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August 28, 2018

VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
201 High Street SE, Suite 100
P.O. Box 1088
Salem, Oregon 97308-1088

Re: Docket UM 1894: Portland General Electric Company vs Pacific Northwest Solar LLC

Attention Filing Center:

Attached for filing in the above-captioned docket is a copy of Portland General Electric Company's Response to Pacific Northwest Solar LLC's Application for Reconsideration and Rehearing.

Please contact this office with any questions.

Sincerely,

Alisha Till

Alisha Till
Legal Assistant

Attachment

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1894

Portland General Electric Company, Complainant v. Pacific Northwest Solar, LLC, Respondent.	PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE TO PACIFIC NORTHWEST SOLAR'S APPLICATION FOR RECONSIDERATION AND REHEARING

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I. INTRODUCTION

1 The central issue in this docket was whether Pacific Northwest Solar, LLC (PNW Solar),
2 having executed six Standard Power Purchase Agreements (PPA) with Portland General Electric
3 Company (PGE), may unilaterally revise the nameplate capacities of three of those projects prior
4 to construction—changing the agreed-upon 4 MW nameplate capacities of Butler, Starlight, and
5 Stringtown to 10 MW, 2.2 MW, and 2.3 MW, respectively. PNW Solar claimed that such changes
6 were permissible under Section 4.3 of PGE's Standard PPA, arguing that this provision allows
7 QFs to freely revise a project's size up or down at will. PGE responded that QFs are bound to
8 construct and operate their projects at the sizes warranted in their PPAs, and that Section 4.3
9 provides only a narrow exception to this obligation for increases in nameplate capacity that may
10 result from efficiency improvements or upgrades.

11 In Order No. 18-284, the Public Utility Commission of Oregon (Commission) concluded
12 that PNW Solar's position was contrary to the plain language of the contracts. First, the
13 Commission concluded that Section 4.3, on its face, contemplates only changes made by an
14 operational QF after it has been constructed. Second, and more broadly, the Commission
15 concluded that PNW Solar's position could not be squared with the PPA's representations and
16 warranties, in which the QF pledges "to commit its best efforts to sell the output of a facility as
17 described at contract execution."[1] The Commission further observed that, while its decision was
18 based on the plain language of the Standard PPA itself, and therefore an analysis of its general
19 policy was not necessary, the Commission's interpretation was nevertheless consistent with the
20 underlying policy articulated in docket UM 1129's Order No. 06-538, which originally directed
21 PGE to include the relevant language in Section 4.3. For all these reasons, the Commission

[1] Docket No. UM 1894, Order No. 18-284 at 6 (Aug. 2, 2018).

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1 ultimately held that PNW Solar is obligated to either (1) build and operate its projects consistent
2 with the PPA's representations and warranties, or (2) obtain new PPAs for re-sized projects.[2]

3 Instead of proceeding according to the Commission's clear direction, PNW Solar now asks
4 the Commission to provide guidance as to whether and how it can circumvent Order No. 18-284.
5 To this end, PNW Solar has requested reconsideration and "clarification" to determine (a) whether
6 PNW Solar can make the very same changes to the sizes of its projects without obtaining new
7 PPAs, so long as it does so on a *post-construction* basis; (b) whether the proposed expansion of its
8 Butler project qualifies as an "upgrade";[3] (c) whether PNW Solar can revise the sizes of its projects
9 *pre-construction*, keep its existing PPAs for all three projects, and obtain a new PPA only for the
10 incremental increased capacity for Butler;[4] and (d) if new PPAs are required, whether PNW Solar
11 is entitled to those avoided cost prices in effect at the time PNW Solar first notified PGE of its
12 intent to revise the sizes of its projects.[5] In addition, PNW Solar briefly asks the Commission to
13 reconsider each of its decisions in this docket, reprising without analysis its jurisdictional,
14 constitutional, statutory, and policy arguments.[6]

15 Each of PNW Solar's requests should be denied.

16 • *First,* the Commission should decline to comment on PNW Solar's ability to make the
17 same changes to the sizes of its projects *post-construction* because such a hypothetical
18 exceeds the scope of this proceeding and the Commission's order—both of which
19 concerned *pre-construction* changes only.

20 • *Second,* if the Commission decides to provide the clarification that PNW Solar seeks
21 regarding post-construction changes, it should clarify that a QF may not freely revise its

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[2] *Id.* (describing "the QF's primary obligation to commit its best efforts to sell the output of a facility as described at contract execution"). The Commission also noted that Section 3.1.8 warrants each project's nameplate capacity.

[3] PNW Solar's Application for Reconsideration and Rehearing at 11 (Aug. 13, 2018) ("PNW Solar's Application for Reconsideration") ("[I]t is necessary to rehear, reconsider and/or clarify what qualifies as an 'upgrade' so that parties do not have to re-litigate this issue at some future date after PNW Solar constructs its facility then notifies PGE of its increase and PGE rejects that request.").

[4] *Id.* at 1-2 ("[I]f PNW Solar moves forward with its plans to construct" all three projects at revised nameplate capacities, would PNW Solar "be required to negotiate new PPAs at current rates"?).

[5] *Id.* at 2 ("[T]he Commission must decide whether these facilities will be paid the avoided cost rates in effect at the time that they provided notice.").

[6] *Id.* at 12.

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nameplate capacities outside of efficiency improvements and upgrades because such an interpretation would nullify the representations and warranties regarding size and performance. Indeed, standalone increases to a project's nameplate capacity that have no connection to efficiency improvements or upgrades are inconsistent with the plain meaning of term "upgrade" as used by this Commission.

- *Third,* if PNW Solar changes the size of any project, it must execute a new PPA *for that project as a whole*. PNW Solar may not first breach its PPA by changing the nameplate capacity of a project, and then retain the same breached PPA for its project going forward.
- *Fourth,* PNW Solar is not entitled to the avoided cost prices in effect at the time it provided notice of its desire to changes its projects' sizes because PNW Solar's notifications did not establish legally enforceable obligations. These notifications were non-binding, as demonstrated by PNW Solar's subsequent withdrawal of one of its proposed changes. Nor is PNW Solar entitled to special pricing treatment as a result of its efforts to breach its PPAs.
- *Finally,* PNW Solar presents no compelling reason for the Commission to reconsider either its jurisdictional or substantive decisions in this case. The Commission properly exercised its delegated authority under ORS 756.500 to resolve this fact-specific complaint involving matters within the Commission's special expertise and understanding.

Overall, the Commission concluded that the plain language of PGE's Standard PPA requires a QF "to commit its best efforts to sell the output of a facility as described at contract execution . . . —that is, ***to act in 'good faith' without a material deviation from the agreed-upon terms***."[7] PNW Solar should not require further instruction as to the dictates of good faith compliance.

II. BACKGROUND

For ease of review, the following recitation briefly summarizes the facts and procedural history relevant to this dispute.

In the first half of 2016, PNW Solar executed Standard PPAs with PGE for six solar QFs.[8] These PPAs reflected avoided cost rates approved by the Commission on August 25, 2015.[9] In

[7] Order No. 18-284 at 6 (emphasis added).
[8] Stipulated Facts for Cross-Motions for Summary Judgment ¶ 1 (Mar. 16, 2018) ("Stipulated Facts").
[9] Stipulated Facts ¶ 2.

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1 May and June of 2017—more than a year after executing the PPAs—PNW Solar informed PGE
2 contracting personnel that it sought to materially revise the nameplate capacity of four of these six
3 QFs, as reflected in the table below:[10]

Solar Facility	Original Size	Requested Size	Change
Amity	4 MW	6 MW	+2 MW
Butler	4 MW	10 MW	+6 MW
Duus	10 MW	10 MW	none
Firwood	10 MW	10 MW	none
Starlight	4 MW	2.2 MW	-1.8 MW
Stringtown	4 MW	2.3 MW	-1.7 MW

4 In 2018, PNW Solar stated that it no longer seeks to increase the size of the Amity project, which
5 will instead remain at its original 4 MW capacity.[11]

6 Since the date that PNW Solar executed the Standard PPAs, PGE's avoided cost prices
7 have been updated four times—on June 7, 2016, on June 1, 2017, on September 18, 2017, and on
8 May 23, 2018.[12] These changes substantially lowered PGE's avoided cost prices.[13] Thus, by
9 attempting to retain access to outdated avoided cost prices, PNW Solar seeks to receive the highest
10 possible prices while modifying the agreed-upon sizes of its projects.

11 After learning of PNW Solar's proposed size changes, PGE informed PNW Solar on June
12 22, 2017, and again on July 21, that the Standard PPA does not permit a QF to materially change
13 its nameplate capacity prior to construction while retaining the right to outdated avoided cost
14 prices.[14] On August 28, 2017, PNW Solar responded with a demand letter stating that, if PGE did

[10] Stipulated Facts ¶¶ 7 & 10.
[11] Stipulated Facts ¶ 13.
[12] Stipulated Facts ¶ 12.
[13] See *In the Matter of Portland General Electric Company Application to Update Schedule 201 Qualifying Facility Informati*on, Docket No. UM 1728 (PGE filings updating avoided costs and Orders approving the same).
[14] Stipulated Facts ¶¶ 9 & 11.

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not accept the proposed nameplate capacity changes by September 1, 2017, then PNW Solar would file a complaint in the circuit court seeking $3.75 million in damages, costs, and fees.[15] To resolve this dispute, PGE sought the Commission's review to confirm that PGE's Standard PPA does not permit material changes to a project's nameplate capacity outside of upgrades or efficiency improvements to existing facilities.[16]

PNW Solar thereafter filed a complaint at the circuit court seeking damages of $11.25 million.[17] The parties subsequently agreed to abate the circuit court case pending resolution of this proceeding.[18]

Over the course of this proceeding the parties have litigated (1) PNW Solar's motion to dismiss the complaint for lack of jurisdiction;[19] (2) PNW Solar's request for certification of the denial of its motion to dismiss;[20] and (3) cross-motions for summary judgment.[21] On January 25, 2018, the Commission denied PNW Solar's motion to dismiss and concluded that it had personal and subject matter jurisdiction to resolve the complaint.[22] On August 2, 2018, after both briefing and oral argument, the Commission denied PNW Solar's motion for summary judgment and granted PGE's motion for summary judgment, concluding that PGE's Standard PPA does not permit material nameplate capacity changes prior to a facility's construction, and that PNW Solar is obligated "to commit its best efforts to sell the output of a facility as described at contract

[15] A copy of the demand letter was attached to PGE's Complaint and Request for Dispute Resolution as Exhibit D.
[16] PGE's Complaint and Request for Dispute Resolution (Aug. 31, 2017) ("PGE's Complaint").
[17] Summons and Complaint, *Pacific Northwest Solar v. Portland General Electric Co.*, Case No. 17-CV-38020 (Mult. Cnty. Cir. Ct. Sept. 6, 2017).
[18] Stipulated Order to Abate, *Pacific Northwest Solar v. Portland General Electric Co.*, Case No. 17-CV-38020 (Mult. Cnty. Cir. Ct. Jan. 26, 2018). That case remains abated.
[19] PNW Solar's Motion to Dismiss (Sept. 19, 2017).
[20] PNW Solar's Request for Certification (Nov. 13, 2017).
[21] PGE's Motion for Summary Judgment (Mar. 23, 2018); PNW Solar's Motion for Summary Judgment (Mar. 23, 2018).
[22] Docket No. UM 1894, Order No. 18-025 at 4 (Jan. 25, 2018) ("We have personal jurisdiction over PNW [Solar] under our complaint statutes."); *see also id.*at 6 ("[W]e affirm that we have primary subject matter jurisdiction.").

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execution and [to] satisfy the performance warranty provisions of the agreement."[23] Now, PNW Solar seeks comprehensive rehearing and reconsideration of the Commission's rulings to date.[24]

III. DISCUSSION

The Commission will grant a request for rehearing or reconsideration where the party seeking reconsideration demonstrates the existence of either (1) an error of law or fact, or (2) good cause for further examination of an issue.[25] The error or other good cause must involve an "essential element" of the Commission's decision.[26]

Here, PNW Solar argues that there is good cause for further examination of Order No. 18-284 "because the order is incomplete and requires some clarification to fully understand and implement."[27] PNW Solar also argues that the Commission's order commits one or more errors of law—namely, that the order violates "a constitutional or statutory provision," conflicts with "an agency rule or officially stated position," and is "not supported by substantial evidence."[28] PGE respectfully requests that the Commission deny PNW Solar's request for reconsideration and rehearing as it fails to identify any error, incompleteness, or other good cause warranting further review.

A. The Commission should decline to consider PNW Solar's attempt to circumvent the application of the Commission's order.

In finding that PNW Solar was not allowed to materially revise its projects' nameplate capacities prior to construction, the Commission properly limited its decision to the facts presented in this case. Now, PNW Solar asks the Commission to conclude that the very changes it is *not*

[23] Order No. 18-284 at 6.
[24] PNW Solar's Application for Reconsideration and Rehearing (Aug. 13, 2018).
[25] OAR 860-001-0720(3)(c)-(d). Other bases for reconsideration are not relevant to this case. OAR 860-001-0720(3)(a)-(b).
[26] OAR 860-001-0720(3).
[27] PNW Solar's Application for Reconsideration at 3.
[28] *Id.* at 11-12.

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1 permitted to make pre-construction may nonetheless be made post-construction.[29] Specifically,
2 PNW Solar asks the Commission to confirm that it "could initially construct the Butler Solar
3 project under its current PPA with a nameplate capacity of 4 MW," before increasing the project's
4 size as an "upgrade."[30] PNW Solar also implies that it could decrease the nameplate capacities of
5 Starlight and Stringtown yet "maintain its existing PPAs."[31] In addition, in order to support PNW
6 Solar's notion that its nameplate capacity changes could be treated as post-construction upgrades,
7 PNW Solar further asks the Commission to define "upgrades," as used in the Commission's
8 analysis of Order No. 06-538.[32] While PNW Solar is unaccountably vague about the proposed
9 nature or timing of these theoretical nameplate capacity changes, it appears that PNW Solar intends
10 to make the same planned size changes to all three of its projects as soon as possible after credibly
11 checking the "post-construction" box.[33]

12 PNW Solar's post-construction proposal and request for "clarification" should be denied
13 for three reasons: *First and most critically,* the post-construction activities posited by PNW Solar
14 are entirely hypothetical and therefore the questions raised exceed the scope of this fact-specific
15 proceeding.[34] *Second,* even if the Commission chooses to respond to PNW Solar's post-
16 construction hypothetical, PNW Solar's proposal to conduct the very same nameplate capacity
17 increases it originally proposed, but on a post-construction basis, would clearly contravene the
18 Commission's direction "to operate" as agreed in the PPA's representations and warranties and
19 "to act in 'good faith' without a material deviation from the agreed-upon terms."[35] *Third,* PNW

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[29] PNW Solar's Application for Reconsideration at 11.
[30] *Id.*
[31] *Id.* at 7-8.
[32] *Id.* at 2 ("What qualifies as a non-material change, material change, or an upgrade?").
[33] *See* PNW Solar's Reply to PGE's Motion for Summary Judgment and CREA's Reply Comments to Summary Judgment Motions at 14 (Apr. 13, 2018) (stating its impression that "material changes [that] are not permitted prior to construction" would be permitted "after commercial operations commenced," while retaining "'out-of-date' avoided costs").
[34] Order No. 18-284 at 7 ("[W]e conclude that the clear intention of the standard PPA . . . is that PNW [Solar] may neither purposefully increase the nameplate capacity of its Butler facility, nor decrease the nameplate capacities of the Starlight and Stringtown facilities *prior to the commencement of commercial operation*[.]") (emphasis added).
[35] *Id.* at 6.

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1 Solar's proposal to simply revise the sizes of its projects would not constitute an "upgrade" under
2 the plain meaning of the term, as confirmed by Order No. 18-284.

3 *i. The Commission should decline to comment on PNW Solar's post-construction*
4 *factual scenario because it raises hypothetical new facts outside the scope of this*
5 *proceeding.*

6 The Commission should not comment on PNW Solar's new post-construction factual
7 scenario because it is beyond the scope of the facts presented in this case. To determine the
8 appropriate scope of review, the Commission applies accepted principles of judicial review as
9 articulated by Oregon courts.[36] It is a fundamental principle of judicial review that a tribunal's
10 determination is limited by the facts of the complaint.[37]

11 Here, the Commission was asked to determine whether PNW Solar is allowed to materially
12 revise the size of its projects *pre-construction*.[38] The Commission concluded that material pre-
13 construction capacity changes are not permitted under the plain terms of PGE's Standard PPA. As
14 the Commission explained, "the terms and conditions of the [S]tandard PPA itself"[39] make clear
15 that "permissible modifications" under Section 4.3 are "predicated upon the facility's completed
16 construction."[40] The Commission also observed that its conclusion was supported by its previous
17 decision in Order No. 06-538, which addressed upgrades to "existing operating facilities."[41] Thus,
18 the Commission's plain language and policy analysis both focused on pre-construction changes,
19 consistent with the facts of the dispute.

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[36] *See, e.g., The Nw. Pub. Commun. Council v. Qwest Corp.*, Docket No. DR 26/UC 600, Order No. 09-155 at 14-15 (May 4, 2009) (applying Oregon court precedent to determine whether new questions were sufficiently related to facts in the original complaint).
[37] *See, e.g., DeJonge v. Mutual of Enumclaw*, 315 Or 237, 244 (1992) (concluding that a court's decision was properly limited to "the facts of the case"); *see also Randall v. Sanford*, 75 Or 68, 75 (1985) (noting that an order going "beyond the scope of plaintiffs' complaint" would be error).
[38] PGE's Complaint at 3 ("Section 4.3 was intended to address the proper treatment of upgrades that alter the nameplate capacity of *operational* QFs.") (emphasis added).
[39] Order No. 18-284 at 7.
[40] *Id.* at 6.
[41] *Id.* at 8.

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Moreover, there is a very practical reason why the Commission should not entertain the hypothetical questions posed by PNW Solar, which is that PNW Solar does not provide sufficient facts on which the Commission could offer an opinion.[42] As noted above, PNW Solar is vague about both the nature and timing of the hypothetical changes contemplated. And while it appears that the proposal is simply to change the projects' nameplate capacities and to do so as soon as possible, PNW Solar has not been sufficiently explicit about its intentions to enable a response from the Commission.

In sum, the Commission properly confined its decision to the facts of the dispute, which involved *pre-construction* capacity changes only. If PNW Solar seeks Commission guidance on a different set of facts, it is free to file a separate complaint. Moreover, if PNW Solar would like guidance from the Commission for "the QF community" as a whole, a generic docket or declaratory ruling may be a more appropriate vehicle for review.[43]

ii. If the Commission comments on post-construction changes, it should conclude that PNW Solar's proposal to conduct the same nameplate capacity changes post-construction clearly violates the PPA's representations and warranties.

Should the Commission choose to respond to PNW Solar's hypothetical regarding potential post-construction nameplate capacity revisions, it should clarify that attempting to perform the very same capacity changes after construction would nevertheless violate the PPAs' representations and warranties. In Order No. 18-284, the Commission noted that Section 3.1.8 "warrants the net dependable capacity of the facility," while Section 3.1.11 "warrants the maximum annual output." The Commission explained that these two provisions "provide the performance parameters within which the QF promises to operate."[44] Failing to perform within these parameters would result in default under Section 9.[45] The Commission concluded that:

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[42] *Berg v. Hirschy*, 206 Or App 472, 475 (2006) ("A justiciable controversy must involve present facts, not future events or hypothetical issues.") (emphasis added).
[43] PNW Solar's Application for Reconsideration at 10.
[44] Order No. 18-284 at 6.
[45] *Id.*

1 Taken together, these provisions establish the QF's primary obligation to commit
2 its best efforts to sell the output of a facility as described at contract execution and
3 satisfy the performance warranty provisions of the agreement—that is, to act in
4 'good faith' without a material deviation from the agreed-upon terms.

5 In light of the PPA's clear and binding representations and warranties, the Commission concluded
6 that Section 4.3 could not "be interpreted to allow a QF to modify its facility at any point."[46] As
7 the Commission explained:

8 Interpreting the contract in a manner such as to allow a QF to unilaterally materially
9 change its nameplate capacity and the resulting performance parameters, merely
10 upon notice to PGE, ***would give little certainty and meaning to the fundamental***
11 ***warranties*** of Section 3.[47]

12 Thus, the Commission concluded that it found "nothing" in the PPAs "to permit a QF . . . to
13 unilaterally change the fundamental warranties solely upon notice to PGE."[48]

14 Now, rather than proceed "in 'good faith' without a material deviation from the agreed-
15 upon terms" in the PPAs, PNW Solar argues that it may undergo the very same nameplate capacity
16 changes as soon as construction is complete, while still "maintain[ing] its existing PPAs."[49] This
17 position is in direct conflict with Order 18-284, which made clear that the foundational
18 representations and warranties of the Standard PPAs require a QF to build and operate at the
19 agreed-upon size, and do not permit a QF "to unilaterally change the [PPA's] fundamental
20 warranties."[50] It would be illogical to conclude that these essential representations and warranties
21 evaporate as soon as a QF is constructed.

22 Thus, if the Commission takes up PNW Solar's proposal, it should confirm that a QF may
23 not freely revise its nameplate capacities either pre- or post-construction because doing so would
24 nullify the PPA's representations and warranties.[51]

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[46] *Id.*
[47] *Id.* (emphasis added).
[48] *Id.* at 7.
[49] PNW Solar's Application for Reconsideration at 8.
[50] Order No. 18-284 at 6-7.
[51] *Id.* at 6.

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iii. The Commission should decline to address the meaning of "upgrades" because the Commission's discussion of "upgrades" was not essential to its decision.

The Commission should also decline to provide an advisory opinion on the meaning of "upgrades."[52] Reconsideration is only appropriate where an error or other good cause involves an "essential element" of the Commission's decision and the Commission's discussion regarding "upgrades" was not essential to its decision.[53]

In its reconsideration request, PNW Solar asks the Commission to opine as to what constitutes an "upgrade" as that term is used in Order No. 18-284.[54] In making this request, PNW Solar refers to the Commission's discussion of the policies underlying Section 4.3, as they were originally explored and articulated in Order 06-538. As explained by the Commission, that order allowed QFs to increase their output only under the following conditions:

> (1) the QF was *already operational*, i.e., producing and transmitting power under the existing contract; (2) all changes were *upgrades to existing operations*; and (3) any such *upgrades would increase* the nameplate capacity or delivered power or both.[55]

Noting that an analysis of Order 06-538 was not necessary to its conclusion in this case, the Commission nevertheless observed that "the planned increase in nameplate capacity of the Butler facility" did not meet "any" of these three criteria.[56] Given the language in item (3), above, and given that the proposed changes to Butler involve an increase to nameplate capacity, the Commission appeared to agree that the planned Butler expansion was inarguably not an upgrade.[57]

Now, PNW Solar is asking the Commission to provide advice as to whether the same expansion would constitute an "upgrade" if it were undertaken after construction instead of pre-construction. The Commission should decline to provide an opinion on the matter. As noted

[52] PNW Solar's Application for Reconsideration at 10.
[53] OAR 860-001-0720(3).
[54] PNW Solar's Application for Reconsideration at 10.
[55] Order No. 18-284 at 8 (emphasis added).
[56] *Id.*
[57] *Id.*

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above, reconsideration is only appropriate where an error or other good cause involves an "essential element" of the Commission's decision.[58] Yet the Commission's discussion of Order No. 06-538—the only portion of the Commission's order that touched on upgrades—was explicitly "not necessary" to the Commission's order. Rather, the Commission's conclusion in this case was based on the plain language of the Standard PPA.[59] Given that the Commission's subsequent discussion of what constitutes a facility upgrade within the meaning of Order No. 06-538 was not "essential" to the Commission's decision, it cannot serve as the basis for reconsideration.[60]

iv. If the Commission comments on the meaning of "upgrades," it should conclude that PNW Solar's proposal to increase its project's nameplate capacity is not an "upgrade."

If the Commission nonetheless chooses to respond to PNW Solar's request for guidance regarding the meaning of "upgrades," then the Commission should clarify that PNW Solar's proposal to simply increase the size of the Butler facility from 4 MW to 10 MW is inconsistent with the meaning of "upgrade," even if undertaken post-construction. The word "upgrade" is synonymous with "improvement" or "modernization."[61] To upgrade is to improve an object's usefulness or quality—not simply to expand the object's size or quantity.[62] For instance, one upgrades a computer to a newer model or an airline passenger to a better seat—one does not

[58] OAR 860-001-0720(3).
[59] Order No. 18-284 at 7 (stating that it was "not necessary" to look beyond the PPA itself in this case); OAR 860-001-0720 (authorizing rehearing or reconsideration only of those issues or errors that are "essential to the decision").
[60] *See State v. Anderson*, 280 Or App 572, 577 (2016) (acknowledging that, where the court had "said more than was necessary to support our holding," its statements were dictum); *see also State ex rel. Huddleston v. Sawyer*, 324 Or 597, 621 n.19 (1997) ("[T]hat statement was dictum, because it was not necessary to the outcome of the case.").
[61] Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/upgrade (defining "upgrade" as "to raise or improve the grade of: such as **a** : to improve (livestock by use of purebred sires [;] **b** : to advance to a job requiring a higher level of skill especially as part of a training program [;] **c** : to raise the quality of"); *see also* Webster's Third New International Dictionary Unabridged 2517 (1961) (defining "upgrade" as "to raise the grade of; as **a** : to improve (as livestock) by the use of purebred sires [;] **b** : to advance to a job requiring a higher level of skill esp. as part of a training program : advance in professional rank [;] **c** : to raise the quality of (as a manufactured product).
[62] *See* American Heritage Unabridged Dictionary 1890 (4th Ed.2000) (defining "to upgrade" as "[t]o exchange a possession for one of greater value or quality; trade up"); *see also* Cambridge English Dictionary, https://dictionary.cambridge.org/us/dictionary/english/upgrade (defining "to upgrade" as "to improve the quality or usefulness of something, or to raise something or someone to a higher position or rank").

"upgrade" a computer by purchasing two computers, or "upgrade" an airline passenger by buying more seats. Simply taking 4 MW of solar panels and adding an additional 6 MW of panels is not an improvement in *quality*; it is a sheer increase in *quantity*.[63] And, importantly, changing the timing on the proposed expansion does not transform the redesign into an upgrade. Moreover, there is no understanding of the term "upgrade" that would encompass PNW Solar's proposal to decrease the sizes of Starlight and Stringtown.

In sum, PNW Solar's proposal to change the sizes of its projects after its facilities are constructed is not within the scope of this proceeding. The Commission properly confined its decision to the facts presented when it concluded that PNW Solar's proposed *pre-construction* changes were not appropriate. Should the Commission nonetheless choose to address PNW Solar's efforts to circumvent the Commission's decision by undertaking the same proposed capacity changes after its projects have been constructed, the Commission should clarify that such revisions would still violate the PPAs' representations and warranties and that wholesale size changes are not upgrades.[64]

B. If PNW Solar changes its projects' nameplate capacities, then it must obtain new PPAs.

The Commission explained that the plain language of the PPAs obligates PNW Solar to construct and operate its projects at the agreed-upon sizes. Accordingly, if PNW Solar elects to change the projects' nameplate capacity, PNW Solar must obtain new PPAs. In its application for reconsideration, PNW Solar asks what would happen if it proceeds to construct its projects at sizes different from those agreed to in its PPAs. That is, "if PNW Solar moves forward with its

[63] Note, these arguments were not previously presented in briefing because no party previously raised the issue of what exactly constitutes an "upgrade." Indeed, it appeared clear that PNW Solar's proposed size changes exceeded the definition of "upgrade" because PNW Solar vehemently argued that something more than "upgrades" must be permissible. *See, e.g.,* PNW Solar's Reply to PGE's Motion for Summary Judgment at 7 (arguing that "the PPA does not limit the types of changes at all"). The fact that further analysis beyond the scope of the parties' briefing would be required on this point further illustrates that PNW Solar's request for reconsideration would considerably expand the scope of the Commission's analysis beyond the pleadings and beyond motions for summary judgment.
[64] Order No. 18-284 at 7-8.

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plans to construct [Butler] at 10 MW . . . or [Starlight and Stringtown] at lower capacities,"[65] could PNW Solar "maintain its existing PPAs" and establish new PPAs "for only the additional capacity."[66] With respect to Butler, PNW Solar's confusion is unwarranted as both Order No. 18-284 and the plain language of the PPAs make clear that changing these projects' nameplate capacities would violate the PPAs' representations and warranties, resulting in termination of the contracts. As for Starlight and Stringtown, it is not even clear what PNW Solar is asking given that these projects are proposed for decreases and there would be no additional capacity that could be addressed in a new PPA.

In Order No. 18-284, the Commission explained that the plain language of the PPAs obligates PNW Solar to construct and operate its projects at the agreed-upon sizes. Section 3.1.8 states that PNW Solar "warrants that Net Dependable Capacity of the Facility is 4,000 kW."[67] And Section 3.1.11 warrants the QF's maximum annual output.[68] Failure to honor these commitments is addressed in Section 9.1, which states that breach of a representation or warranty results in default. PGE may then "immediately terminate" the agreement "at its sole discretion by delivering written notice."[69]

As the Commission explained more fully:

> Taken together, [the PPA's] provisions establish the QF's primary obligation to commit its best efforts to sell the output of a facility as described at contract execution and satisfy the performance warranty provisions of the agreement—that is, ***to act in "good faith" without a material deviation from the agreed-upon terms***. Interpreting the contract in a manner such as to allow a QF to unilaterally materially change its nameplate capacity and the resulting performance parameters, merely upon notice to PGE, would give little certainty and meaning to the fundamental warranties of Section 3.[70]

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[65] PNW Solar's Application for Reconsideration at 1-2.
[66] *Id.* at 8.
[67] PGE's Complaint, Exhibit B at 8 ("Standard Renewable In-System Variable Power Purchase Agreement").
[68] *Id.* at 9.
[69] *Id.* at 13.
[70] Order No. 18-284 at 6 (emphasis added).

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1 Pursuant to both the Commission's analysis and the plain language of the PPAs, if PNW Solar
2 deviates from the agreed-upon terms by changing the size and/or output of its projects, "such
3 changes would result in breaching the warranties of Section 3.1.8."[71]

4 In sum, if PNW Solar elects to changes its projects' sizes, such action would breach its
5 PPAs. Those breached PPAs would then be terminated and new PPAs would be required if PNW
6 Solar wishes to sell its projects' output to PGE.

7 **C. PNW Solar did not establish a legally enforceable obligation by providing non-**
8 **binding notice of its intent to changes its projects' nameplate capacities.**

9 Avoided cost prices are set according to the time that a QF establishes a legally enforceable
10 obligation.[72] A legally enforceable obligation "exists when a QF signs a final draft of an
11 executable standard contract that includes a scheduled commercial on-line date and information
12 regarding the QF's minimum and maximum annual deliveries, ***thereby obligating itself to provide***
13 ***power*** or be subject to penalty for failing to deliver energy on the scheduled commercial on-line
14 date."[73] Accordingly, PNW Solar cannot possibly be entitled to out-of-date avoided cost prices
15 when PNW Solar has not completed any of the steps necessary for the issuance of draft executable
16 PPAs at revised capacity amounts, much less executed final draft PPAs.

17 In its application for reconsideration, PNW Solar asks, what avoided cost prices would
18 apply if it proceeds to change the sizes of its facilities and enters into new PPAs: (1) "the prices in
19 effect at the time the facility provided its notice of intent to construct a facility at a different
20 nameplate capacity"; (2) "the currently effective prices;" or (3) "something else."[74] PNW Solar
21 argues that each QF established a new legally enforceable obligation "at least by the time it
22 formally notified PGE of its requested" capacity change, "and therefore is entitled to the avoided

[71] *Id.*
[72] *In the Matter of Staff Investigation Into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 16-174 at 25 (May 13, 2016).
[73] *Id.* at 27 (emphasis added).
[74] PNW Solar's Application for Reconsideration at 4.

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1 cost prices in effect at that time."[75] PNW Solar is mistaken for four reasons: *First,* PNW Solar's
2 non-binding notice did not establish a legally enforceable obligation with PGE because it was
3 demonstrably capable of being withdrawn. *Second,* PNW Solar elected not to request new
4 contracts that would accurately reflect its projects' new sizes. *Third,* even had PNW Solar
5 requested new contracts when it provided notice, it would not have established a legally
6 enforceable obligation immediately. *Fourth,* PNW Solar is not entitled to special pricing treatment
7 as a result of its efforts to breach its PPAs.

8 Here, PNW Solar merely notified PGE that it intended to revise the size of its projects.[76]
9 It did not sign an executable contract nor make a binding commitment. Indeed, PNW Solar
10 subsequently withdrew its proposed size change for a fourth project, Amity—demonstrating that
11 PNW Solar did not consider its notifications to be binding in any way. PNW Solar thus advocates
12 that PGE and its customers, are bound by the notice even though PNW Solar itself is not bound by
13 it. PNW Solar provides no justification for such lopsided enforcement.

14 PNW Solar acknowledges that, under existing Commission precedent, its notifications
15 would not normally establish legally enforceable obligations,[77] but suggests that the Commission
16 should create an exception in this case because the Commission has stated that a legally
17 enforceable obligation may be established prior to signing an executable PPA "in certain
18 circumstances."[78] However, the circumstances the Commission has described concern possible
19 delays caused *by a utility*—not delays caused by the QF itself. As the Commission explained:

20 We acknowledge . . . that problems may delay or obstruct progress towards a final
21 draft of executable contract, *such as failure by a utility* to provide a QF with
22 required information or documents on a timely basis.[79]

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[75] *Id.* at 5.
[76] Stipulated Facts ¶ 7 & 10.
[77] PNW Solar's Application for Reconsideration at 5 ("the Commission generally requires that a QF sign an executable PPA" in order to establish a legally enforceable obligation).
[78] *Id.*
[79] Order No. 16-174 at 27 (emphasis added).

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1 Therefore, the Commission agreed to an exception when QFs can demonstrate that a utility
2 inappropriately delayed execution of a QF's PPA.[80] While the Commission sought to shield the
3 QF from delays for which it had no responsibility, the Commission made no mention of providing
4 an exception for QFs who delay the process through their own conduct.[81]
5 In this case, however, PNW Solar voluntarily declined to enter new PPAs on the basis of
6 its mistaken belief that the representations and warranties in existing PPAs were non-binding.
7 PNW Solar was informed that it could terminate its existing PPAs and request new PPAs at the
8 revised sizes.[82] PNW Solar's failure to execute new PPAs was therefore PNW Solar's own error;
9 this mistake does not fall within any exception to the Commission's rule for establishing a legally
10 enforceable obligation.[83]
11 Not only does PNW Solar fail to meet an established exception to the Commission's rule
12 on the creation of a legally enforceable obligation, but there is also no equitable basis for granting
13 PNW Solar an exception in this case. PNW Solar claims that it should be allowed to hold onto the
14 prices in effect at the time it gave notice because "the Commission tries to place parties in the
15 position they would have been in if they did not need the Commission's assistance in resolving
16 their dispute."[84] But the case on which PNW Solar relies, *Kootenai Electric Cooperative, Inc. v.*
17 *Idaho Power Co.*,[85] in fact stands for the established principle that an *injured* party will be restored
18 "the position he or she would have been had the other party performed."[86] In *Kootenai*, the QF

[80] *Id.* Note, however, that a reasonable or harmless delay by the utility would not serve as the basis for establishing a legally enforceable obligation. Nor is a legally enforceable obligation established simply because the QF would prefer a faster process than that approved by the Commission.
[81] *Id.* at 27-28.
[82] PGE's Complaint, Exhibit C at 4.
[83] It also bears noting that PNW Solar's proposal that a QFs be allowed to create a legally enforceable obligation by providing a notification of a proposed change to its PPA would create a completely unworkable new legal standard that would cause enormous confusion and inevitable disputes.
[84] PNW Solar's Application for Reconsideration at 6.
[85] Docket No. UM 1572, Order No. 14-027 (Jan. 27, 2014).
[86] *Seibel v. Liberty Homes, Inc.*, 305 Or 362, 373 (1988) ("[I]n an action for breach of contract, the law aims to place the party injured by the breach in the position he or she would have been had the other party performed."); *see also Montara Owners Ass'n v. La Noue Dev., LLC*, 357 Or 333, 346 (2015) ("When a 'contractor fails to keep [an] agreement,' the measure of damages 'is always the sum which will put [the injured party] in as good a position as if

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1 had prevailed in its claim that the utility was obligated to purchase the QF's output; the
2 Commission thus concluded that the utility was obligated to pay the price applicable when the QF
3 filed its complaint—thereby restoring the QF (the injured party) to the position it would have been
4 in had the utility performed as required.[87]

5 Here, by contrast, PNW Solar sought to breach its contracts and PGE objected to avoid
6 injury to its customers. Had PNW Solar properly performed, it would have proceeded to develop
7 its facilities consistent with its representations and warranties. If PNW Solar still chooses to breach
8 its contracts then it may do so, but ***there is absolutely no basis for rewarding such a breach by***
9 ***providing out-of-date avoided cost prices at customers' further expense***.

10 Moreover, even if the Commission were inclined to reward PNW Solar by returning it to
11 the position it would have been in had it not determined to breach its PPAs, the price that would
12 apply would not be the price in effect at the time of notice, but rather the price that PNW Solar
13 could have obtained had it requested a new PPA. As PGE explained in its reply to PNW Solar's
14 motion for summary judgment, after requesting a standard contract, a QF generally will not
15 establish a legally enforceable obligation in less than approximately 45 business days under the
16 Commission-approved standard contracting process.[88] As a result, the earliest avoided cost prices
17 to which PNW Solar might have been entitled—had it pursued new PPAs when it provided
18 notice—would be the prices that took effect on June 1, 2017.[89] However, because PNW Solar
19 elected not to request new contracts, it should receive the avoided cost prices in effect when it
20 establishes a new legally enforceable obligation in the future for any revised projects.

21 PNW Solar further argues that, if it is not awarded the avoided cost prices in force at the
22 time it sought to breach its PPAs, it would be "penalized for attempting to litigate and gain clarity

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the contract had been performed.'") (quoting Samuel Williston, 24 *Williston on Contracts* § 66.17, 461 (Richard A. Lord ed., 4th ed 2002)) (as modified).

[87] Order No. 14-027.

[88] PGE Schedule 201, Sheet 201-2.

[89] PNW Solar notified PGE of the requested change in size for Butler on May 8, 2017 and for Starlight and Stringtown on June 23, 2017. Stipulated Facts ¶ 10.

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1 regarding the terms of [its] contracts."[90] Yet PNW Solar simultaneously argues that, if it "must
2 start afresh with PGE's contracting process, then the Commission will encourage PGE to file more
3 suits like this one."[91] Thus, PNW Solar asks to be rewarded for unsuccessfully litigating its
4 position, while simultaneously castigating PGE for successfully seeking Commission guidance to
5 prevent abuse of its PURPA PPAs. This position should be rejected.[92]

6 In sum, the Commission properly denied PNW Solar's request for an exception from the
7 standard rules for establishing a legally enforceable obligation. To the extent that the Commission
8 believes further clarification is required, it should confirm that PNW Solar will be entitled to those
9 prices in effect at the time it establishes a new legally enforceable obligation by signing a new
10 executable PPA, consistent with the Commission's clear precedent in Order No. 16-174.

11 **D. PNW Solar's cursory recitation of errors is meritless and does not warrant**
12 **reconsideration.**

13 In addition to requesting reconsideration and rehearing on the bases described above, PNW
14 Solar argues that the Commission "should reconsider and/or rehear this case in its entirety" on the
15 basis of a list of purported errors, including (1) lack of personal jurisdiction; (2) lack of subject
16 matter jurisdiction; (3) implausible plain language construction; (4) relying on extrinsic evidence
17 in construing contractual language; and (5) lack of substantial evidence in the record. Each of
18 these claimed bases for reconsideration and rehearing is presented in a single sentence without
19 citation.

20 As an initial matter, the Commission need not address PNW Solar's cursory and conclusory
21 assertions listed without adequate briefing or supporting authority.[93] Courts routinely decline to

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[90] PNW Solar's Application for Reconsideration at 2.

[91] *Id.* at 6-7.

[92] A copy of the demand letter was attached to PGE's Complaint and Request for Dispute Resolution as Exhibit D.

[93] *Dep't of Human Servs. v. J.B.V.*, 262 Or App 745, 757 n.6 (2014) (declining to address a party's "cursory and conclusory assertion"); *Carleton v. Or. Health Auth.*, 282 Or App 142, 144 (2016) (holding that the petitioner's "conclusory assertion in her supplemental brief" that a rule was "'plainly erroneous and inconsistent' with the applicable unambiguous federal regulation'" was "an insufficient basis" for the court to consider the petitioner's rule challenge).

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entertain arguments that are "insufficiently articulated" to enable review,[94] as it is not a court's "proper function to make or develop a party's argument when that party has not endeavored to do so itself."[95] Thus, the Commission is not obligated to develop PNW Solar's arguments in the absence of complete briefing.

To the extent that PNW Solar's claims are articulated, they are also unsupported. The Commission's earlier jurisdictional decision was fully reasoned and clearly concluded that the Commission possesses both personal and subject matter jurisdiction in this case.[96] The Commission's analysis has since been confirmed by the District Court of Oregon,[97] stating that "the [Commission's] conclusion that it may exercise jurisdiction over executed contract disputes, despite PURPA's ban on executed PPA modification, is correct."[98] Nor is the Commission's jurisdiction narrowly defined: "the [Commission] is not limited to hearing claims based on violations of statutes, regulations or commission orders, but can also hear complaints based on other grounds, such as contract claims."[99] The District Court further confirmed the Commission's conclusion that a QF consents to the Commission's jurisdiction by entering into a PPA with a regulated utility:[100]

> Perhaps most relevant, in this case, is that Plaintiff has consented to the PUC's jurisdiction [because] Plaintiffs' PPA provides that '[t]his Agreement is subject to the jurisdiction of those governmental agencies having control over either Party or

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[94] *S. Valley Bank & Trust v. Colorado Dutch, LLC*, 291 Or App 175, 187 (2018) ("In short, the argument is insufficiently articulated for our review and so we do not address it."); *see also Migis v. AutoZone, Inc*., 282 Or App 774, 785 n.5 (2016) ("Defendant's argument is not sufficiently developed to allow us to address it, and we therefore reject it without further discussion.").

[95] *Beall Transport Equipment Co. v. Southern Pacific*, 186 Or App 696, 700 n.2 (2003), *adh'd to on recons*, 187 Or App 472 (2003); *see also State v. Dawson*, 277 Or App 187, 190 (2016) ("[W]e conclude that defendant's argument is inadequately developed and decline to consider it.").

[96] Order No. 18-025.

[97] *Alfalfa Solar I LLC v. Portland Gen. Elec. Co*., Case No. 3:18-cv-40-SI, 2018 U.S. Dist. LEXIS 92771 at *13-14 (May 31, 2018) ("Resolution of this case necessarily requires interpretation of a PPA term that was approved by the PUC, and there is little question that PURPA, FERC regulations and Oregon regulations subject utilities, and their contractual relationships with QFs, to a comprehensive regulatory scheme overseen by the PUC.").

[98] *Alfalfa Solar* at *20.

[99] *Alfalfa Solar* at *21.

[100] Order No. 18-025 at 5 ("[W]e conclude that a party can voluntarily submit to personal jurisdiction, which PNW [Solar] has done here.").

1 this Agreement.' Thus, even if Plaintiff QFs were to object to the PUC's 'control
2 over' themselves, because there is no question that the PUC 'has control over' [the
3 utility], Plaintiffs have consented to both the personal and subject matter
4 jurisdiction of the PUC for disputes arising from their executed PPA with [the
5 utility].[101]

6 PNW Solar's faint echo of its prior jurisdictional briefing is inadequate to reopen the
7 Commission's jurisdictional decisions, particularly in light of the compelling court decision
8 reaching the same result.[102]

9 PNW Solar also objects that the Commission impermissibly relied on Section 3.1.8 of the
10 Standard PPA (warranting the facility's "Net Dependable Capacity") because this provision "was
11 not briefed by the parties" and therefore was not "evidence in the record."[103] First, it is absurd that
12 PNW Solar objects to the Commission's reliance on *a provision of the PPA itself* in interpreting
13 the PPA. Second, the provision *is* evidence in the record; the Standard PPA, as executed by PNW
14 Solar, was submitted into the record as Exhibit B to PGE's complaint, and is publicly available
15 evidence because the PPA was filed with and approved by the Commission.[104] Third, PGE
16 repeatedly emphasized PNW Solar's commitment to its nameplate capacity in its briefing,
17 including various of the warranties relating to nameplate capacity. And finally, Net Dependable
18 Capacity is itself referenced in Section 4.3 of the Standard PPA, which was clearly incorporated
19 as a key term in all briefing in this docket. Thus, the fact that the Company did not specifically
20 cite to Section 3.1.8 does not change the fact that the implications of the warranties relevant to
21 nameplate capacity, including the Net Dependable Capacity of the project, was fully briefed.

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[101] *Alfalfa Solar* at *22.

[102] PNW Solar also points to ORS 28.030 for the new position that this dispute "is a declaratory ruling as to the meaning of a contract expressly reserved to the courts." PNW Solar's Application for Reconsideration at 12. Regardless of the fact that this is a wholly new argument raised for the first time in a motion for reconsideration of a separate Commission order, the statute that PNW Solar cites is irrelevant. ORS 28.030 states, in its entirety: "A contract may be construed either before or after there has been a breach thereof." It is wholly unclear how this statute operates to constrain the Commission's ability to review a PURPA PPA.

[103] PNW Solar's Application for Reconsideration at 12.

[104] PGE's Complaint, Exhibit B ("Standard Renewable In-System Variable Power Purchase Agreement"); Docket No. UM 1129, Order No. 07-065 (Feb. 2, 2007) (approving PGE's revised Standard PPA).

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1 PNW Solar's remaining two objections are so meager as to be all but indecipherable. First,
2 in stating that "the Commission impermissibly relied upon external evidence in construing the
3 plain language of the contract," PNW Solar does not explain (1) what external evidence it refers
4 to, (2) where it is evident that the Commission relied on this evidence, (3) how such an error would
5 have been essential to the Commission's result, or (4) why considering extrinsic evidence is even
6 an error, where the Oregon Supreme Court has clearly stated that courts can consider that at the
7 first level of contract interpretation.[105] Second, PNW Solar claims that the Commission
8 "erroneously interpreted the plain contract language at issue."[106] Yet PNW Solar does not explain
9 how the Commission's interpretation was at fault or explain why a different interpretation was
10 required. A mere assertion is simply insufficient to merit reconsideration.[107]
11 In sum, PNW Solar presents no convincing reason for the Commission to reconsider either
12 its jurisdictional or substantive decisions in this case.

IV. CONCLUSION

13 Through their cross motions for summary judgment, the parties asked the Commission to
14 determine whether a QF can revise the size of its projects *prior* to completing construction of its
15 facilities. The Commission properly concluded that the plain language of PGE's Standard PPA
16 does not permit material pre-construction changes to a QF's agreed-upon nameplate capacity. The
17 Commission's plain language analysis reasonably concluded that a QF may not freely deviate from
18 its agreed-upon nameplate capacity pre-construction because the representations and warranties
19 must be meaningful, and because Section 4.3 of the PPA clearly applies to post-construction
20 changes only. Because the Commission's order fully resolved the essential issue in this dispute,
21 reconsideration to determine a post-construction hypothetical or to further define the meaning of
22 an "upgrade" is neither necessary nor appropriate. In addition, the Commission should not

[105] *State v. Gaines*, 346 Or. 160, 172 n.8 (2009) (so stating).
[106] PNW Solar's Application for Reconsideration at 12.
[107] *Carleton*, 282 Or App at 144.

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1 reconsider its decision that PNW Solar's proposed changes in nameplate capacity would breach
2 the PPAs, therefore requiring PNW Solar to enter into new PPAs if PNW Solar elects to proceed
3 with its nameplate capacity changes. Finally, the Commission should reject PNW Solar's request
4 that PGE's customers bear the expense of paying outdated avoided cost prices based on PNW
5 Solar's erroneous interpretation of the PPAs and its non-binding statements that PNW Solar
6 acknowledges failed to establish a legally enforceable obligation.

Dated August 28, 2018

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