IN THE COURT OF APPEALS OF THE STATE OF OREGON

PORTLAND GENERAL ELECTRIC COMPANY
and PUBLIC UTILITY COMMISSION OF OREGON,
Respondents,

v.

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

and

NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION et al.,
Intervenors Below.

Public Utility Commission of Oregon
Docket No. UM1931

A173197

On appeal from the Public Utility Commission of Oregon's Order No. 19-394, dated November 14, 2019; Order No. 19-255, dated August 2, 2019; and Order No. 18-174, dated May 23, 2018

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. SUMMARY OF ARGUMENT

The Court should reverse Public Utility Commission of Oregon ("PUC") Order No. 18-174, and set aside Order Nos. 19-255 and 19-394, because the PUC lacked jurisdiction to interpret the power purchase agreements (the "PPAs") between petitioners (collectively, the "NewSun Parties") and respondent Portland General Electric Company ("PGE"). Alternatively, the Court should reverse Orders Nos. 19-255 and 19-394 because, applying Oregon's contract interpretation rules, the PPAs provide for a period of fixed-price power sales ending fifteen years after the NewSun Parties' solar facilities achieve commercial operation.

The PUC and PGE argue jurisdiction exists under both ORS 756.500(1) and ORS 756.500(5). ORS 756.500(1), however, does not apply because the PUC does not "regulate" the post-execution contractual relationship between qualifying facilities ("QFs") and regulated utilities such as PGE. And the PUC's broad reading of its "affecting rates" jurisdiction under ORS 756.500(5) improperly ignores the context of the regulatory scheme.

On the merits, the PUC and PGE argue certain other provisions of the PPAs demonstrate that Schedule 201 unambiguously provides for a fixed-price period that begins at execution. These provisions, however, are equally compatible with reading Schedule 201 to provide for a fixed-price period

extending fifteen years from the Commercial Operation Date. Only the NewSun Parties' interpretation avoids unnecessary inconsistencies and gives meaning to all the PPAs' provisions.

II. REPLY ARGUMENT ON FIRST ASSIGNMENT OF ERROR

A. *ORS 756.500(1) Does Not Apply.*

ORS 756.500(1) does not grant the PUC jurisdiction. As PGE and the PUC concede, ORS 756.500(1) only allows complaints against an entity with respect to its activities "regulated" by the PUC. ORS 756.500(1); *see* PUC Br at 13-14; PGE Br at 6-9. "Regulate," as normally used by the legislature, means "'to govern or direct according to rule.'" *Doe v. Medford Sch. Dist. 549C*, 232 Or App 38, 52, 221 P3d 787 (2009) (quoting *Webster's Third New Int'l Dictionary* 1913 (unabridged ed 1993)). The PUC incorrectly contends that the NewSun Parties' regulated activity at issue is "entering [into] PURPA PPAs." PUC Br at 13. The PPAs, however, are fully executed. ORS 756.500(1) therefore applies only if it empowers the PUC to exert ongoing governance over the fixed prices in long-term PURPA PPAs. The PUC's claim to such jurisdiction suffers from multiple flaws.

First, the PUC's regulatory authority to establish the PPA's prices "end[s] with * * * approval of the PPA[,]" and the post-execution source of authority to address, or even modify, a PPA's prices must arise from "some basis in the law of contracts[.]" *Freehold Cogeneration Assoc., L.P v. Bd. of*

Reg. Comm'rs of State of N.J., 44 F3d 1178, 1192 (3rd Cir), *cert den*, 516 US 815 (1995).[1] The PUC and PGE are mistaken to rely on *Gearhart v. Pub. Util. Comm'n of Or.*, 255 Or App 58, 61, 299 P3d 533 (2013), and *Pac. Nw. Bell Tel. Co. v. Katz*, 116 Or App 302, 309-10, 841 P2d 652 (1992), because those decisions address the PUC's quasi-legislative ratemaking authority under ORS 756.040, *not* the impartial application of contract law required by PURPA. Likewise, the "goal" that avoided cost rates "shall over the term of a contract be just and reasonable[,]" set forth in ORS 758.515(2), cannot create ongoing jurisdiction to regulate such rates included in executed PPAs.

The PUC and PGE mischaracterize the NewSun Parties' position as an assertion that PURPA preempts any state utility commission from interpreting a PURPA PPA. PGE Br at 22-23. A state theoretically could enact a statute providing that the state's utility commission may issue binding declarations construing fully executed PURPA PPAs. ORS 28.030, which allows Oregon courts to resolve contract disputes, appears to provide Oregon's trial courts with

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[1] PGE's authorities distinguishing *Freehold* are off-point. *See* PGE Br at 23 n 2. In *City of New Martinsville v. Public Service Commission of West Virginia*, 729 SE 2d 188, 196 (W Va 2012), the court found that the state commission could determine ownership of renewable energy credits where the PPA did not address such credits. In *City of Boulder v. Public Service Co. of Colorado*, 996 P2d 198, 204 (Colo App 1999), the court held that a claim seeking "modification of rates set forth in PUC-approved tariffs" should be addressed by Colorado PUC. *Adrian Energy Associates v. Michigan Public Service Commission*, 481 F3d 414, 425 (6th Cir 2007) addressed federal abstention, not *Freehold* or preemption.

that authority. The legislature, however, has not granted the PUC similar declaratory judgment authority over executed PPAs.[2]

Rather, the plain words of the applicable statutory provision, ORS 758.535(2)(a), do not confer post-execution jurisdiction over the issue here. *See* PUC Br at 18 (relying on ORS 758.535); PGE Br at 7 (same). That provision merely states "[t]he terms and conditions for the purchase * * * 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) (emphasis added). The word "establish" means "to settle or fix after consideration or by enactment or agreement." *Webster's Third New Int'l Dictionary* 778 (unabridged ed 2002). Thus, the PUC is authorized to *settle or fix by rule* the terms offered to a QF in PURPA PPAs, but is not thereby granted ongoing jurisdiction over executed PPAs.

ORS 758.535(2)(a) only empowers the PUC to act "*by rule.*" ORS 758.535(2)(a) (emphasis added). An agency's "authorizing statutes will specify whether rulemaking or adjudication authority, or both, are delegated to the agency and will indicate the agency's tasks." *Trebesch v. Emp't Div.*, 300 Or 264, 267, 710 P2d 136 (1985)); *see also* ORS 183.325-183.410 (APA's

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[2] *Compare* ORS 756.500 (the statutory provision under which PGE proceeds in this case) *with* ORS 756.450 (providing the PUC limited authority to issue declaratory rulings) *and* ORS 28.030 (providing courts authority to issue declaratory judgments regarding terms of a contract).

rulemaking procedures). The PUC's quasi-legislative authority to act "by rule" does not include quasi-judicial authority to interpret PPAs.

Even if the PUC's authority arguably includes jurisdiction to interpret its rules, this dispute does not involve interpretation of any rules. The PUC did not adopt administrative rules addressing the fixed-price period until two years after execution of the PPAs at issue. *See Northwest & Intermountain Power Producers Coal. v. Portland Gen. Elec.*, 308 Or App 110, 114, 480 P3d 981 (2020) (discussing amendments to OAR Chapter 860, Division 29, effective Nov 2, 2018). Further, "[a]lthough Order 05-584 prescribed standard terms for contracts with QFs, it did not prescribe a standard form for such contracts." *Id.* at 112. Thus, PGE's PPA form at issue is not a "rule" subject to any ongoing interpretive authority under ORS 758.535(2)(a).

Other subsections of ORS 758.535(2) addressing nonregulated utilities (including electric cooperatives, public utility districts, and municipal utilities) confirm this. PURPA requires nonregulated utilities to implement PURPA's "must purchase" provisions themselves. 16 USC § 824a-3(f)(2); 16 USC § 2602(9). Oregon's PURPA statute requires those nonregulated utilities to "offer to purchase" energy pursuant to "projected avoided costs" under a long-term contract. ORS 758.525(2)(b); *see also* ORS 758.505(4), (6). And ORS 758.535(2) states that the "terms and conditions for the purchase * * * shall" be "*established*" or "*adopted*" by the nonregulated utility, depending

on the type of utility. ORS 758.535(2)(b)-(c) (emphasis added). Under the PUC and PGE's interpretion of ORS 758.535(2), a nonregulated utility not only would establish the terms and rates it offers to QFs, it also would adjudicate disputes between itself and QFs regarding executed PPAs containing those terms and rates. This cannot be what the legislature intended and confirms that the legislature only granted the PUC and nonregulated utilities authority to *establish* the rates and terms offered to QFs, not ongoing adjudicatory jurisdiction over executed PPAs.

PGE also invokes ORS 758.535(3)(a), regarding safety and operating requirements, and the PUC's related rules governing interconnection to a utility's electrical system to support PGE's theory that the PUC has regulatory authority over the NewSun Parties. PGE Br at 7-8. But this case does not concern the PUC's authority over such issues. Additionally, a QF's interconnection would be governed by a separate contract referred to as an interconnection agreement. OAR 860-082-0025(7)(e).

PGE's remaining references to the PUC's administrative rules are equally unavailing. PGE Br at 8. Those rules generally establish certain terms that must be *offered* to QFs. *See* OAR 860-029-0005(1) (stating, "these rules do not supersede contracts existing before the effective date of this rule[,]" but "any contract extension or new contract must comply with these rules").

Similarly, *Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 734 P2d 1366 (1987), is inapposite. That case addressed regulations requiring utilities to *enter into* long-term PPAs. The court did not hold that the PUC possesses ongoing regulatory authority over executed PPAs. *Id.*, 84 Or App at 594-600; *see also Water Power Co., Inc. v. PacifiCorp*, 99 Or App 125, 130-32, 781 P2d 860 (1989) (holding the "statutes, regulations and rules require a utility to *offer* to purchase power from a qualifying facility" (emphasis in original)).

In sum, ORS 756.500(1) does not apply here because the activities at issue are not subject to the PUC's ongoing regulatory authority.

B. *ORS 756.500(5) Does Not Apply.*

The PUC's contention that ORS 756.500(5) provides it "broad jurisdiction over complaints raising any issue that influences a public utility's rates," PUC Br at 15, improperly isolates the phrase "affecting * * * rates" in ORS 756.500(5) without considering the context of the "regulatory scheme as a whole." *Crooked River Ranch Water Co. v. PUC*, 224 Or App 485, 490-491, 198 P3d 967 (2008), *rev den*, 346 Or 361 (2009).

First, PURPA preempts the PUC's exercise of jurisdiction aimed at preventing an adverse effect on PGE's rates. The factual premise of the PUC's purported affecting-rates jurisdiction is that the high fixed prices in the PPAs will adversely affect PGE's rates charged to its customers unless the PUC relieves PGE of paying those prices during certain years. But PURPA

precludes the PUC from altering the prices that should result from unbiased application of contract law. *Freehold*, 44 F3d at 1192-93. Thus, jurisdictional reliance on ORS 756.500(5) unlawfully presumes the PUC may do indirectly what PURPA expressly preempts it from doing directly. *See State ex rel. Juvenile Dep't v. Alderson*, 146 Or App 185, 188-89, 932 P2d 97 (1997) (interpreting statute to not allow juvenile court to "accomplish indirectly what" a statute "forbids it from doing directly").

In other words, the PUC may not claim jurisdiction to protect against an adverse effect on PGE's rates under ORS 756.500(5), just to later assert that it merely applied contract law without considering the effect on PGE's rates, as it must to avoid violating PURPA. If, as the PUC appears to assert, *see* PUC Br at 17, it did not consider the effect on PGE's rates, then the PUC did not act within the confines of its affecting-rates jurisdiction under ORS 756.500(5). On the other hand, if the PUC did act to prevent an adverse effect on PGE's rates, the PUC violated PURPA by modifying the prices that should result from unbiased application of contract law. Either way, reliance on ORS 756.500(5) should be rejected.

Second, aside from the preemption problem, the PUC's purported affecting-rates jurisdiction is unreasonably boundless. Apparently recognizing this problem, PGE attempts to distinguish QF costs as unique. It asserts that, unlike other costs affecting utility rates, PURPA PPAs "directly affect" PGE's

rates because prices paid to QFs will be automatically recovered under ORS 469A.120. PGE Br at 14. However, ORS 469A.120 requires automatic rate recovery for *all costs of all renewable energy facilities*, not just QFs. *See* ORS 469A.120(2). And renewable energy is a substantial component of PGE's supply. *See* ORS 469A.052(1) (escalating renewable energy requirement from 20 to 50 percent between now and 2040). Thus, even if ORS 756.500(5) were limited to transactions *directly* affecting rates through automatic rate recovery, the PUC's adjudicatory jurisdiction over nonregulated entities would still reach far beyond PGE's regulatory authority, to include commercial disputes regarding wholesale energy sales, construction, and operation and maintenance, as well as income taxes, and property taxes.[3]

Next, PGE misreads analogous federal caselaw limiting Federal Energy Regulatory Commission ("FERC") affecting-rates jurisdiction under federal statutes. *See* Br Amici Curiae Community Renewable Energy Association, Northwest and Intermountain Power Producers Coalition, and Renewable Energy Coalition in Support of Petitioners ("QF Amici Br") at 21-24 (discussing this authority). PGE incorrectly contends such decisions either do not interpret an affecting-rates provision or apply some other statutory limitation. PGE Br at 12. To the contrary, in *American Gas Association v.*

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[3] PGE lists such costs subject to ORS 469A.120(2) in its PUC-approved Schedule 122, Renewable Resource Automatic Adjustment Clause, at Sheet 2, available at https://portlandgeneral.com/about/info/rates-and-regulatory/tariff.

FERC, 912 F2d 1496, 1505-07 (DC Cir 1990), petitioners "isolate[d] the words '*contract affecting such rate*,' and argue[d] that [FERC] may assess the justness and reasonableness of the provisions of any contract that would likely influence a pipeline's end-of-the-pipeline charges." *Id.* (quoting 15 USC § 717d (1988)) (emphasis added). Although the decision discussed another statute, the DC Circuit ultimately agreed with FERC's interpretation of "'contract affecting such rate' as limited to contracts in which a 'natural gas company' (within the meaning of the [Natural Gas Act]) acts as seller and which directly governs the rate in a jurisdictional sale[.]" *Id.*

Instead of that analogous authority, PGE relies on off-point interpretations of the Johnson Act, which proscribes federal courts from enjoining certain state commission orders "'affecting rates chargeable by a public utility[.]'" 28 USC § 1342; PGE Br at 11. The Johnson Act is inapt because it merely allocates authority between state and federal courts. *See Freehold*, 44 F3d at 1185-86 (discussing the Johnson Act). Because the Johnson Act does not confer jurisdiction on an agency, it need not be construed within the broader context of a regulatory scheme or limited to matters within an agency's actual regulatory authority, as is the case with ORS 756.500(5).

PGE also points to the PUC's own recent orders interpreting executed PPAs in support of the PUC's affecting-rates jurisdiction. PGE Br at 13. But

PUC orders cannot expand the PUC's statutory jurisdiction. Nor can they bind this Court.

Finally, PGE identifies no legislative history supporting its arguments. PGE Br at 17-20. Although PGE points to an unsuccessful effort to legislatively overturn the PUC's recent assertion of jurisdiction, that provides no insights to legislative intent. Relying on such legislative inaction "assumes, usually without foundation in any case, that legislative silence is meant to carry a particular meaning." *Farmers Ins. Co. of Oregon v. Mowry*, 350 Or 686, 696, 261 P3d 1 (2011). In contrast, the QF Amici identified persuasive legislative testimony that ORS 756.500 was merely intended as a procedural statute and thus not a vehicle to expand the PUC's regulatory authority. QF Amici Br at 24-28.[4] If anything, the legislative history supports a finding the PUC lacks jurisdiction.

In sum, ORS 756.500(5) does not confer the PUC with jurisdiction over this case. The Court should set aside the orders on appeal for lack of jurisdiction.

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[4] QF Amici quote the testimony by Norman Stoll as having occurred at the Senate Judiciary Committee on April 21, 1971, but it occurred at the House Judiciary Committee on March 1, 1971. Tape Recording, House Judiciary Committee, HB 1100, March 1, 1971, Tape 9, Side 2 at 41:08 to 42:41.

III. REPLY ARGUMENT ON SECOND AND THIRD ASSIGNMENTS OF ERROR

A. *Standard of Review*

While the PUC concurs with the NewSun Parties regarding the applicable standard of review, *see* PUC Br at 23, PGE contends that the Court should give deference to the PUC's orders interpreting the PPAs. But PGE's reliance on *Oregon Restaurant Services, Inc. v. Oregon State Lottery*, 199 Or App 545, 112 P3d 398 (2005), is misplaced.

At issue in *Oregon Restaurant Services* were letters from the Oregon State Lottery informing Oregon Restaurant Services of the lottery's determination that it had violated a rule adopted by the lottery and that the lottery would terminate the contracts allowing Oregon Restaurant Services to sell lottery products unless it complied with the rule. *Id.* at 547. On appeal, this Court gave deference to the lottery's determination that its rule had been violated, stating that when "a contract incorporates by reference the terms of an administrative rule, [the Court] must apply the rules of interpretation that apply to administrative rules," and that an agency's interpretation of its own rule is entitled to deference. *Id.* at 560 (citation omitted). This is different from the ordinary case in which the Court "construe[s] the terms of a contract" according to "the general rules of contract interpretation, as set forth in *Yogman v. Parrott*, 325 Or 358, 361–65, 937 P2d 1019 (1997)." *Id.*

Here, the provisions at issue do not incorporate by reference any administrative rule. PGE concedes that the general contract interpretation rules set forth in *Yogman* apply, but identifies no authority supporting deference to an agency's application of *Yogman*. *See* PGE Br at 24-25. Accordingly, the PUC is not entitled to deference.

PGE also wrongly contends that, if the Court determines the PPAs are ambiguous at step one of *Yogman*, it can only decide steps two and three in PGE's favor. PGE Br at 25. The premise of PGE's argument is that a decision by this Court in the NewSun Parties' favor at step two or three would constitute reversal on different grounds. But this Court has reversed contract interpretation decisions based on steps two and three even when the trial court determined the provision at issue was unambiguous at step one. *See, e.g.*, *Portland Fire Fighters' Ass'n, Loc. 43 v. City of Portland*, 181 Or App 85, 92, 96, 45 P3d 162 (2002) (reversing Employment Relations Board conclusion that contract unambiguously favored defendant and resolving ambiguity in plaintiff's favor at step three). And this case was resolved on cross-motions for summary judgment, so all necessary evidence and arguments have been presented, made and preserved.

B. *PGE and the PUC's Interpretative Arguments Fail*

1. *PGE and the PUC employ a flawed interpretative analysis.*

The PUC observed in Order No. 19-255 that "Schedule 201 does not explicitly define the 'term' during which fixed prices are available." ER 81. Read in a vacuum, the Renewable Fixed Price Option in Schedule 201 plausibly describes a period of fixed pricing ending either fifteen years after execution *or* fifteen years after the Commercial Operation Date. Because the express language of Schedule 201 does not resolve the question before the Court, only the context in which the language exists can supply the unambiguous meaning necessary to resolve this dispute at step one of *Yogman*. The PUC and PGE agree. PUC Br at 25 (Schedule 201 must be read "[i]n the context of other pertinent PPA provisions"); PGE Br at 28 (identifying provisions PGE asserts provide context to Schedule 201).

This Court examines the context to determine whether other PPA provisions indicate which of the two plausible interpretations is correct. If one interpretation creates a conflict with other PPA provisions, that interpretation must be rejected. *Hoffman Const. Co. of Alaska v. Fred S. James & Co. of Oregon*, 313 Or 464, 470, 836 P2d 703 (1992).

The PUC's application of this interpretative methodology fails to consider the inconsistency between its interpretation of Schedule 201 and Section 4.5 until after concluding that its interpretation of the PPAs is correct.

Both the PUC and PGE identify select provisions that they assert support their interpretation and both conclude based on those provisions that the PPAs unambiguously mean what the PUC and PGE claim they mean. PUC Br at 25-26; PGE Br at 27-28. Both then argue that the inconsistency between Section 4.5 and their preferred reading of Schedule 201 "does not create an ambiguity," PGE Br at 30-31, or "displace[]" the PPAs' otherwise "plain, express terms," PUC Br at 27.

If, instead, one reads *all* of the PPAs' provisions as a whole *before* deciding whether one plausible reading of Schedule 201 is unambiguously correct, one sees that the inconsistency between Section 4.5 and the PUC's interpretation of Schedule 201 is unnecessary because the provisions on which the PUC and PGE rely also are consistent with the NewSun Parties' reading of Schedule 201. PGE and the PUC rely on provisions which provide that the PPAs are "entered into" at execution, ER 8, "become effective upon execution," ER 14, are "final and binding" when "executed by both parties," ER 32, and that define the capitalized word "Term" as "the period beginning on the Effective Date," ER 13. These provisions, individually and collectively, mean nothing more than that each PPA becomes a set of binding obligations and rights at the time of execution. The NewSun Parties agree with this proposition. But, there is no reason the fifteen-year fixed-price period must begin when the PPA becomes binding. Indeed, given the structure of the relationship

contemplated by the PPAs, that result would be quite unexpected. Accordingly, the provisions on which PGE and the PUC rely do not answer the disputed question.

2. *Trade usage favors the NewSun Parties' interpretation.*

The PUC's contention that evidence of trade usage does not "undermine the PPAs plain, express terms regarding the effective date of the contract term," PUC Br at 28, also assumes that the provisions establishing that the PPAs become effective at execution resolve the interpretation of Schedule 201. But, rather than an attempt to undermine an otherwise unambiguous description of a fixed-price period that necessarily begins at contract execution, this evidence is an aid to resolving the open question regarding the correct interpretation of the PPAs. And it supports the conclusion that the PPAs provide for fixed pricing for fifteen years after the Commercial Operation Date.

3. *PGE's reliance on the phrase "initial 15" is misplaced.*

PGE's contention that there is only one plausible reading of the phrase "initial 15" in the last sentence of the Renewable Fixed Price Option is wrong. The phrases "exceeding 15 years" and "initial 15" in that sentence could just as easily refer to the period of power sales following the Commercial Operation Date as to the period of effectiveness beginning at execution. Indeed, an earlier sentence of the Renewable Fixed Price Option states that "[t]his *option* is available for a *maximum term* of 15 years." (Emphasis added.) "Term" here

must mean the term of the fixed-price option, not the term of the contract. *See* Pet'rs' Opening Br at 32-34. Given that Schedule 201 begins by describing a period of fixed-price power sales, and not a period of contract effectiveness, it is natural to read the phrases "exceeding 15 years" and "initial 15" at the end of this passage as referring to the initial fifteen years of power sales, which is not necessarily the same as the initial fifteen years of PPA effectiveness.

Further, PGE's own "plausible reading" of this phrase requires a subtle sleight of hand. PGE argues "initial 15" should be read "'initial 15' years of the PPA." *See* PGE Br at 27. This creates the impression that the period of power sales described in the Renewable Fixed Price Option must be coextensive with the period during which the PPA is an effective set of binding obligations and rights. But the words "years of the PPA" do not appear in Schedule 201, and Schedule 201 does not expressly or necessarily refer to the period of effectiveness. Thus, without additional context, the phrase "initial 15" does not resolve the parties' dispute.

4. *The PUC's reliance on Section 4.1 is misplaced.*

Section 4.1 provides that "[c]ommencing on the Effective Date and continuing through the Term of this Agreement, [the QF] shall sell to PGE the entire Net Output delivered from the Facility." ER 17. The PUC argues this means that the fixed-price period must begin on the effective date. But, aside from a small amount of test energy just prior to full operation, the NewSun

Parties will not *deliver* output to PGE before the Commercial Operation Date. *See* ER 14, § 2.2.2. Moreover, Schedule 201 separately provides for payment for energy delivered prior to the Commercial Operation Date. *See* ER 33 ("The Company will pay the Seller * * * the Off-Peak Renewable Avoided Cost * * * for: (a) all Net Output delivered prior to the Commercial Operation Date * * * ."). Accordingly, at execution, the NewSun Parties' obligation to sell power to PGE is a future obligation to sell power after their facilities are operational and delivering power. Section 4.1 therefore is entirely consistent with the NewSun Parties' interpretation that the Renewable Fixed Price Option provides for fifteen years of fixed-price sales once full commercial power deliveries begin.

5. *Section 4.5 is inconsistent with PGE's interpretation of Schedule 201.*

PGE's contention that Section 4.5 is consistent with its interpretation of Schedule 201 ignores the plain language of Section 4.5. PGE Br at 31-21.[5] The first sentence of Section 4.5 states that the NewSun Parties "*shall provide*" RPS Attributes to PGE "[d]uring the Renewable Resource Deficiency Period." ER 17 (emphasis added). The second sentence makes clear that this obligation continues until the "completion of the first fifteen (15) years after the Commercial Operation Date." *Id.* Under the PUC's interpretation, Schedule

[5] The PUC did not adopt this reasoning in its orders or raise this argument in its answering brief.

201 provides the NewSun Parties will "retain all Environmental Attributes," including RPS Attributes, beginning fifteen years after execution. Fifteen years after execution is as much as three years earlier than fifteen years after the Commercial Operation Date. Thus, Section 4.5 obligates the NewSun Parties to continue to provide RPS attributes to PGE for up to three years after they would retain RPS Attributes under the PUC's interpretation of Schedule 201. This obvious inconsistency cannot be reconciled except by adopting the NewSun Parties' interpretation.

PGE also asserts that transfer of Environmental Attributes is a separate subject from fixed prices, and contends that this justifies the inconsistency caused by the PUC's interpretation. PGE Br at 30. Both Section 4.5 and Schedule 201, however, expressly link payment of fixed prices and transfer of Environmetnal Attribrutes as material elements of the bargain for the sale of *renewable* power. ER 17-18, 37.

C. *The "Drafting History" of PGE's PPA Forms Is Irrelevant*

PGE's reliance on the "drafting history" of its previously offered PPA forms, dating back to 2005, is misplaced. PGE Br at 28-30. While PGE refers to its prior forms as "regulatory history," any such history is irrelevant to the interpretation of executed agreements under *Yogman*. Indeed, it would be manifestly unfair to require qualifying facilities to review all of PGE's past PPA forms to understand PGE's current PPA form.

Moreover, PGE's assertion that a prior iteration of PGE's PPA form "explicitly began the fixed-price period at execution," (*id.*), undermines PGE's interpretation of the PPAs at issue. The provisions of *these* PPAs do not compel the same reading of Schedule 201 that the purported express statement in PGE's *old* forms may have.

D. *If the Court Reaches Steps Two and Three, the NewSun Parties Should Prevail*

PGE's arguments that extrinsic evidence of the parties' intent and applicable maxims of construction support PGE's interpretation of Schedule 201 fare no better than its textual interpretation.

While the NewSun Parties understood that *PGE claimed* its contract forms "began the fixed-price period at execution," *see* PGE Br at 41, the NewSun Parties expressed their disagreement with PGE's interpretation of its forms prior to execution. Rec 3641-47. If parties disagree about the meaning of a term of a contract, one parties' interpretation of the term controls only if the other party hid its interpretation of the term. *Restatement (Second) of Contracts* § 201(2) (when parties "attach[] different meanings to a promise or agreement * * * [,] the meaning attached by one of them" controls only if "that party did not know [and had no reason to know] of any different meaning attached by the other, and the other knew [or had reason to know] the meaning attached by the first party"). As PGE stipulated below, both parties entered into

the PPAs knowing that the other party had a different understanding of the fixed-price period. Rec 3665.

PGE appeals to the maxim resolving ambiguity in favor of the beneficiary of the provision on the theory that utility customers are the intended beneficiary of the PUC's policy decision to limit fixed pricing in PURPA contracts to fifteen years. This maxim, however, requires a court to examine the language of the provision to determine which party it benefits. *See Ross Dress for Less, Inc. v. Makarios-Oregon, LLC*, 210 F Supp 3d 1259, 1270 (D Or 2016). Here, the fixed prices benefit the NewSun Parties by providing certainty as to the rates they will receive for power delivered to PGE. *See, e.g.*, PUC Docket No UM 1805, PUC Order No 17-256 at 4 ("to provide a QF the *full benefit* of the [PUC's] fixed price requirement, the 15-year term must commence on the date of power delivery" (emphasis added)). Indeed, the Renewable Fixed Price *Option* was "available" to the NewSun Parties at their election. *See* ER 38. As between the NewSun Parties and PGE, the PPA's fixed-price option benefits the NewSun Parties.

PGE also appeals to the canon that a particular provision prevails over an inconsistent general provision and contends that Schedule 201 is particular. The Court will reach step three only if it determines that Schedule 201 is ambiguous—that is, if the text and context do not resolve the parties' dispute about the correct reading *of Schedule 201*. That Schedule 201 may be more

particular than Section 4.5 does not help to resolve an ambiguity within Schedule 201. In any event, only PGE's reading of Schedule 201 is inconsistent with Section 4.5; the NewSun Parties' reading is consistent with Section 4.5 and there is no need to decide between the particular and the general.

IV. CONCLUSION

The Court should set aside the orders on appeal for lack of jurisdiction or, in the alternative, reverse Orders Nos. 19-255 and 19-394.

DATED this 13th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 5.05, as modified by the Court's April 6, 2021 Order Granting Extended Reply Brief, which word count is 4,993.

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 13th day of April, 2021.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 13, 2021, I directed the original **PETITIONERS' REPLY BRIEF** to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Dallas S. DeLuca, Anna M. Joyce, Anit K. Jindal and Erin N. Dawson, attorneys for Respondent Portland General Electric Company; Jordan R. Silk, attorney for Respondent Oregon Public Utility Commission; Irion A. Sanger, attorney for *Amici Curiae* Community Renewable Energy Association, Northwest and Intermountain Power Producers, and Renewable Energy Coalition; Lisa F. Rackner, attorney for *Amici Curiae* Idaho Power Company and PacifiCorp; and Gregory M. Adams, attorney for Petitioners Alfalfa Solar I LLC, Dayton Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, Riley Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, and Wasco Solar I LLC, using the court's electronic filing system.

I further certify that on April 13, 2021, I directed the **PETITIONERS' REPLY BRIEF** to be served upon Jeffrey S. Lovinger, attorney for Respondent Portland General Electric Company; and Shoshana J. Baird, attorney

for *Amici Curiae* Idaho Power Company and PacifiCorp by mailing a copy, with postage prepaid, in an envelope addressed to:

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DATED this 13th day of April, 2021.

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