutes ("ORS") 756.500 and Oregon Administrative Rules ("OAR") 860-001-0170. As explained below, Portland General Electric Company ("PGE") is implementing its standard contracts offered to qualifying facilities ("QF") in a manner that is inconsistent with well-established Commission's policy and precedent implementing the Public Utility Regulatory Policies Act ("PURPA").

The Commission's policy is that 15 years of fixed pricing commences when the QF achieves operation. Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129, Order No. 05-584 (May 13, 2005). The Commission adopted the policy because it has determined that the minimum period of fixed revenue necessary for QF

DOCKETED

financing is 15 years. Id. at 19. This policy is sound and should be followed by all off-takers of QF energy. One rationale supporting this policy is that standard contracts for new QFs are generally executed prior to financing and construction, which can be up to three or more years earlier than power deliveries. However, a QF cannot sell electric energy for revenue prior to construction and operation. Assuming payment at the time of contract execution is also inconsistent with new contract implementation for existing QFs that, like new QFs, also need to sign their contracts well in advance of their contract expiration to obtain financing. Therefore, starting the 15 years fixed payment prior to operation appears designed to discourage new and existing QF development.

Both Idaho Power Company's ("Idaho Power") and PacifiCorp's Commission-approved standard contracts have unambiguous terms that allow a QF to elect to sell under prices that are fixed for a full 15 years from the date the QF starts delivering their net output—*not* on the date that the parties execute the contract. To the extent of the Complainants' knowledge, Idaho Power and PacifiCorp have correctly implemented the Commission's policy and provide for all QFs to be paid for a full 15 years of fixed prices after commercial operation, if they select that option.

PGE's Commission-approved standard contracts allow QFs to select a full 15 years of fixed prices, but through different language than Idaho Power and PacifiCorp. PGE's standard contracts have contained blank spaces that can be filled in with terms that specify that the QF's net output will be sold under fixed prices for 15 years after the QF's operation. In addition, PGE has agreed to make minor modifications to make even clearer specification in its standard contracts that the 15-year fixed price period commences when the QF begins commercial

operation. However, PGE's current policy is to only pay fixed prices for 15 years from the date that the standard contract is executed.

PGE's publicly stated position that contract payments start with contract signing rather than power delivery is not consistent with the Commission's policy and how Idaho Power and PacifiCorp implement 15 year fixed pricing because new QFs need years to be developed and constructed and cannot sell power on the date of contract execution. Thus, PGE is unreasonably reducing the available term of predictable and financeable revenue available to QFs seeking standard contracts. PGE's policy shortens the period a QF is paid known prices by the amount of time after execution required to achieve commercial operation—typically up to three years. This means that many QFs will not be able to obtain 15 years of fixed pricing, the minimum amount that the Commission has determined that most QFs need to obtain financing.

Complainants respectfully request the Commission reaffirm its policy and direct PGE to conform its business practices to be consistent with the terms of its standard contract and Commission orders and policy to pay 15 years of fixed prices after the QF begins delivering its net output to the utility. The Commission can resolve this Complaint without altering or revising any existing contracts or PGE's current standard contract, and only needs to confirm that Commission policy and PGE's standard contract require PGE to pay 15 years of fixed prices after the QF begins delivering its net output.

II. SERVICE

Copies of all pleadings and correspondence should be served on Complainants' counsel and managing members at the addresses below:

Robert D. Kahn
Northwest and Intermountain
Power Producers Coalition
P.O. Box 504
Mercer Island, Washington 98040
Telephone: 206-236-7200
rkahn@nippc.org

Brian Skeahan
Community Renewable Energy Association
PMB 409
18160 Cottonwood Rd
Sun River, OR 97707
Telephone: 360-431-5072
brian.skeahan@yahoo.com

John Lowe
Renewable Energy Coalition
88644 Hwy 101
Gearhart, OR 97138
Telephone: 503-372-6909
Fax: 503-372-6908
jravenesanmarcos@yahoo.com

Irion A. Sanger
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: 503-756-7533
Fax: 503-334-2235
irion@sanger-law.com

Sidney Villanueva
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: 503-747-3658
Fax: 503-334-2235
sidney@sanger-law.com

In support of this Complaint, Complainants allege as follows:

III. IDENTITY OF THE PARTIES

1. PGE is an investor-owned public utility regulated by the Commission under ORS Chapter 757. PGE is headquartered at 121 Southwest Salmon Street, Portland, Oregon 97204.

2. NIPPC is a non-profit organization, qualified under Internal Revenue Code Section 501(c)(6), with the organizational purpose of representing the interests of independent power producers, marketers, and service providers in the Pacific Northwest. NIPPC is headquartered at 4106 78th Avenue Southeast, Mercer Island, Washington 98040.

3. CREA is an intergovernmental association organized under ORS Chapter 190 with the organizational purpose of promoting the development of locally-owned, renewable

energy projects in Oregon. CREA's physical mailing address is c/o Mid-Columbia Council of Governments, 1113 Kelly Avenue, The Dalles, Oregon 97058.

4. The Coalition is an unincorporated association representing non-utility owned renewable energy generators throughout the Pacific Northwest. The Coalition is headquartered at 88644 Hwy 101, Gearhart, Oregon 97138.

IV. APPLICABLE STATUTES AND RULES

5. The Oregon statutes expected to be involved in this case include: ORS 756.500 to 756.610; and 758.505 to 758.555. The Oregon rules expected to be involved in this case include those within Divisions 1 and 29 of Chapter 860 of the OARs.

6. Additionally, federal law is implicated under the mandatory purchase provisions of PURPA, 16 USC § 824, et seq., 16 USC § 2601, et seq., and administrative rules promulgated by the Federal Energy Regulatory Commission ("FERC") under PURPA, 18 CFR §§ 292.101-292.602.

V. JURISDICTION

7. This case involves contracts PGE offers to QFs under PURPA's mandatory purchase provisions and FERC's implementing regulations thereto, which PURPA directs states to implement. See 16 USC § 824a-3; FERC v. Mississippi, 456 U.S. 742, 751, 102 S. Ct. 2126 (1982).

8. In Oregon, the Commission implements PURPA's mandatory purchase provisions by setting the rates, terms and conditions for long-term PURPA contracts that Oregon's public utilities must offer to QFs. See 16 USC § 824a-3(a), (f); ORS 758.505-758.555; Snow Mountain Pine Co. v. Maudlin, 734 P.2d 1366, 84 Or. App. 590, rev. den., 739 P.2d 571, 303 Or. 591, (1987). Public utilities are defined in ORS 758.505(7), and include PGE. Oregon law provides

that the "terms and conditions for the purchase of energy or energy and capacity from a qualifying facility shall . . . [b]e established by rule by the commission if the purchase is by a public utility." ORS 758.535(2)(a).

9. This Complaint involves PGE's standard contracts offered and executed as a result of Commission orders in existence at the time of this Complaint (Prayer for Relief Pars. 1 & 2), as well as an alternative request for a declaration as to the Commission's policy for standard contracts or other legally enforceable obligations incurred with PGE after the resolution of this complaint (Prayer for Relief Par. 3).

10. To the extent the Complaint requires interpretation of contractual obligations incurred prior to the filing of this complaint (Prayer for Relief Pars. 1 & 2), the Commission possesses primary or concurrent jurisdiction over interpretation of such contracts. Boise Cascade Corp. v. Bd. of Forestry, 935 P.2d 411, 416-20, 325 Or. 185 (1997); Reinwald v. Dep't of Emp't, 939 P2d 86, 88- 89, 148 Or. App. 75 (1997).

11. To the extent this Complaint requires an alternative request for a declaration as to the Commission's policy for standard contracts executed with PGE after the resolution of this complaint (Prayer for Relief Par. 3), the Commission has jurisdiction under its authority to set contract terms and rates for PURPA contracts with public utilities. ORS 758.505-758.555.

VI. INTEREST OF COMPLAINANTS

12. Complainants collectively advocate for the interests of independent power producers, including owners and prospective developers of QFs. Pursuant to ORS 756.500, "[a]ny person may file a complaint before the Public Utility Commission" and "[t]he complaint shall be against any person whose business or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or regulation of which is conferred upon the

commission." ORS 756.500(2) makes clear that "[i]t is not necessary that a complainant have a pecuniary interest in the matter in controversy or in the matter complained of . . . ."

13. NIPPC's organizational purpose is to represent the interests of independent power producers, marketers, and service providers in the Pacific Northwest to advance fair and competitive power markets. NIPPC's members include independent power producers, electricity service suppliers, transmission companies, and commercial and industrial customers.

14. CREA's organizational purpose is to educate and advocate for policies that support development of locally-owned, renewable energy projects in Oregon. CREA's members include several Oregon counties, irrigation districts, councils of government, project developers, for-profit businesses, and non-profit organizations.

15. The Coalition's organizational purpose is to ensure that small renewable generation projects continue to make an important contribution to the future of energy in the region. The Coalition's thirty four members operate over fifty QF projects throughout the Northwest. Several types of entities are members of the Coalition, including irrigation districts, water and waste management districts, corporations, small utilities, and individuals.

VII. FACTUAL BACKGROUND

16. In 2004, the Commission opened Docket No. UM 1129 to investigate public utility purchases from QFs, including contract length and price structures.

17. Under Commission Order No. 05-584, Docket No. UM 1129, dated May 13, 2005, the Commission established a 20-year standard contract term for QFs. Order No. 05-584 at 19. The Commission also required fixed pricing for the first 15 years, providing QFs with the option to commit to sell net output at market-based pricing for the final five years of the contract.

18. In Order No. 05-584, the Commission concluded that 15 years is the minimum term "to ensure the terms of the standard contract facilitate appropriate financing for a QF project." Id. at 19.

19. The Commission also ordered that each public utility "should draft its own standard contract rates, terms and conditions." Id. at 41. The Commission declined to require each utility's standard contract to be "identically worded across all standard contract forms, so long as the meaning of each term is consistent with the present or past decisions" of the Commission. Id.

20. The purpose of the Commission approving standard contracts for each utility was to "eliminate negotiations" by pre-establishing "terms and conditions that an eligible QF can elect without any negotiation with the purchasing utility." Id. at 12, 16.

21. In compliance with Order No. 05-584, both Idaho Power's and PacifiCorp's Commission-approved standard contracts have declared that the QF may elect to sell under prices that are fixed for a full 15 years from the date the QF achieves operation, and provide that the 15 years do not start on the date that the parties execute the contract. Both Idaho Power's and PacifiCorp's standard contracts have remained materially unchanged since 2005 on this point.

22. PGE's Commission-approved standard contracts and Schedule 201 available since 2005 have contained blank spaces that can be filled in with terms that specify that the QF's net output will be sold under fixed prices for 15 years after the QF's operation.

23. Historically, PGE has agreed, when requested, to make minor modifications to the language in the standard PPA, further clarifying that the 15-year fixed price period commences when the project begins commercial operation.

24. On April 29, 2010, PGE entered into a standard contract with PaTu Wind Farm LLC. Re PGE – Qualifying Facility Contracts, Docket No. RE 143, Informational Filing- PaTu Wind Farm, LLC (Sept. 19, 2014). Section 2.2.2 states, "By 5/31/11 Seller shall have completed all requirements under Section 1.6 and shall have established the Commercial Operation Date." Section 2.3 provides, "This Agreement shall terminate on 5/31/2031. . . ." The Commercial Operation Date of May 31, 2011 and Termination Date of May 31, 2031 provide a contract term of a full 20 years after the Commercial Operation Date and over 20 years after the date the contract was executed.

25. On February 19, 2014, PGE entered into a standard contract with OneEnergy Oregon Solar, LLC. Re PGE – Qualifying Facility Contracts, Docket No. RE 143, Informational Filing- OneEnergy Oregon Solar, LLC (Sept. 19, 2014). Section 2.2.2 states, "By August 19, 2015 Seller shall have completed all requirements under Section 1.5 and shall have established the Commercial Operation Date." Section 5.1 provides a "Fixed Price (for the first 15 years following the Commercial Operation Date)" shall be paid by PGE.

26. PGE's express contractual clarifications, in paragraphs 24 and 25 above, demonstrate PGE's belief that payment of 15 years of fixed prices commencing upon commercial operation is permissible under Schedule 201.

27. As recently as 2014, PGE has agreed to allow such clear specification in its standard contracts. PGE's course of performance permitting QFs to add further language clarifying that the 15-year fixed price period commences with the QF's commercial operation resolved any potential ambiguity in the contract language.

28. At no time prior to 2016 did PGE publicly state that it would only pay QFs 15 years of fixed prices commencing on the effective date of the PPA.

29. In 2012, the Commission opened Docket No. UM 1610 to investigate QF contracting, including appropriate contract term and duration for fixed-price portion of the contract.

30. On February 24, 2014, the Commission concluded Phase I of UM 1610 by issuing Order No. 14-058, which maintained its QF contract term policy of offering QFs contracts of 20 years with up to 15 years of fixed pricing from the time of operation. Re Investigation Into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Order No. 14-058 (Feb. 24, 2014). The Commission noted several parties testimony that "a QF developer may only have access to financing **after** a PPA has been signed [and that] prior to that time, the QF developer may rely only on the developer's own resources." Id. at 7 (emphasis added).

31. In compliance with Order No. 14-058, PGE drafted a standard contract for renewable avoided costs that specified payment at fixed prices for 15 years after the commercial operation date. On December 16, 2014, the Commission issued Order No. 14-435 approving this standard contract as part of PGE's Supplemental Filing to Update Schedule 201. Re Investigation Into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Order No. 14-435 (Dec. 16, 2014). Section 4.5 of PGE's renewable standard contract approved in the December 16, 2014 order stated, "During the Renewable Resource Deficiency Period, Seller shall provide and PGE shall acquire the RPS Attributes for the Contract Years as specified in the Schedule and Seller shall retain ownership of all other Environmental Attributes (if any). During the Renewable Resource Sufficiency Period, and any period within the Term of this Agreement after completion of the first fifteen (15) years after the Commercial Operation Date, Seller shall retain all Environmental Attributes in accordance with the Schedule." Re Investigation Into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, PGE's Supplemental Filing

to Update Schedule 201 at 124 (Nov. 25, 2014). Section 1.7 of that renewable standard contract defined "contract year" as "each twelve (12) month period commencing upon the Commercial Operation Date or its anniversary during the Term, except the final Contract Year will be the period from the last anniversary of the Commercial Operation Date during the Term until the end of the Term." Id. at 116. Thus, the fixed renewable rate pricing was offered for up to 15 years from the Commercial Operation Date in exchange for the QF's conveyance of RPS Attributes for those 15 years.

32. PGE's renewable standard contract referenced in paragraph 31 unambiguously demonstrated that the QF will receive the fixed renewable prices for 15 years after achieving operation – not just for 15 years after execution of the contract.

33. On March 29, 2016 the Commission concluded UM 1734 by issuing Order No. 16-130, denying PacifiCorp's request to reduce the standard QF fixed-price contract term from 15 to three years. Re PacifiCorp, dba Pacific Power, Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap, Docket No. UM 1734, Order No. 16-130 (Mar. 29, 2016). The Commission determined "our use of 20-year contracts, with prices fixed at avoided costs for 15 years followed by index pricing for the remaining five years, continues to have merit." Id. at 5.

34. On March 29, 2016, the Commission concluded UM 1725 by issuing Order No. 16-129, denying Idaho Power's request to reduce the standard QF contract term from 20 to two years. Re Idaho Power Co., Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, Docket No. UM 1725, Order No. 16-129 (Mar. 29, 2016). The Commission determined that a 20 year standard contract was not required by Oregon's

PURPA statute, but nevertheless upheld the policy to establish "a settled and uniform institutional climate for QFs . . . ." Id. at 7 (citing Order No. 14-058 at 23).

35. On April 14, 2016, the Coalition and CREA filed a Motion for Clarification with the Commission noting ambiguity in Order No. 16-129, which states "our current policy . . . provides for 20-year contracts, with prices fixed at avoided cost rates in place at the time of signing remaining in effect for a 15-year period, and indexed pricing for the remaining five years . . . ." Re Idaho Power Co., Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, Docket No. UM 1725, CREA's and Coalition's Motion for Clarification (Arp. 12, 2016) (citing Order No. 16-129 at 8). The Coalition and CREA sought clarification that the quoted language did not change the pre-existing policy that the 15-year term of fixed prices commences when the QF achieves operation.

36. On April 29, 2016, PGE filed with the Commission a response to the Coalition and CREA's Motion for Clarification referenced in paragraph 35, wherein PGE argued that the Commission's policy does not require PGE to sign a 15-year fixed price contract running from the operation date. Re Idaho Power Co., Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, Docket No. UM 1725, PGE's Response in Opposition to Motion for Clarification (Arp. 29, 2016). PGE stated, "Clearly, the Commission's policy, as applied to PGE, does not require utilities to pay fixed rates for more than 15 years measured from the date of execution." Id. at 5. PGE further argued, "Idaho Power's contract is 'more generous than that required.'" Id. at n.9.

37. On May 16, 2016, the Commission issued Order No. 16-175, clarifying that the Commission's "use of 'in place at the time of signing' in Order No. 16-129 meant only that the fixed avoided cost rate to be paid during the first 15-year period following commercial operation,

is the rate that existed at the time of signing." Re Idaho Power Co., Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, Docket No. UM 1725, Order No. 16-175 at 2 (May 16, 2016). Further, the Commission explained, "Order No. 16-129 made no changes to Idaho Power's Schedule 85, which unambiguously provides that the 15-year period commences at the time of the QF's 'Operation Date.'" Id.

38. Order No. 16-175 also noted that PGE's standard contract language differed from that of Idaho Power and PacifiCorp. But the Commission did "not address the provisions of PGE's standard contract at [that] time." Id. at 3.

39. PGE's current policy in negotiating with QFs is consistent with the position it presented in response to the Coalition and CREA's Motion for Clarification of Order No. 16-129.

40. PGE's current policy means that no QF entering into a new or renewal contract can ever obtain 15 years of fixed prices.

41. Since early 2016, PGE has refused to sign standard contracts that allow QFs to fill in the standard contract in a manner that makes it clear that PGE will pay fixed prices for a full 15 years after the operation of the QF.

42. PGE's July 12, 2016 compliance filing included changes to the renewable standard contracts and updated Schedule 201 as required by Order No. 16-174. Re Investigation Into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, PGE's Schedule 201 Qualifying Facility Information Compliance Filing at 1 (July 12, 2016). Those changes incidentally removed language which could only be interpreted as being consistent with the requirement that the 15-year fixed price period commenced on the Commercial Operation Date. See id. at 3 (summarizing changes made to Section 4).

43. On November 18, 2016, NIPPC, CREA and the Coalition sent a joint letter to PGE requesting it unambiguously affirm that current Oregon policy and PGE's standard contract require PGE to pay fixed prices for a full 15 years after the operation of the QF, or NIPPC, CREA and the Coalition would file a complaint with the Commission.

44. On December 5, 2016, PGE informed NIPPC, CREA and the Coalition that PGE was not willing to compromise in any substantive manner.

45. There is no factual or policy basis set forth in any Commission order to allow PGE to offer shorter contract terms than Idaho Power and PacifiCorp.

VIII. LEGAL CLAIMS

First Claim For Relief

Violation of Commission Orders and Policies Implementing PURPA and Related State Law

46. Complainants incorporate by reference paragraphs 1 through 45.

47. The Commission's policy set forth in its extant orders is to require Oregon's public utilities to offer fixed prices for 15 full years after operation begins – not only for 15 years after execution of the standard contract, which almost always occurs months to years in advance of operation.

48. That policy is succinctly reflected in Idaho Power's and PacifiCorp's standard contracts, which unambiguously allow the QF to elect to enter into a contract to sell its net output at fixed prices for a full 15 years after beginning operations.

49. PGE's standard contract forms do not have a specified term, and instead, the term of the contract is filled out by the contracting parties. The maximum term of fixed prices cannot be known from the form of the contract reviewed and approved by the Commission.

50. PGE position is that the blank spaces in the contract require the 15 year fixed pricing to start at the time of execution of the contract. PGE's current position is not consistent with the Commission's policy and has obvious detrimental impacts on the ability of QFs to negotiate a contract with PGE that is consistent with Commission policy.

51. PGE allows its standard contract to be filled out in a manner that would allow the same level of clarity as is available in the Idaho Power and PacifiCorp standard contracts with regard to the payment at fixed prices for 15 years from the time the QF achieves operation.

52. PGE's business practice prevents QFs from obtaining 15 years of fixed prices after the commencement of operation and violates the plain terms and intent of the Commission's orders and policy implementing PURPA and associated state law.

Second Claim For Relief

Arbitrary Application of Schedule 201 and the standard PPA

53. Complainants incorporate by reference paragraphs 1 through 52.

54. QFs that have executed standard contracts are eligible for up to 15 years of fixed prices, depending on their contract length.

55. PGE has clarified that it is willing to pay some QFs 15 years of fixed prices commencing on the Commercial Operation Date, while informing other similarly situated QFs that they are only eligible for 15 years of fixed prices commencing on the date of signing, which means that they will receive less than 15 years of fixed prices.

56. PGE's refusal to follow Commission policy that all QFs can obtain 15 years of fixed prices commencing on the Commercial Operation Date is arbitrary, and unjustly harms those QFs who PGE asserts are entitled to 15 years of fixed prices from the Effective Date.

IX. PRAYER FOR RELIEF

WHEREFORE, Complainants respectfully requests that the Commission issue an order:

1. Ordering PGE to cease and desist from any business practices inconsistent with Commission policy and orders that require long-term contracts with fixed rates, by openly disputing that it must offer 15 years of fixed prices from the QF's operation date, as PacifiCorp and Idaho Power contracts already do in an unambiguous fashion; and

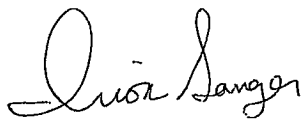
2. Declaring that PGE's standard contract, as interpreted in the regulatory context from which it arose, requires payment by PGE at fixed prices for 15 years after the QF's operation date rather than merely 15 years after the time of contract execution, unless express language is inserted by the QF that demonstrates a contrary intent;

3. Alternatively, if the relief requested in paragraphs 2 and 3 of this Prayer for Relief is denied, ordering PGE to file revised standard contracts clearly stating that the 15 years of fixed prices run from the commercial operation date; and

4. Granting any other such relief, including equitable relief, as the Commission deems necessary.

Dated this 6th day of December, 2016.

Respectfully submitted,



Irion A. Sanger
Sidney Villanueva

Of Attorneys for Northwest and Intermountain Power Producers Coalition

Of Attorneys for Community Renewable Energy Association

Of Attorneys for Renewable Energy Coalition

CERTIFICATE OF SERVICE

I hereby certify that on the December 6, 2016, on behalf of NIPPC, CREA, and the Coalition, I filed the foregoing Complaint with the Oregon Public Utility Commission by electronic communication consistent with OAR 860-001-0170.

Sidney Villanueva

Sidney Villanueva
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: 503-747-3658
Fax: 503-334-2235
sidney@sanger-law.com

UM 1805

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1805

RECEIVED
SEP 08 2017
Public Utility Commission of Oregon
Administrative Hearings Division

NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, COMMUNITY RENEWABLE ENERGY ASSOCIATION and RENEWABLE ENERGY COALITION, Complainants, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	**JOINT PETITION TO INTERVENE OUT OF TIME OF DAYTON SOLAR I LLC, STARVATION SOLAR I LLC, TYGH VALLEY SOLAR I LLC, WASCO SOLAR I LLC, FORT ROCK SOLAR I LLC, FORT ROCK SOLAR II LLC, ALFALFA SOLAR I LLC, FORT ROCK SOLAR IV LLC, HARNEY SOLAR I LLC, AND RILEY SOLAR I LLC**

Pursuant to ORS 756.525 and OAR 860-001-0300, Dayton Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, Wasco Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Alfalfa Solar I LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, and Riley Solar I LLC (collectively the "NewSun Solar Projects") hereby petition the Public Utility Commission of Oregon ("Commission") to intervene in this proceeding out of time. As explained herein, the NewSun Solar Projects seek late intervention in this docket to correct errors or ambiguities in Order No. 17-256, which the NewSun Solar Projects fear could be interpreted to inadvertently address the terms of executed power purchase agreements that none of the original parties to this proceeding asked the Commission to address. Without the right to intervene and clarify the matter, the NewSun Solar Projects will suffer immediate and significant financial harm in their

DOCKETED

ongoing efforts to develop and finance their solar projects under standard contracts to sell to Portland General Electric Company ("PGE") at the renewable avoided cost rates.

In support of this Petition the NewSun Solar Projects state as follows:

1. The legal names and addresses of these individual intervenors are:

Dayton Solar I LLC
3500 S. Dupont Hwy
Dover, DE 19901

Starvation Solar I LLC
3500 S. Dupont Hwy
Dover, DE 19901

Tygh Valley Solar I LLC
3500 S. Dupont Hwy
Dover, DE 19901

Wasco Solar I LLC
3500 S. Dupont Hwy
Dover, DE 19901

Fort Rock Solar I LLC
3500 S. Dupont Hwy
Dover, DE 19901

Fort Rock Solar II LLC
3500 S. Dupont Hwy
Dover, DE 19901

Alfalfa Solar I LLC
3500 S. Dupont Hwy
Dover, DE 19901

Fort Rock Solar IV LLC
3500 S. Dupont Hwy
Dover, DE 19901

Harney Solar I LLC
3500 S. Dupont Hwy
Dover, DE 19901

Riley Solar I LLC
3500 S. Dupont Hwy
Dover, DE 19901

2. The NewSun Solar Projects will be represented in this proceeding by Gregory M. Adams (OSB No. 101779) and Peter J. Richardson (OSB No. 066687) of the law firm Richardson Adams, PLLC.

3. All documents relating to this proceeding should be served on the following persons:

Gregory M. Adams (OSB No. 101779)
Richardson Adams, PLLC
515 N. 27th Street
Boise, Idaho 83702
Telephone: 208-938-2236
Fax: 208-938-7904
greg@richardsonadams.com

4. Dayton Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, Wasco Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Alfalfa Solar I LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, and Riley Solar I LLC are each similarly situated qualifying facilities ("QF") that share a common developer and manager, NewSun Energy LLC.

5. Each of these QFs has separately contracted to sell the entire net output of its solar QF to PGE under the renewable avoided cost prices, and each QF executed the standard contract approved for renewable solar QFs by this Commission's Order No. 15-289. The executed standard contracts for each of the NewSun Solar QFs are attached hereto and incorporated by reference into this petition to intervene.

6. The NewSun Solar Projects are currently in the development stage and are planned to be constructed in geographically diverse locations in the state of Oregon, including locations in Harney County, Yamhill County, Wasco County, Crook County, and Lake County, as described in the recitals of each of their respective executed standard contracts.

7. The NewSun Solar Projects had understood their standard contracts, as completed and fully executed by each QF and PGE, to require that PGE pay the QF the fixed renewable prices in the table attached thereto as an exhibit for 15 "Contract Years" after the "Commercial Operation Date" in exchange for selling the entire net output of the QF, and its "RPS Attributes" during the "Renewable Deficiency Period," to PGE, as those terms are defined and discussed in

the contracts. The NewSun Solar Projects understand that PGE has argued otherwise. However, careful examination of the terms of the actual standard contracts executed by each of the NewSun Solar Projects, as well as customary industry convention and understanding, contradict PGE's position. The basis for this conclusion is discussed more completely in the NewSun Solar Project's accompanying application for rehearing and reconsideration filed on this same date. The NewSun Solar Projects therefore chose not to engage in litigation against PGE over the point, and the extensive delays inherently associated therewith, prior to executing their standard contracts.

8. Notably, the NewSun Solar Projects' each executed the version of PGE's form standard contract for renewable QFs that was approved by Order No. 15-289, and that form of agreement was no longer available for new QF contracts at the time of the complaint in this proceeding. Accordingly, the NewSun Solar Projects did not understand this docket to be a docket where the complainants or PGE sought to obtain a legally binding interpretation of the unique terms of that previously available contract form, which differs in important material respects from the contract forms available at the time the complaint here was filed.

9. Each of the NewSun Solar Projects is directly affected by the Commission's Order No. 17-256 issued in this proceeding to the extent that order could be interpreted to provide a binding interpretation of the NewSun Solar Projects' fully executed power purchase agreements with PGE. The NewSun Solar Projects are particularly concerned with the following sentence in Order No. 17-256 at page 3: "Because we approved PGE's standard contract filings that limited the availability of fixed prices to the first fifteen years measured from contract execution, PGE cannot be found to have been in violation of our orders." This sentence does not

identify any particular standard contract form that "*limited* the availability of fixed prices to the first fifteen years measured from contract execution." *Id.* (emph. added). The NewSun Solar Projects suspect that the ambiguous breadth of this statement in the order was an inadvertent oversight, and that the Commission had no intent to provide a binding interpretation of all of PGE's previously effective and executed standard contract forms. But the open-ended nature of this language in the order will create a severe hardship on QFs, like the NewSun Solar Projects, that executed previously effective standard contract forms and must now rely on those executed agreements for project financing, which is necessary to complete construction.

10. Although the terms of the NewSun Solar Projects' standard contracts provide the right to sell the QFs' net output at fixed renewable rates for 15 years after commercial operation, Order No. 17-256 and PGE's increasingly litigious position adverse to QFs casts a cloud of doubt that must be removed with clarification or rehearing of the ambiguous Order No. 17-256.

11. The NewSun Solar Projects have good cause to seek late intervention. The complaint and the parties' initial filings in this proceeding led the NewSun Solar Projects to understand that this complaint proceeding would not result in a binding interpretation of any existing, fully executed power purchase agreements. Such agreements often include inserted language in blank spaces or exhibits that can provide clarity and alter the meaning that could be adduced from the boilerplate form alone on important points. Additionally, as PGE itself argued, such a binding determination of a party's rights under its contract cannot be rendered without joining that party as a party to the proceeding. *PGE's Comments on Declaratory Ruling Option* at 4 (filed Jan. 5, 2017). Thus, after NewSun Energy itself participating in one of the initial prehearing conferences, *see ALJ Ruling* at 1 (Dec. 22, 2016), none of the NewSun Solar Projects

sought to intervene in this proceeding because Complainants repeatedly asserted they did not request a binding determination of any existing and fully executed standard contracts.[1] Now that ambiguities in the final order may be interpreted to address unidentified versions of PGE's past standard contract forms, which PGE could argue to include the NewSun Solar Projects' executed contracts, the NewSun Solar Projects have a direct and substantial interest in seeking clarification and rehearing of that determination.

12. Moreover, the above-quoted ambiguities in Order No. 17-256 have now effectively made the NewSun Solar Projects parties to this proceeding. The rehearing provision of Oregon's utility law provides that "[a]fter an order has been made by the Public Utility Commission in any proceeding, *any party thereto* may apply for rehearing or reconsideration thereof within 60 days from the date of service of such order." ORS 756.561(1) (emph. added). It further provides that the rehearing filing itself "shall not excuse *any party against whom an order has been made*" from abiding by the order. ORS 756.561(2) (emph. added). Although the NewSun Solar Projects perceived no reason to intervene in this proceeding previously, the order itself appears to possibly make the NewSun Solar Projects a "party thereto", i.e. a party to the order, and even possibly a "party against whom the order has been made," to the extent that its ambiguous language purports to interpret the NewSun Solar Projects' binding and fully executed contracts. Therefore, granting this petition to intervene to allow the NewSun Solar Projects' participation in proceedings on clarification and rehearing would be a mere formality in

---

[1] Additional background on this point, with citations to the record, is contained in the Motion for Clarification and Reconsideration or Rehearing filed on this date.

recognition of the fact that the order could be construed to have already made the NewSun Solar Projects parties to this proceeding.

13. Furthermore, granting intervention to the NewSun Solar Projects will save administrative and judicial resources because if denied the opportunity to intervene and present argument for clarification and rehearing, the NewSun Solar Projects would have no choice but to exercise their statutory right to seek expedited judicial review of Order No. 17-256. The judicial review provisions applicable here provide that "*any person* adversely affected or aggrieved by an order *or* any party to an agency proceeding is entitled to judicial review of a final order." ORS 183.480(1) (emph. added); *see also* ORS 183.310(7), (8) (defining "person" more broadly than "party"). This disjunctive language unambiguously establishes the NewSun Solar Projects' statutory right, as aggrieved *persons*, to seek judicial review of Order No. 17-256, even if not made formal parties to the underlying contested case. *People for Ethical Treatment v. Inst. Animal Care*, 312 Or. 95, 98-102, 817 P.2d 1299 (1991); *accord* ORS 183.482(2). There is no doubt that the Court of Appeals would set aside the Commission's order to the extent that it purports to interpret numerous unidentified and undiscussed standard contract forms the Commission has approved over the past decade, including, possibly, those executed by the NewSun Solar Projects. *See OR-OSHA v. CBI Services, Inc.*, 356 Or. 577, 599, 341 P.3d 701 (2014) (holding "there must be some sort of explanation that enables the reviewing court to evaluate whether [an agency's] decision comports with the authority granted.").[2] Accordingly,

[2] The Motion for Clarification and Reconsideration or Rehearing filed concurrently herewith provides additional legal argument regarding the need for clarification of the order.

granting intervention now will allow the Commission to correct and clarify the order, saving all parties involved the delay and expense of a judicial review of a facially inadequate order.

14. Finally, even if the Commission disagrees with the other bases for late intervention asserted above, the Commission should grant late intervention in the interest of administrative efficiency and just resolution of the ambiguities identified above in Order No. 17-256. Oregon's utility code allows the Commission to rescind, suspend, or amend its orders without specifying detailed requirements for such action, aside from notice and opportunity to be heard by affected parties. ORS 756.568. Granting intervention to accept argument at this time as to why the Commission should clarify and rescind certain language in Order No. 17-256 would result in the most expedient procedure to resolve the matter.

WHEREFORE, for the reasons set forth above, Dayton Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, Wasco Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Alfalfa Solar I LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, and Riley Solar I LLC each respectfully request to be made parties to this proceeding as allowed under ORS 756.525 and OAR 860-001-0300.

RESPECTFULLY SUBMITTED this 8th day of September 2017.

RICHARDSON ADAMS, PLLC

/s/ Gregory M. Adams

Gregory M. Adams (OSB No. 101779)
515 N. 27th Street
Boise, Idaho 83702
Telephone: 208-938-2236
Fax: 208-938-7904
greg@richardsonadams.com
Of Attorneys for Dayton Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, Wasco Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Alfalfa Solar I LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, and Riley Solar I LLC

that it plans to use the ambiguities in the Order as a sword against the NewSun Solar Projects. But PGE's arguments are entirely misplaced.

Indeed, PGE's recent filings confirm the basis for the NewSun Solar Projects' significant interest in any proceeding related to the Order, which now include the pending clarification and rehearing requests filed by the Complainants as well as PGE's own untimely request for clarification of the Order contained in its objection (discussed further below). PGE's objection fails to refute the critical points in the joint petition to intervene.

Most notably, PGE overlooks that it is the *Order itself* – not the claims or any relief requested by the Complainants – which has made the NewSun Solar Projects an interested party in this proceeding. The applicable statute, ORS 756.561, therefore fully supports the NewSun Solar Projects' filing of an application for clarification and rehearing or reconsideration.

PGE is also incorrect that ORS 756.525 bars the Commission from granting late intervention. The statute contains no affirmative bar against intervention after the taking of evidence. Additionally, the record did not even contain the 2015 Standard Renewable Contract Form (approved by Order No. 15-289) or the NewSun Solar Project's executed agreements until the NewSun Solar Projects' placed those documents in the record at the time of their intervention filing. Thus, even if the statute bars intervention after the taking of evidence, the joint petition to intervene is not late to the extent that this is a proceeding to address the meaning of previously effective contract forms.

Under the unique circumstances of this case, the Commission should grant late intervention.

II. REPLY TO BACKGROUND

The background section of PGE's objection contains mischaracterizations of the underlying facts supporting intervention. Most significantly, PGE asserts: "Complainants sought such a ruling with regard to all versions of PGE's standard contract forms used by PGE after Order No. 05-584." *PGE's Objection* at 3. This assertion forms the basis of a theme throughout PGE's objection – that the NewSun Solar Projects should have intervened earlier because this was a proceeding to address all prior PGE contract forms and executed contracts instead of a proceeding to address PGE's current practices. PGE is demonstrably wrong.

In fact, the claims in the complaint did not request any binding interpretation of any of PGE's formerly effective contract forms or any executed contracts. The First Claim boiled down to an allegation that "PGE's *current* position is not consistent with the Commission's policy and has obvious detrimental impacts on the ability of QFs to negotiate a contract with PGE that is consistent with Commission policy." *Complaint* at ¶ 50 (emph. added); *see also id.* at ¶¶ 40-45 (regarding PGE's current practices). Likewise, the Second Claim alleged that "PGE's refusal to follow Commission policy that all QFs can obtain 15 years of fixed prices commencing on the Commercial Operation Date is arbitrary, and unjustly harms those QFs who PGE asserts are entitled to 15 years of fixed prices from the Effective Date." *Id.* at ¶ 56. The Prayer for Relief identified no previously effective contract form or any executed contract for which it sought interpretation, and instead focused on PGE's current practices and requested alternative relief that PGE be ordered to correct its current contract form. *Id.* at Prayer for Relief.

The Complainants consistently disavowed the need for a binding interpretation of any

previously effective forms. For example, one summary judgment brief asserted, "Finally, just as with the PaTu and OneEnergy contracts, Complainants *are not asking the Commission to interpret any of PGE's older standard form contracts*. These older form contracts are merely illustrative of PGE's inconsistent views on the Commission's policy and business practices." *Complainants' Reply to PGE's Response to Complaints' Motion for Summary Judgment*, at 12 (filed May 15, 2017) (emph. added). Complainants' position was consistent on this point. *See also Complainants' Response to PGE's Motion for Summary Judgment* at 17 (filed May 8, 2017) (in response to PGE's argument regarding the 2007 contract form, arguing "the Commission simply need not interpret this older contract form in this proceeding, but focus on interpreting its overall policy and current contract forms . . . ."); *id.* at 19 (asserting, "Complainants reiterate that they do not believe that any of PGE's older form PPAs or executed contracts need to be interpreted to resolve this case").

The NewSun Solar Projects provided extensive citations to the record on the same point in their clarification and rehearing filing. *See NewSun Solar Projects' Motion for Clarification and Application for Rehearing* at 4-7 (filed Sept. 8, 2017). PGE appears to argue that NewSun Solar Projects' motion for clarification and application for rehearing or reconsideration is a legal nullity that should be ignored, and therefore the background contained therein is necessary in this reply.

As explained therein, representatives of NewSun Energy, the developer of the NewSun Solar Projects, participated in the prehearing conference on December 22, 2016, because it appeared possible that the scope of this proceeding might be expanded to impact the NewSun

Solar Projects' executed standard contracts. *See ALJ Ruling* at 1 (Dec. 22, 2016). However, to the extent there was any ambiguity previously, the intent *not* to adjudicate the meaning of executed contracts became clear in the comments on the correct procedure. Complainants explained, "Complainants are not requesting that the Commission reform or otherwise impose wholesale contract interpretation on PGE's previously executed standard contracts." *Complainants Comments on Declaratory Ruling Option* at 4 (filed Dec. 29, 2016).

PGE also reiterated its concern regarding a perceived need to interpret existing contracts: "Of particular concern to PGE are ambiguous assertions that the relief requested will involve the interpretation of previously executed standard contracts. The complaint fails to identify the contracts to be interpreted or the language to be interpreted." *PGE's Comments on Declaratory Ruling Option* at 2 (filed Jan. 5, 2017). PGE expressly argued that the Commission could not interpret "*previously executed* standard contracts . . . because Complainants lack standing to seek adjudication of the private rights of contract represented by the executed contracts and because Complainants have failed to join indispensable parties (the QF counterparties to the executed contracts)." *Id.* at 4 (emph. in original).

Administrative Law Judge ("ALJ") Allan Arlow ultimately ruled the case should be processed by complaint procedures because the declaratory ruling statute, ORS 756.450, only allows the Commission to interpret "any rule or statute enforceable by the Commission" and does *not* allow declaratory rulings on the meaning of the Commission's orders. *ALJ Ruling* at 3 (Jan. 19, 2017). Thus, any objective non-party considering whether it should intervene would conclude that the proceeding was a complaint against PGE related to its *current* practices and

utilities without making any distinctions as to its position. For example, in UM 1610 PGE argued "a term of 20 years (with 15 year fixed pricing) is appropriate."[41] PacifiCorp concurrently argued "the current term length of up to 20 years be continued with the fixed-price period in the contract changed from the initial 15 years to the initial 10 years."[42] Yet as PacifiCorp's standard contracts clarify, PacifiCorp interprets the "initial" years of its contract starts at the time of commercial operation. Likewise, Idaho Power phrased its proposal in UM 1610 as "the currently authorized 15-year fixed price portion of the contract should be reduced to 10 years."[43] If PGE had a different interpretation of Commission policy, or a recommendation based on a view of the world different from all other parties in UM 1129, UM 1610, UM 1725 and UM 1734, then it should have clearly and unambiguously expressed it.

B. Complainants' Position Is Consistent with Standard Industry Treatment and Other State Commission Decisions

The common industry understanding of how fixed prices work with respect to contract term is that the fixed-price period begins when power deliveries begin. The term of fixed pricing in a power sale agreement has been understood in the industry to commence at the project's in-service date. This logical requirement – to match the

---

41 Re Investigation into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, PGE Direct Testimony at PGE/300, Macfarlane-Morton/5 (Apr. 29, 2013).

42 Re Investigation into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Pacific Power's Direct Testimony at PAC/200, Griswold/4-5 (Feb. 4, 2013); see also Re Investigation into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, PacifiCorp Direct Testimony at PAC/101, Dickman/4 (Feb. 4, 2013).

43 Re Investigation into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Idaho Power's Post-Hearing Brief at 3 (June 17, 2013).

revenue stream to the term – is consistent with basic utility ratemaking for utility-owned plants.

As the Commission is well aware, a utility-owned plant is not placed in rates until its in-service date, and the plant's depreciable life and recovery of and on the investment does not begin until that time.[44] For example, PGE made the decision to commit to acquire the Carty Generating Station on June 3, 2013, and the plant was not committed to be placed in service until July 31, 2016.[45] But PGE did not forego two years of recovery of the depreciation expense and return on undepreciated balances scheduled over the long-term year depreciable life of its the plant because it took two years to construct the plant and place it in service. Rather, and quite logically, the commencement of recovery of the long term depreciable life and recovery of the years of the depreciation expense and return on undepreciated balances commenced on the in-service date of the plant.

This basic treatment has long existed for third-party power sales agreements as well. In fact, PGE's recent request for proposals ("RFP") demonstrate that similar treatment as Carty's would have existed for a power purchase agreement, or a tolling agreement from an independently owned gas-fired plant. In the RFP that resulted in Carty, issued in 2012, PGE's own term sheet for bids stated that the "[m]inimum term is 10 years and preferred term is 20 years, starting no earlier than 2013 and no later than 2015."[46] Likewise, PGE's renewable RFP, issued later in 2012, also sought bids where

---

44 ORS 757.140, 757.355(1).

45 See Re PGE Request for General Rate Revision, Docket No. UE 294, Order No. 15-356 at 5-6 (Nov. 3, 2015).

46 PGE Request for Proposals for Renewable Resources, Docket No. UM 1535, PGE's final draft Request for Capacity and Baseload Energy Resources at 35

the "minimum bid term is 10 years, with a start date no earlier than January 1, 2013."[47] Notably, these RFPs allowed QFs and non-QF independent power producers to compete against utility-owned generation resources, demonstrating that PGE's treatment here is indeed unique and discriminatory against small QFs.

Precedent from numerous other states establish that PGE's own treatment in its recent RFP is not an outlier, but instead PGE's position in this case for standard PURPA contracts is the industry outlier. For example, in apt order during the early stages of implementing PURPA, the Idaho Public Utilities Commission explained the rationale for similar treatment to the commencement of the fixed price term for QF contracts. The Idaho Commission reasoned:

> The avoided cost rules, 18 CFR 292.304(d)(2), state that long term rates shall, ...
>
> > "at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred."
>
> Avoided cost rates calculated under the methodology prescribed herein represent "... avoided costs calculated at the time the obligation is incurred." Although we recognize the risks (both 'upside' and 'downside') we believe that long lead time QFs should receive full benefit of avoided costs as estimated "at the time the obligation is incurred." Therefore, we find it reasonable that avoided costs computed under the methodology prescribed herein shall be published for six years, including the year of computation.[48]

(Jan. 25, 2012); see also id. at 15 (containing tables demonstrating that the term runs from the in-service date).

47 PGE Request for Proposals for Renewable Energy Resources, Docket No. UM 1613, PGE's Revised Draft Request for Proposals at 30 (Sept. 10, 2012).

48 Re Review of the Idaho Public Utilities Commission's Policies Establishing Avoided Costs Under the Public Utility Regulatory Policies Act of 1978, IPUC Case No. U-1500-170, Order No. 22636 at 59 (July 27, 1989).

The Idaho Commission then reaffirmed its prior policy to make published prices available for a 20-year contract term, as a means to ensure reasonable comparability to utility-owned generation.[49] It further explained:

> [W]e find that the avoided cost rates shall be published for on-line dates up to six years in the future. . . . The purpose is to provide developers with adequate rates for facilities with long construction times and to provide utilities with a basis for negotiating delayed QF on-line date contracts where desirable.[50]

More recent Idaho Commission rulings in QF and non-QF power purchase agreements are in accord with this treatment.[51]

As a further example, the Idaho Commission recently shortened its PURPA contract term from a twenty-year fixed-rate contract to a two-year fixe- rate contract.[52] PacifiCorp's and Idaho Power's Idaho service territory contracts are consistent with Idaho's policy that contract terms means the term of power delivery, and do not include the period of time between contract execution and power delivery.[53] PGE's interpretation

---

49 Id. at 63-65.

50 Id. at 73.

51 See, e.g., Re Application of Idaho Power Co. for Approval of an Agreement to Purchase Capacity and Energy from USG Oregon, LLC, IPUC Case No. IPC-E-09-34, Order No. 31087 at 3 (May 20, 2010) (approving non-QF power purchase agreement for unbuilt geothermal facility with 20 years of fixed rates commencing after in-service date after noting this extensive delay between contract execution and the guaranteed online date.).

52 Re Idaho Power Company's Petition to Modify Terms and Conditions of PURPA Purchase Agreements, IPUC Case No. IPC-E-15-01, Order No. 33357 (Aug. 20, 2015).

53 See, e.g., PacifiCorp Application for Power Purchase Agreement with Consolidated Irrigation Company, IPUC Case No. PAC-E-15-11, Application Attachment at 4, 17 (Sept. 18, 2015) (requiring payment for each Billing Period in each Contract Year after Commercial Operation Date); Idaho Power Amendment to Power Purchase Sales Agreement with Telocaset, IPUC Case No. IPC-E-15-09, Application Attachment at 12, 14 (Apr. 1, 2015) (requiring payment for all Net Energy delivered from the Operation Date, with full 20 years of payments).

of the fixed-price period would lead to an absurd result in Idaho, because two years does not provide enough time for a QF to become operational, so new QFs likely would not be able to make any power deliveries if their two-year contract began upon execution.

Some parties suggested that Idaho adopt a policy similar to Oregon's, where prices could be adjusted after 10 years of fixed prices. The Idaho Commission rejected this idea stating that "the same result can be accomplished through successive short-term contracts."[54] The fact that the Idaho Commission believed that prices would naturally sync up in the same manner as successive short-term contracts is further evidence of the common industry understanding of fixed-price periods beyond Oregon.

Other states have maintained 15-20 year standard PURPA contracts from the date of power deliveries on the grounds that this time period was necessary for QFs to obtain financing. The Wyoming Commission, for example, recently denied a request from PacifiCorp to reduce the maximum term of its standard PURPA contract to three years.[55] The Wyoming Commission required 20-year contracts with fixed pricing, which PacifiCorp asked to be shortened to three years. Ultimately, the Wyoming Commission rejected PacifiCorp's request and retained its 20-year fixed-price contract term.[56]

The Utah Commission also recently denied a request from PacifiCorp to reduce the contract term of its standard PURPA contract to three years. The Utah Commission required 20-year contracts with fixed pricing, which PacifiCorp asked be shortened to

---

54 IPUC Case No. IPC-E-15-01, Order No. 33357 at 24.

55 WPSC Docket No. 20000-481-EA-15, Record No. 14220 at 21.

56 The Wyoming Commission characterized its goal as establishing "a PURPA QF contract term that advances the policy interests and goals underlying PURPA of encouraging development, while not discriminating against QFs in Wyoming, and without unduly burdening Wyoming ratepayers with excessive price risk." Id. at P. 95.

three years. Several parties testified that QF projects needed 20 years to establish financing.[57] Although the Utah Commission rejected PacifiCorp's request, it reduced the PURPA contract term to 15 years, explaining it "strikes the balance . . . by mitigating a fair portion of the fixed-price risk ratepayers would otherwise bear while allowing QF developers and their financiers a reasonable opportunity to adjust to this more modest change in business practice.[58] PacifiCorp's Utah and Wyoming contracts, similar to its Idaho and Oregon contracts, are all consistent with these orders and establish that the fixed price term beings at commercial operation and not contract execution.[59]

---

57 UPSC Docket No. 15-035-53, Final Order at 9 ("a three-year PPA term would almost certainly prevent project financing for almost any new renewable energy project"); id. at 12 ("[a] three year contract … will make it impossible for these projects to secure financing" and "QF developers will be unable to obtain financing under a three-year PPA"); id. at 13 ("a 20-year term 'reduces the risk of the income stream upon which financing for [QF] projects is based'"); id. at 6 ("the 20-year term is a benefit to developers and that reducing that benefit will likely reduce development").

58 Id. at 20.

59 PacifiCorp's Oregon PPA at 12, https://www.pacificpower.net/content/dam/pacific_power/doc/About_Us/Rates_Regulation/Oregon/Approved_Tariffs/PURPA_Power_Source_Agreement/Power_Purchase_Agreement_for_New_Firm_QF_Not_An_Intermittent_Resource.pdf (providing fixed prices "during the first fifteen (15) years after the Schedule Initial Delivery Date"); PacifiCorp's Utah PPA at 8, https://www.rockymountainpower.net/content/dam/pacificorp/doc/Efficiency_Environment/Net_Metering_Customer_Generation/Power_Purchase_Agreement_for_Utah.pdf (requiring PacifiCorp to pay purchase prices "for all deliveries of Net Output…"); PacifiCorp's Wyoming PPA at 2, https://www.rockymountainpower.net/content/dam/rocky_mountain_power/doc/About_Us/Rates_and_Regulation/Wyoming/Approved_Tariffs/Rate_Schedules/Avoided_Cost_Purchases_from_Non_Standard_Qualifying_Facilities.pdf (indicating that "typical generic power purchase agreements may be obtained from the Company's website at www.pacificorp.com"); see, e.g., PacifiCorp Application for Power Purchase Agreement with Consolidated Irrigation Company, IPUC Case No. PAC-E-15-11, Application Attachment at 4, 17 (Sept. 18, 2015) (requiring payment for each Billing Period in each Contract Year after Commercial Operation Date); Idaho Power Amendment to Power Purchase Sales

In addition to the Pacific Northwest and Rocky Mountain states, there are numerous examples throughout the country over a span of several decades that demonstrate that a power sales contract for a new generating facility generally has a term that runs from the in-service date, including from California,[60] Michigan,[61] New York,[62] South Dakota,[63] and Florida.[64]

Agreement with Telocaset, IPUC Case No. IPC-E-15-09, Application Attachment at 12, 14 (Apr. 1, 2015) (requiring payment for all Net Energy delivered from the Operation Date, with full 20 years of payments).

60 Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program, Cal. Pub. Util. Comm'n. Decision 07-07-027, 2007 Cal. PUC LEXIS 348 at *46 (Jan. 1, 2001) (for purposes of implementing a standard contract under the state's renewable portfolio standard, "Each respondent proposes including a contract term that is materially the same as the Commission-adopted [Standard Terms and Conditions] with regard to delivery for periods of 10,15 or 20 years . . . . we adopt respondents' proposals").

61 Re Midland Cogeneration Partnership, Mich. Pub. Serv. Comm'n. Case No. U-8871 et al.; Case No. U-10127, 1993 Mich. PSC LEXIS 58 at *41 (Mar. 31, 1993) (approving settlement PPA where on QF "will receive a rate of 3.62 cents per kWh for the first ten years after commercial operation" and five other QFs will receive a different rate structure for first 10 years after commercial operation).

62 Re Value of Distributed Energy Resources, N.Y. Pub. Serv. Comm'n., Case Nos. 15-E-0751 & 15-E-0082, 2017 N.Y. PUC LEXIS 121 at *22 (Mar. 9, 2017) ("For customers served under Phase One [Net Energy Metering], the Commission adopts Staff's recommendation that they receive Phase One NEM compensation for a 20-year term from their in-service date. As noted in the Staff Proposal, this is consistent with other programs and trends in other jurisdictions.") (footnotes omitted); Electric Utilities - Standardized contracts for eligible on-site generation, N.Y. Pub. Serv. Comm'n., Case 29318, 1987 N.Y. PUC LEXIS 18 at *118 (July 24, 1987) (Administrative Law Judge recommending Commission approval of standard PURPA contract where, "If the IPP begins construction within 24 months (30 months for non-hydro over 5 MW) after Commission approval of the contract, and begins commercial operation within 42 months (48 months for hydro over 5 MW and 60 months for non-hydro over 5 MW) after such approval, the IPP is entitled to receive the fixed payments of the contract starting with the year commercial operations commence").

63 Re Complaint by Oak Tree Energy LLC, S. Dakota Pub. Serv. Comm'n., Case No. EL11-006, 2013 S.D. PUC LEXIS 84 at **13-14, 28 & App. A (May 17, 2013) (finding that "the appropriate contract term for the Project was 20 years to

Finally, FERC established the concept of long-term PURPA contracts, but has never specifically addressed what the required duration is. FERC regulations do, however, allow a QF to choose to have avoided cost rates for the purchase of its power calculated in one of two ways: (1) at the time of delivery; or (2) at the time it enters into the contract/obligation for the delivery of power.[65] FERC has recently explained that the entire purpose of its rule requiring long-term contracts is to facilitate financing, stating as follows:

> [FERC] has long held that its regulations pertaining to legally enforceable obligations are intended to reconcile the requirement that the rates for purchases equal to the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments, by necessity, on estimates of future avoided costs and has explicitly agreed with previous commenters that stressed the need for certainty with regard to return on investment in new technologies. Given this need for certainty with regard to return on investment, coupled with Congress' directive that [FERC] encourage QFs, a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors.[66]

---

enable the Project to obtain financing" and "actual annual calculated value or the levelized value over the 20-year power purchase obligation contract term" adopted was "$53.31/MWh if operation begins in 2013 and $55.34/MWh if operation begins in 2014;" also providing rate tables demonstrating 20 years or rates running from the operation date).

64 Re Standard offer contract for the purchase of firm capacity and energy from a qualifying facility between Panda-Kathleen, L.P. and Florida Power Corp., Florida Pub. Service Comm'n., Order No. PSC-96-0221-PHO-EI, 1996 Fla. PUC LEXIS 368 at *8 note (Feb. 15, 1996) ("The Panda contract originally provided for a Contract In-Service Date of April 1, 1995 and an expiration date of March 31, 2025, which amounted to a term of 30 years."); Re: Proceedings to Implement Cogeneration Rules, Florida Pub. Service Comm'n., Order No. 13247, 1984 Fla. PUC LEXIS 637 at *19 (May 1, 1984) ("Assuming a contract term extending ten years beyond the in-service date of the statewide avoided unit, the following standard offer capacity payments result . . .").

65 18 C.F.R. § 292.304(d).

66 Windham Solar LLC, 157 FERC ¶ 61,134, at P. 8 (Nov. 22, 2016) (quotations omitted).

Thus, FERC's understanding of contract duration is also based on the number of years in which the QF can count on revenues, which means that the term cannot start at contract execution.

C. PGE's Contract Can, and Should, Be Implemented Consistent with The Commission's Policy

PGE's standard QF contracts can be implemented consistent with the Commission's policy because they allow for 15 years of fixed prices starting from power deliveries or commercial operation. The logical reading of PGE's Commission approved standard contracts does not support a conclusion that the fixed price term begins at contract execution. Simply put, because PGE's contracts do not expressly specify when the fixed-price period begins, and allow for a date to be filled in, the current contracts can be used in a way that adheres to the Commission's policy.

The Commission's Staff appears to agree with Complainants on this point. In docket UM 1725, the OPUC Staff filed a response in which it argued:

> PGE asserts that its standard contract includes a 20-year term, inclusive of the time between contract execution and the commercial on-line date of the QF. A review of PGE's Standard Renewable Off-System Variable Power Purchase Agreement Form, effective September 23, 2015, does not clearly substantiate PGE's claim. Notably, the form of contract does not have a specified term. Instead, the term of the contract is filled out by the contracting parties. While PGE may have completed and executed these contracts so that the fifteen-year fixed-price term starts from the effective date of the contract rather than the QF's COD, this cannot be known from the form of the contract reviewed and approved by the Commission.[67]

---

[67] See Re Idaho Power Co., Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, Docket No. UM 1725, Staff's Response to Motion for Clarification at 4 (May 6, 2016).

contracts, 20-year standard contracts with 15-year fixed prices,"[5] and that it adopted standard contracts with "with 15-year fixed prices."[6] As repeatedly explained by the Complainants in their own Motion for Summary Judgment and this response, the plain or ordinary meaning of "15-year fixed prices" that those prices will be fixed for 15 years of payments. Otherwise, there will be no prices paid and the words will not have any relevant meaning to a QF.

Even more importantly, PGE's analysis of the plain meaning of Order No. 05-584 fails to consider PPA custom and trade usage, which is well established in the energy industry. In addition to the numerous PURPA and non-PURPA industry examples referred to in Complainants' Motion for Summary Judgment, a cursory internet search is sufficient to understand that these agreements are typically meant to set out all of the commercial terms for power sales that cannot possibly begin until the project comes on line.[7] It is important to distinguish between the contract's effective date ("[t]he PPA is considered contractually binding on the date that it is signed") and the commercial operation date ("the date after which all testing and commissioning has been completed and the initiation date to which the seller can start producing electricity for sale").[8] Even Wikipedia understands that the latter of these dates typically sets the contract term ("[t]he

---

5 Re Investigation Into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Order No. 14-058 at 4 (Feb. 24, 2014).

6 Re Idaho Power Co. Applications to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, Docket No. UM 1725, Order No. 15-199 at 2 (June 23, 2015).

7 Power Purchase Agreement, WIKIPEDIA, https://en.wikipedia.org/wiki/Power_purchase_agreement#Effective_date (last visited May 4, 2017).

8 Id.

commercial operation date also specifies the period of operation, including an end date that is contractually agreed upon") and notes the distinction between the effective date and commercial operation is important, because until a project is operational there are no sales ("[o]nce the project has been built, the effective date ensures that the purchaser will buy the electricity that will be generated and that the supplier will not sell its output to anyone else").[9] PGE's interpretation of Order No. 05-584 offers fixed-price payments to QFs during a multi-year period where the entire energy industry understands that payments are typically not even possible.

Notwithstanding the fact that the plain meaning supports Complainants' position, the plain meaning test is the wrong test. PGE relies upon PGE v. BOLI, which may not necessarily apply because Complainants have asked the Commission to interpret its own orders and policy, not a statute. It does not make sense for the Commission to undergo a plain meaning analysis for what a lay person understands, because in this case the Commission is interpreting its own policy and orders directed at a regulated utility, and must ascertain the meaning used in the power industry and in the Commission's own proceedings. Applying the "plain dictionary meaning" to the Commission's orders would often lead to absurd or confusing results because the energy industry is replete with industry jargon and terms of specialized meaning to industry participants.

Should the Commission decide to apply Oregon's statutory construction methodology, it should apply In re Nuss, 335 Or. 367, 372, 67 P.3d 386 (2003), which requires courts to consider terms of art with special technical meaning that are different

---

9 Id.

those states interpreting the term necessary for financing to start at contract execution rather than power deliveries.[20]

C. Regardless Which Legal Standard is Applied to Interpret Order No. 05-584, the 15-Year Period Centers On Payments, Which Requires Power Purchases

The Commission's 15-year policy notably focuses on pricing and payments between the parties, which informs its meaning.[21] Pricing and payment terms most naturally begin when power sales begin, not before. Both Order No. 05-584 and all three initial compliance filings used the same shorthand to describe the 15-year term without spelling out that it commences when sales commence. But the series of years specified in the order nevertheless runs from the date of power deliveries, and PGE's reliance on its compliance tariff and standard contracts is unpersuasive.

1. All Three Utilities' Tariffs Use Similar Shorthand Language to Describe the Contract Terms

Aside from its misreading of Order No. 05-584, the linchpin of PGE's argument is the description of the contract term in PGE's PURPA tariff, Schedule 201. PGE quotes from a shorthand description of the fixed-price term in that Schedule 201, and argues that the ordinary meaning of it supports PGE's position.[22] However, PacifiCorp and Idaho Power have used substantively identical shorthand descriptions of the fixed-price and/or maximum contract term in tariffs, even though both of those utilities unambiguously understand the fixed-price term to run from the operation date of the facility, not the date of contract execution. These undisputable facts seriously undermine PGE's reliance on

---

20 Complainants' Motion for Summary Judgment at 20-25.
21 Docket No. UM 1129, Order No. 05-584 at 1.
22 PGE's Motion at 19.

language in its Schedule 201.

Specifically, PGE quotes at length from its Schedule 201, which states in pertinent part:

> The Fixed Price Option ... is available for a maximum term of 15 years. Sellers with contracts exceeding 15 years will make a one time election at execution to select a market-based option for all years up to five in excess of the initial 15.[23]

This is the same basic description of the "term" as used in Order No. 05-584. PGE argues that the ordinary meaning of this language conclusively establishes that 15 years of fixed prices begins at contract execution because an ordinary person would understand a contract term to begin on the day the contract is signed.

However, PGE fails to mention that PacifiCorp used (and still uses) substantively identical shorthand in its compliance tariff. PacifiCorp's initial Schedule 37 filing provided, in pertinent part:

> Fixed Avoided Cost Prices are available for a contract term of up to 15 years and prices under a longer term contract (up to 20 years) will thereafter be under either Banded Gas Market Indexed Avoided Cost Prices or Gas Market Indexed Avoided Cost Prices.[24]

Yet, as noted previously, PacifiCorp's original standard contract unambiguously allowed the 15-year fixed-price period to begin from the Scheduled Initial Delivery date. That PacifiCorp contract stated, "[i]n the event Seller elects the Fixed Price payment method,

---

23 Re Investigation Related to Electric Utility Purchases From Qualifying Facilities, Docket No. UM 1129, PGE's Compliance Filing, Schedule No. 201 at 201-4, (July 12, 2005).

24 Attachment A at 38 (Re Investigation Related to Electric Utility Purchases From Qualifying Facilities, Docket No. UM 1129, PacifiCorp's Compliance Filing, Power Purchase Agreement, Ex. F, Schedule No. 37 at page 2 (July 12, 2005)).

PacifiCorp shall pay Seller ... during the first fifteen (15) years after the Scheduled Initial Delivery Date. Thereafter, PacifiCorp shall pay Seller market-based rates . . . ."[25] This language remains in PacifiCorp's tariff and standard contract today.[26]

Similarly, Idaho Power's original compliance standard contract uses nearly identical language and is consistent with PacifiCorp's standard contract.[27] Although Idaho Power's initial 2005 compliance filing tariff, Schedule 85, did not discuss the available term of fixed prices or the maximum contract term, its currently effect avoided cost schedule uses the same type of shorthand as in Order No. 05-584 and PGE's Schedule 201 to express the maximum contract term available for non-standard contracts. It provides: "QFs have the unilateral right to select a contract length of up to 20 years for a PURPA contract."[28] The shorthand language states the contract length or contract term, but these terms of art are understood in the context of a PPA to mean the length of time of power deliveries.

---

25 Id. at 16.

26 See PacifiCorp's current Schedule 37 at 4, available at https://www.pacificpower.net/env/nmcg/qf.html ("Standard Fixed Avoided Cost Prices are available for a contract term of up to 15 years and prices under a longer term contract (up to 20 years) will thereafter be under the Firm Market Indexed Avoided Cost Price. . . . Renewable Fixed Avoided Cost Prices are available for a contract term of up to 15 years and prices under a longer term contract (up to 20 years) will thereafter be under the Firm Market Indexed Avoided Cost Price.").

27 Attachment B at 18 (Re Investigation Related to Electric Utility Purchases From Qualifying Facilities, Docket No. UM 1129, Idaho Power's Compliance Filing, Schedule No. 85 at Article 7.1 (July 12, 2005)) (allowing fixed prices "for the first 15 Contract Years" and defining Contract Year as "[t]he period commencing each calendar year on the same calendar date as the Operation Date and ending 364 days thereafter").

28 Idaho Power's Schedule 85 was most recently approved in UM 1610. See Attachment C at 17 (Re Investigation Into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Idaho Power's Compliance Filing at Schedule 85 Revised Sheet 85-11 (Apr. 25, 2014)).

Thus, the seemingly clear description of the 15-year term of fixed prices in PGE's Schedule 201 proves far less plain than PGE argues. PacifiCorp and Idaho Power understand that their use of Order No. 05-584's shorthand in their tariffs (Schedule 37 and Schedule 85, respectively) did not mean that the 15 years of fixed prices would begin at contract execution. The fact that all three utilities use the same language in their tariffs seriously undermines PGE's reliance on that language in its tariff as a basis for different treatment. The only material difference between the three utilities is that PGE has recently begun mis-interpreting that shorthand language. For the Commission to agree with PGE in this case, it would need to conclude that the Commission itself intended this nearly identical language in three separate utility filings to have radically different meanings.

2. PGE's Reliance on Section 5 of its 2007 Standard Contract Contradicts PGE's Other Arguments

Next, PGE quotes at length from Section 5 of its 2007 standard contract form to argue that it "unambiguously limits fixed prices to the first 15 years of the contract Term."[29] But in fact PGE's interpretation of Section 5 of this contract form only provides a QF with fixed prices for the first 15 years of the contract if the contract is signed on January 1. Thus, PGE's interpretation should be rejected because it produces an illogical result that would even further limit the availability of fixed prices to those few QFs that happen to execute a PPA at the start of the year.

---

[29] PGE's Motion at 20-21.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 19, 2019, I directed the original **RESPONDENTS NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS, COMMUNITY RENEWABLE ENERGY ASSOCIATION, AND RENEWABLE ENERGY COALITION'S ANSWERING BRIEF** to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Anna M. Joyce, Dallas S. DeLuca, and Anit K. Jindal, attorneys for Petitioner Portland General Electric Company; Keith L. Kutler, attorney for Respondent Oregon Public Utility Commission; and Irion A. Sanger, attorney for Respondents Northwest and Intermountain Power Producers, Community Renewable Energy Association, and Renewable Energy Coalition, using the court's electronic filing system.

DATED this 19th day of February, 2019.

STOLL STOLL BERNE LOKTING & SHLACHTER PC

By: s/Nadia H. Dahab
Steven C. Berman, OSB No. 951769
Keil M. Mueller, OSB No. 085535
Nadia H. Dahab, OSB No. 125630

209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Email: sberman@stollberne.com
kmueller@stollberne.com
ndahab@stollberne.com

Attorneys for Respondents Northwest and Intermountain Power Producers, Community Renewable Energy Association, and Renewable Energy Coalition