BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1894

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. PACIFIC NORTHWEST SOLAR, LLC, Defendant.	REPLY TO PGE'S MOTION FOR SUMMARY JUDGMENT AND CREA'S REPLY COMMENTS TO SUMMARY JUDGMENT MOTIONS

I. INTRODUCTION

On March 23, 2018 Pacific Northwest Solar ("PNW Solar") and Portland General Electric Company ("PGE") filed cross-motions for summary judgment and on March 30, 2018 intervenor Community Renewable Energy Association ("CREA") filed a Reply to those motions for summary judgment. Pursuant to the procedural schedule adopted in this matter on March 6, 2018, PNW Solar files this Reply to PGE's Motion for Summary Judgment and CREA's Reply Comments to Summary Judgment Motions. The reason PGE sought to have the Oregon Public Utility Commission ("Commission") adjudicate this dispute has become clear as PGE asks the Commission to interpret the terms of its power purchase agreements with PNW Solar by considering external evidence, maxims of construction, and public policy concerns regarding ratepayer interests before looking at the plain language of the contracts. The Commission should follow the Oregon judicial standard for contract interpretation by looking first to the text of the provisions at issue and the context of the document as a whole and enforce the PPAs at issue in this case like any other Oregon contract. As fully detailed in PNW Solar's Cross-Motion for

Summary Judgment and explained further herein, the text of the PPAs clearly and unambiguously allow PNW Solar to make its desired changes to the Nameplate Capacity Rating of its facilities. Even if the Commission finds an ambiguity, the external evidence also supports this finding as to the appropriate maxims of construction. Therefore, an award of summary judgment in favor of PNW Solar is appropriate.

II. ARGUMENT

A. PGE's Analysis is Inconsistent with Oregon's Methodology for Contract Interpretation

PGE inappropriately argues that, before considering the plain language, the Commission should interpret Section 4.3 consistent with the Commission's intent when it resolved Issue 8 in Docket No. UM 1129 and ordered PGE to revise its Standard PPA.[1] As fully detailed in PNW's Cross-Motion for Summary Judgment, a court interprets a contract by first examining the text of the provision in the context of the contract, then reviewing extrinsic evidence of the parties' intent, and finally applying the appropriate maxims of construction.[2]

PGE's approach is inappropriate because it skips the first stage and jumps right into a review of external evidence regarding the provision's intended meaning. PGE takes this approach for two reasons. One, the text and terms in the contract support PNW Solar's interpretation, and thus PGE's weakest arguments are regarding what the contract actually says. Second, PGE wants to make this case about its interpretation of public policy issues and essentially ask the Commission to creatively interpret the contract consistent with its view of

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1 See PGE's Motion for Summary Judgement at 5.

2 Yogman v. Parrott, 325 Or 358, 361, 363, 364 (1997).

how the Commission's policies implemented the Public Utility Regulatory Policies Act ("PURPA").

PGE's asserts that Section 4.3 "must be interpreted in light of the Commission's specific direction and statement of approval."[3] In support of that assertion, PGE oddly cites to State v. Gaines noting that "the starting point for interpretative inquiries is the 'text and context.'"[4] PGE appears to be arguing that the "context" refers to the situation or circumstances that gave rise to a particular contract provision (i.e. "the Commission's specific direction and statement of approval"); however, what "context" actually refers to in the first stage of contract interpretation is the "context of the document as a whole."[5] Therefore, the Commission should not consider the external evidence regarding the Commission's "specific direction and statement of approval" until after it examines the text of the provision in the context of the document as a whole. After the text is examined, and if (and only if) the text is ambiguous in the context of the document as a whole, the trier will review external evidence.[6]

Further, the Commission will violate PNW Solar's PURPA contract rights if it allows PGE's external evidence to prevail over the PPA's clear and unambiguous language. Under

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3 PGE's Motion for Summary Judgment at 8

4 Id (quoting State v. Gaines, 346 Or 160, 171 (2009)).

5 Yogman, 325 Or at 361 ("First, the court examines the text of the disputed provision, in the context of the document as a whole"). The court in State v. Gaines was engaging in statutory interpretation, which is similar to contract interpretation in that a court first examines the text and context of the statute, then reviews the legislative history, and finally applies maxims of statutory construction. Gaines, 346 Or at 164-65. Even under that analysis, the court does not look at the circumstances giving rise to the statute (i.e., the legislative history) until the second stage, so PGE's asserted rule is not supported.

6 See Yogman, 325 Or at 363; see also Gaines, 346 Or at 164 ("If, but only if, the legislature's intent is not obvious from the text and context inquiry, the court will then move to the second level, which is to consider legislative history") (internal quotations removed).

PURPA, QFs have a right to provide energy or capacity pursuant to a legally enforceable obligation over a specified term at rates and terms specified at the time that legally enforceable obligation is incurred.[7] In this case, the obligation was incurred when the PPAs were executed in early 2016 at PGE's avoided cost rates in effect at that time and pursuant to the terms of PGE's Standard PPA in effect at the time. The terms and rates are expressed in the text of the written, executed contract. Effect must be given to that text. If the Commission now changes those terms or ignores the plain and unambiguous language in favor of some other meaning, then the rates and terms of PNW Solar's obligation will be determined as of now, not at the time the obligation was incurred as required by PURPA. Therefore, in order to preserve PNW Solar's right to have the rates and terms determined at the time the obligation is incurred, the Commission must interpret the text of the PPA before considering external evidence.

Additionally, looking to this external evidence before considering the text of the PPA defeats the purpose of having standard contracts. The purpose of a standard contract is to "eliminate negotiations and to thereby remove transaction costs."[8] If PGE's approach is followed, transaction costs will be increased. Qualifying facilities ("QFs") would not be able to rely on the text of the Standard PPA, and in order to understand all the terms, they would need to (or hire an attorney to) review the administrative record in all OPUC dockets where the Commission gave "specific direction" or a "statement of approval" to PGE on any term in its Standard PPA. This could potentially include thousands of pages of documents, including all testimony, exhibits, legal briefs, oral comments, and Commission orders in UM 1129, UM 1610,

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7 18 C.F.R. 292.304(d)(2)(ii).

8 Re Investigation Related to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129, Order No. 05-584 at 16 (May 13, 2005).

and any other docket where the Commission directed PGE to make a change to its Standard PPA. PGE participated in all of these dockets but any individual QF likely did not and, even if it did, it is likely not aware upon signing a PPA that the words in their PPA may be changed to conform with some other intent indicated in a Commission order or other document. Therefore, it is completely unrealistic and counter to the purpose of Standard PPAs to consider all of this external evidence that PGE asserts should control the Commission's decision. The Commission should follow Oregon's standard methodology for contract interpretation.

B. PGE's Interpretation of the Plain Language is Not Supported

PGE's interpretation of the plain language is not supported by the text of Section 4.3 or the context of the PPA as a whole; the PPA does not discuss "material" versus "minor" changes, does not distinguish between the types of changes permitted to a pre- or post-operational facility, and does not limit changes to only those from "upgrades" or "efficiency improvements."

PGE admits that "a minor change" to the Nameplate Capacity Rating may be made before construction is completed and indicated as such in the As-built Supplement but argues that "a material change" may not be made.[9] Section 4.3 does not use the terms "material" and "minor," and those terms are not discussed elsewhere in the PPA. If PGE is correct, then we need a standard for what is "minor" versus what is "material."

The only potential distinction between "minor" and "major" changes under Section 4.3 is at the 10 MW mark because that has a material impact on what prices the QF is entitled to when it increases its Nameplate Capacity Rating. Section 4.3 is abundantly clear on this point and if the Commission elects to make a distinction between "minor" and "material" changes, then it

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9 PGE's Motion for Summary Judgment at 10.

should find that: a "minor" change is one that results in a Nameplate Capacity Rating under 10 MW; and a "material" change is one that results in a Nameplate Capacity Rating over 10 MW.

Under that bright-line standard, plainly articulated in the PPA, the Nameplate Capacity Rating changes PNW Solar requested would all be permitted as they are all under 10 MW. Any other standard would be completely unworkable because there is no indication regarding the degree to which the Nameplate Capacity Rating as specified in the As-built Supplement may differ from that in the original PPA. Therefore, PGE's assertion that "minor" changes are permitted but not "material" changes is not supported by the plain text.

PGE asks the Commission to ignore the only distinction listed in the PPA for size changes, and instead to derive a "material" versus "minor" distinction solely from the words "supplement" and "specify."[10] The word "supplement" means that the As-built Supplement will be a document added to the original PPA without physically modifying the language in that executed PPA, but that does not mean that the "supplement" may not contain information that is different from the information contained in the original PPA. The fact that an As-built Supplement is required, at all, necessarily presumes that there will be some change to the facility before construction is completed (and PGE admits that). Any change in the Nameplate Capacity Rating, even a "minor" one should be listed in the As-built Supplement and different from the size initially identified in the PPA. The word "specify" just means that the Seller must describe all of the details of the Facility as constructed. It does not mean that the As-built Supplement is not permitted to contain terms that differ from the original description. Therefore, the plain

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[10] Id. at 10.

language of the PPA allows changes in the As-built Supplement but provides no limitation regarding the degree to which those changes many diverge from the original.

In fact, the PPA does not limit the types of changes at all. PGE goes on to argue that the plain language permits a material change, but only to an already constructed facility as a result of "upgrades or efficiency improvements."[11] In the very next sentence following the As-built Supplement language, Section 4.3 places a procedural requirement (notice) that must be met if one type of change (the Nameplate Capacity Rating) is increased. However, Section 4.3 does not limit the means by which the Nameplate Capacity Rating may be increased. Specifically, it may be "through any means including, but not limited to, replacement, modification, or addition of existing equipment."[12] This clearly does not include PGE's language: "upgrades or efficiency improvements." Instead the increase to the Nameplate Capacity Rating may be made through *any* means, even including *additions*. An addition could occur for many reasons, including those which are not upgrades or efficiency improvements, but simply adding more generating units.

PGE cites the same quoted language above but ignores the words plainly written in the contract: that it may be through "any" means including "replacement," "modification," and "addition." Instead PGE cites to a maxim of construction (the third stage in contract law interpretation) and a Commission order (the second stage in contract law interpretation), in support of its argument that only "upgrades or efficiency improvements" are permitted. If PGE's interpretation is followed, the plain terms in the PPA would be rendered a nullity and the Commission would effectively read into the contract additional terms derived from PGE's

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11 PGE's Motion for Summary Judgment at 11.

12 PGE's Complaint and Request for Dispute Resolution, Exhibit B - Butler Solar, LLC Standard In-System Renewable Power Purchase Agreement at Section 4.3.

proffered external evidence. Therefore, the text does not support PGE's argument that only "upgrades or efficiency" improvements are permitted, but instead allows increase through *any* means including *additions*.

Contrary to PGE's arguments, permitting an increase to the Nameplate Capacity Rating under Section 4.3 does not render Section 3.1.7 a nullity. Under Section 3.1.7, "Seller warrants that the Facility has a Nameplate Capacity Rating not greater than 10,000 kW." Looking at the text and context of this provision it is clear that this warranty is made either as of the date of execution or that it is ongoing. The warranty is not made at the commercial operation date as PGE asserts. First, the text of 3.1.7 does not state explicitly when this warranty is made. Second, the "Facility" as a defined term refers to the not yet constructed solar generation facility,[13] so the Seller can make a warranty at execution that this facility it intends to construct has a Nameplate Capacity Rating of less than 10 MW. Third, other warranties appearing in the same section are made explicitly "[b]y the Commercial Operation Date,"[14] but Section 3.1.7 contains no similar limiting language. Some warranties explicitly state they are made for the duration of the term of the agreement.[15] The other warranties that do not contain any timing language appear to be made at execution, but they may also be ongoing for the duration of the

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13 PGE's Complaint at Exhibit B ("Recitals Seller intends to construction, own, operate, and maintain a solar generation facility for the generation of electric power located in Yamhill County, Oregon with a Nameplate Capacity Rating of 4,000 kilowatt ("kW"), as further described in Exhibit A ("Facility")").

14 PGE's Complaint at Exhibit B at Section 3.1.12.

15 Id. at Section 3.1.3 ("for the Term of this Agreement continue"); id. at Section 3.1.4 ("will continue to be for the Term of this Agreement"); id. at Section 3.1.5 ("during the Term of this Agreement").

agreement.[16] Additionally, the warranties are stated in present terms (i.e. that "Seller and PGE represent, covenant, and warrant as follows"), or future terms ("Seller warrants that it *will* design and operate the Facility consistent with Prudent Electrical Practices"[17]). So, based on that textual reading, the warranties would generally be made at execution unless stated otherwise. Therefore, the warranty made in Section 3.1.7 was likely made at execution and therefore could never be in conflict with Section 4.3.

Even if the 3.1.7 warranty was an ongoing obligation, the conflict with Section 4.3 that PGE describes, would still exist if a facility's capacity was increased above 10 MW after commercial operations. This conflict, however, would be inconsistent with the express terms of the PPA that allows increases above 10 MW, which PGE agrees is permitted under Section 4.3. In any event, PGE's assertion that Section 3.1.7 would be rendered a nullity is not at issue in the present case because PNW Solar is not increasing any of its facilities to a size above 10 MW. Therefore, PGE's assertion that PNW Solar is not permitted to revise its Nameplate Capacity Rating to something less than 10 MW before construction would not render Section 3.1.7 a nullity.

C. PGE's External Evidence Shows That the Commission Concluded Generally that Increases Should be Permitted

The external evidence offered by PGE shows that the Commission's general conclusion about increases was that they should be allowed, and PGE's Standard PPA is "consistent with, or in the spirit of" that conclusion. PGE argues that the "Commission expects that the terms of a

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16 Id. at Section 3.1.1 ("Seller warrants it is a LLC duly organized under the laws of Oregon").

17 Id. at Section 3.1.6.

utility's standard contract will be interpreted 'consistent with, or in the spirit of [the Commission's] general conclusions about implementation of PURPA.'"[18] PGE takes this quote out of context. What the Commission actually stated was that it expected that "the *terms* in a standard contract" would be "consistent with, or in the spirit of [the Commission's] general conclusions about implementation of PURPA," even if all standard contract forms are not identical or if the standard contracts contained terms not addressed by the Commission.[19] Thus, PGE should draft the standard contracts to be consistent with the Commission's orders.

The Commission did not assert that the plain meaning of those *terms*, once drafted and included in an executed PPA, could be ignored or contorted in favor of an interpretation consistent with the Commission's general conclusions about the implementation of PURPA. Such a reading would mean that regardless of what any of the standard contracts actually say, they all would be required to be interpreted identically. This is clearly not what the Commission intended when it required standard contracts and allowed the utilities to use differing language. Rather, the utilities were permitted to adopt differing contract terms that comply with the Commission's general conclusions, and the Commission should interpret those contracts as written, pursuant to the principles of contract interpretation. In the end, if the contract term was drafted in a manner inconsistent with the Commission's articulated policy, then the remedy is for the Commission to direct PGE to revise its standard contract form on a going forward basis and not retroactively adjust executed contracts.

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18 PGE Motion for Summary Judgment at 8 (quoting Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. 1129, Order No. 06-538 at 8 (Sept. 20, 2006)).

19 Docket No. 1129, Order No. 06-538 at 8 (emphasis added).

Additionally, Section 4.3 is, in fact, "consistent with, or in the spirit of [the Commission's] general conclusions about implementation of PURPA." As explained in PNW Solar's Cross-Motion for Summary Judgment, the Commission's general conclusions about Issue 8 in Docket UM 1129 was to allow increases in the Nameplate Capacity Rating and that the utility would pay the Contract Price for increases up to up to 10 MW. Section 4.3 is consistent with and in the spirit of that conclusion because it allows increases in the Nameplate Capacity Rating and PGE is required to pay the Contract Price for increases up to up to 10 MW. So, even if the Commission considers this external evidence, it supports the conclusion that PNW Solar is entitled to increase the Nameplate Capacity Rating of its facility.[20]

D. The Fact That the PPA is Silent on Decreases Does Not Mean That They are Not Authorized

Under the PPAs, there is no penalty for failure to deliver a minimum level of energy or capacity. Section 4.1 requires the Seller to "sell to PGE the entire Net Output delivered from the Facility at the Point of Delivery." "Net Output" is defined as "all energy expressed in kWhs produced by the Facility, less station and other onsite use and less transformation and transmission losses."[21] The amount of energy sold is measured by the output of the Seller. By the express language, even if a Facility was built exactly to the specifications in the original contract at execution, it could simply produce less and wouldn't be subject to penalties or default.

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[20] Additionally, even if the Commission agrees that its general conclusion regarding Issue 8 in UM 1129 was to only permit "upgrades" and "efficiency improvements" after commercial operation, that does not prevent PGE from going beyond what the Commission ordered to allow QFs to increase the Nameplate Capacity Rating prior to construction or through any means including additions.

[21] PGE's Complaint at Exhibit B at Section 1.21.

Additionally, the PPA does not explicitly restrict the types of decreases in the way it does for increases, so the decreases to the Nameplate Capacity Rating are permitted even without meeting those additional restrictions. PGE argues that because the PPA only describes increases and not decreases, that decreases are therefore not permitted.[22] However, the way in which Section 4.3 addresses increases is to say that they are *not* permitted except where certain interim steps have been completed (i.e. notice). Specifically, Section 4.3 states "Seller shall not increase the Nameplate Capacity Rating above that specified in Exhibit A. . . except . . .," and then it discusses the notice required in order to increase. If decreases were not permitted at all or if other requirements were required (like notice), then the PPA should have clearly stated in a similar fashion "Seller shall not decrease the Nameplate Capacity Rating . . ." It does not. Therefore, the fact the PPA is silent on decreases does not mean that they are not permitted but means that there are no restrictions on them.

The external evidence PGE cites to also indicates that the Commission contemplated decreases to the Nameplate Capacity Rating. PGE cites Staff's testimony explaining that "[t]he QF cannot control necessary equipment replacement, and available turbine and generator sizes change over time."[23] Presumably, turbine and generator sizes may increase or decrease, or as a result of increased sizes, a QF may choose to restructure its facility to use fewer turbines or generators, thus resulting in an overall decrease to the Nameplate Capacity Rating.

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22 PGE's Motion for Summary Judgment at 9.

23 PGE's Motion for Summary Judgment at 7 (citing staff/1000, Schwartz/64-65)

E. PGE Would Subject to PNW Solar to Utility-Type Regulation and Violate PURPA

PGE's final argument would subject PNW Solar to utility-type regulations, from which it is expressly exempt under PURPA. PGE argues that allowing a QF to materially alter its Nameplate Capacity Rating undermines resource planning and could expose customers to substantial and unpredictable cost increases. This is exactly the argument PNW Solar feared PGE would make when it challenged the Commission's jurisdiction over PGE's Complaint and Request for Dispute Resolution.

PGE's arguments are also irrelevant. The only reason that PNW Solar did not dispute PGE's facts regarding these claimed impacts is that PNW Solar needs a prompt resolution and any disputes regarding factual claims or their relevance would slow the resolution of this proceeding. PNW Solar, as do most QF developers, need timely resolution of their disputes because every day of delay costs money and increases the chances that the project will fail.

The Commission's general powers granted by statute are to "balance the interests of the utility investor and the consumer in establishing fair and reasonable rates."[24] The statute further provides that "[r]ates are fair and reasonable . . . if the rates provide adequate revenue both for operating expenses of the public utility . . . and for capital costs of the utility, with a return to the equity holder."[25] Therefore the traditional utility-type regulation is to balance the interests of the ratepayer with those of the utility investor.

Under Oregon's PURPA statutes, utilities are required to file with the Commission a schedule of avoided costs,[26] and the Commission has the power to establish "the terms and

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24 ORS 756.040(1).
25 Id.
26 ORS 758.525.

conditions for the purchase of energy or energy and capacity from a qualifying facility" by rule.[27] This power is fundamentally different from the Commission's utility-type regulatory power. The rate at which the qualifying facility is paid is the utility's avoided cost absent any consideration of the ratepayers' interests and absent any consideration of the utility investors' interests. Presumably the ratepayer's interest has already been considered in setting the avoided cost because it is set at the utility's "incremental cost."[28]

A QF is expressly exempt from utility-type regulation respecting the rates of public utilities and the financial and organizational regulation of public utilities.[29] PGE's argument is that the Commission should not interpret the contract to allow Butler Solar facility to increase its Nameplate Capacity Rating because it will undermine resource planning and expose customers to substantial and unpredictable cost increases. To consider such factors is akin to a utility-type rate regulation, from which Butler Solar is expressly exempt.

Further, PGE's concerns would still materialize even under PGE's interpretation of the PPA. PGE's fundamental argument that material changes are not permitted prior to construction but are permitted after construction means that the approximate 186 MW of unplanned-for capacity could still come online; it would just be after commercial operations commenced. PGE's concern regarding "out-of-date" avoided costs would be even more concerning under PGE's interpretation because a qualifying facility that increases its capacity after commercial operations would be even further into the future and further from the date the contract was executed. Thus, even under PGE's interpretation of the contract, every single MW that it is

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27 ORS 758.535.
28 ORS 758.505(1).
29 18 CFR 292.602(c)

concerned about could come on line and cause the same alleged impacts on its planning and rates.

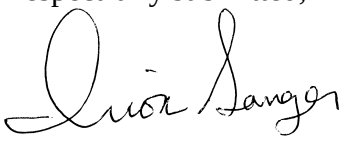
In sum, the Commission should not consider ratepayer interests when interpreting a PPA between a qualifying facility and a utility because those interests have already been considered in the avoided cost setting process and to do so would subject the qualifying facility to utility-type regulation from which it is expressly exempt under PURPA.

III. CONCLUSION

As fully detailed in PNW Solar's Cross-Motion for Summary Judgment and explained further above, the text of the PPAs clearly and unambiguously allow PNW Solar to make its desired changes to the Nameplate Capacity Rating of its facilities. Further, even if the Commission finds an ambiguity, the external evidence also supports this finding, as to the appropriate maxims of construction. As such, summary judgment in favor of PNW Solar is appropriate.

Dated this 13th day of April 2018.

Respectfully submitted,



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

Of Attorneys for Pacific Northwest Solar, LLC