MRG
McDOWELL RACKNER GIBSON PC

ALISHA TILL
Direct (503) 290-3628
alisha@mrg-law.com

April 13, 2018

VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
P.O. Box 1088
Salem, Oregon 97308-1088

Re: Docket UM 1894: Portland General Electric 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 (PGE) Reply to Pacific Northwest Solar LLC's (PNW Solar) Cross-Motion for Summary Judgment and Community Renewable Energy Association's (CREA) Reply Comments.

Please contact this office with any questions.

Sincerely,

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.	**PGE'S REPLY TO PNW SOLAR's CROSS-MOTION FOR SUMMARY JUDGMENT AND CREA'S REPLY COMMENTS**

In the first half of 2016, PNW Solar, LLC (PNW Solar) entered standard Power Purchase Agreements (PPA) with Portland General Electric Company (PGE) for six qualifying facilities (QFs). PNW Solar now seeks to change a key term in the parties' agreements—by materially revising the Nameplate Capacity Ratings of three of its facilities prior to construction—while retaining its right to receive the outdated and higher avoided cost prices reflected in the executed agreements. In taking this position, PNW Solar relies on Section 4.3 of the PPAs. PGE disagrees that Section 4.3 authorizes the material changes PNW Solar has proposed, and PGE filed this proceeding with the Commission to resolve the dispute.

In its Motion for Summary Judgment, PGE explained that any interpretation of Section 4.3 must give full weight to the regulatory context in which it was adopted. PGE's standard PPA is a product of the Commission's regulatory policies, and Section 4.3 in particular was drafted to carry out a specific Commission directive issued in Order No. 06-538. That order, and the record on which it is based, make clear that in allowing certain changes to a QF's Nameplate Capacity Rating, the Commission was specifically addressing necessary upgrades or efficiency improvements made to operating facilities and had no intention of allowing QFs an opportunity to make wholesale changes to their Nameplate Capacity Rating at any time after executing a PPA.

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Portland, OR 97205

When viewed in light of this crucial context, it is clear that Section 4.3 does not allow a QF to materially increase its output while retaining its right to receive an outdated avoided cost price—unless the increase results from a necessary upgrade or efficiency improvement made to an operational facility.

In its Motion for Summary Judgment, PNW Solar makes three primary arguments supporting its interpretation of Section 4.3:

- PNW Solar emphasizes its view that a traditional contract law analysis controls the interpretation of Section 4.3, but misapplies the analysis by suggesting that the regulatory context and circumstances underlying Section 4.3 should be ignored in the initial phase of the analysis;
- PNW Solar argues that both the text and the context of Section 4.3 allow QFs to revise their Nameplate Capacity Rating at any time and for any reason with no recourse on the part of the utility; and
- PNW Solar argues the Commission must allow QFs to alter their Nameplate Capacity Rating whenever they choose in order to fulfill PURPA polices supporting QF development.

The Commission must reject these arguments***. First,*** contrary to PNW Solar's suggestions, ***both caselaw interpreting PURPA and traditional Oregon contract law*** require that the circumstances underlying a contract be reviewed in the initial step of its interpretation. As recognized by the Oregon Court of Appeals, a utility's obligation to purchase from a QF "is created by statutes, regulations and administrative rules."[1] Moreover, under the framework imposed by Oregon statutes and caselaw, the context and circumstances of a contract must be considered in the initial step of interpreting its terms. Thus, the unambiguous meaning of Section 4.3 must be determined in light of the Commission order requiring its adoption and the underlying record.

[1] *Snow Mountain Pine Co. v. Mauldin*, 84 Or App 590, 598 (1987).

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Second, both the regulatory context and circumstances and the text of Section 4.3 itself support PGE's more narrow reading of the provision and confirm that the Commission had no intention of allowing QFs to alter at will the nameplate capacity they committed to in their PPAs. The Commission adopted the policy giving rise to Section 4.3 in Docket No. UM 1129, in which it addressed the circumstances under which a QF might increase the Nameplate Capacity Rating indicated in its PPA, and the price that should be paid for the increased output. Ultimately, the Commission found that increases to a project's capacity are permissible only if they result from necessary upgrades or efficiency improvements. This intent is clearly borne out in the text of Section 4.3, which lists examples of permissible changes—those resulting from modifications to existing equipment. Moreover, PGE's reading of Section 4.3 is required to give effect to the PPA's Recitals establishing the basic underpinnings of the PPA—in which the QF contracts to sell the output of a particular project of a specified size. To allow QFs to change their size at any time under any circumstances, as advocated by PNW Solar, would render one of the key terms of the PPA a nullity.

Third, PNW Solar's policy arguments are without any factual basis, and for that reason alone may be rejected. Moreover, they are entirely one-sided and fatally flawed. PNW Solar takes the position that its view of Section 4.3 is required to support QF business aims. However, in making this argument PNW Solar ignores the fact that PURPA requires the Commission to balance the interests of customers and QFs, and in this case, the legal mandate to hold customers indifferent to QF purchases requires the Commission to confirm PGE's interpretation.

In addition to PNW Solar's arguments, Community Renewable Energy Association (CREA) has filed Reply Comments in support of PNW Solar, which improperly attempt to re-litigate the Commission's subject matter jurisdiction to resolve this dispute and also raise concerns regarding PURPA policy that are based on a misunderstanding of PGE's position in this case. PGE is not, as CREA asserts, asking the Commission to alter the executed PPAs to reduce the expenses passed on to customers. Instead, PGE asks the Commission to *interpret* the PPAs, to conclude

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that PNW Solar must adhere to the project sizes to which it committed in the agreements, and to uphold PURPA's customer-indifference standard. CREA's misplaced arguments do not provide credible support for PNW Solar's position in this case.

PGE and PNW Solar agreed upon Stipulated Facts and filed cross-motions for summary judgment to efficiently resolve this dispute. Neither PNW Solar nor CREA has raised any persuasive argument that supports their interpretation of Section 4.3, and although PGE disputes the additional facts raised by the other parties, these facts are not material to the interpretation of Section 4.3. Therefore, on the basis of the undisputed evidence contained in the Stipulated Facts, PGE requests that the Commission grant PGE's Motion for Summary Judgment and hold that a QF is not permitted to materially change the Nameplate Capacity Rating reflected in its executed standard PPA while maintaining access to outdated avoided cost prices, except through necessary upgrades or efficiency improvements to an existing facility.

I. DISCUSSION

A. Section 4.3 must be interpreted in the context of the Commission order it implements and in light of the circumstances underlying its development.

In UM 1129, the Commission and the parties considered how to address increases in a QF's Nameplate Capacity Rating that resulted from necessary upgrades or efficiency improvements.[2] Seeking to encourage efficiency improvements and allow necessary upgrades, the Commission ordered the utilities to revise their PPAs to allow such changes, and also addressed the question as to what prices should apply to resulting increases.[3] PGE revised Section 4.3 of its standard PPA to implement this directive, and the Commission then reviewed and approved the provision.[4]

[2] *In the Matter of Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 06-538 at 4, 37-39 (Sept. 20, 2006); Docket No. UM 1129, Order No. 06-586, App'x A at 4-5 (Oct. 19, 2006) (Issues List).
[3] Order No. 06-538 at 39, 67.
[4] Order No. 06-538 at 39, 67; Docket No. UM 1129, Order No. 07-065 (Feb. 27, 2007).

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Therefore, as the Commission already made clear in resolving PNW Solar's Motion to Dismiss, interpretation of Section 4.3 of the standard PPA is not simply a matter of pure contract law.[5] Instead, it concerns the Commission's implementation of PURPA,[6] and the Commission must interpret Section 4.3 within its regulatory context.

Historically, the Commission has emphasized that it expects the terms of a utility's standard contract to be "consistent with, or in the spirit of, [the Commission's] general conclusions about implementation of PURPA."[7] The Commission recognizes that a utility's standard PPA is drafted "at [the Commission's] direction to comply with PURPA, related federal and state law, and [Commission] orders, and [i]s subject to the review and comment by [Commission] Staff and interested parties, as well as [Commission] consideration and approval."[8] Moreover, the Commission analyzes disputes about a standard PPA "with the understanding that the contract . . . has been previously deemed compliant with PURPA and implementing federal and state law."[9]

In this case, the Commission already has confirmed that "the issue presented in this particular complaint involves a long and evolving history of Commission policies, orders, and rules related to this our legal obligation to implement state and federal PURPA policy."[10] The Commission stated that the issue, "properly framed, relates to our interpretation of PURPA implemented through PGE's standard purchase agreement."[11] As a result, any interpretation of Section 4.3 must consider the Commission's PURPA policies, as established through the Commission's implementing orders, which provide the circumstances and context in which the provision was drafted.

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[5] *Portland Gen. Elec. Co. v. Pac. Nw. Solar, LLC*, Docket No. UM 1894, Order No. 18-025 at 6-7 (Jan. 25, 2018).
[6] Order No. 18-025 at 6-7.
[7] Order No. 06-538 at 8.
[8] *PaTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1566, Order No. 14-287 at 13 (Aug. 13, 2014).
[9] *See PaTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1566, Order No. 14-287 at 13 (Aug. 13, 2014).
[10] Order No. 18-025 at 7.
[11] Order No. 18-025 at 4.

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PNW Solar argues that the language of Section 4.3 is unambiguous and therefore the Commission need not consider the surrounding circumstances when interpreting the provision.[12] CREA argues that the PPAs must be interpreted "based on the rules of contract interpretation," but suggests that the context and circumstances are not relevant.[13] The fundamental premise of PNW Solar's and CREA's arguments is wrong: the interpretation of the PPAs is not merely an exercise in pure contract law but also must consider the regulatory history and context. Equally important, PNW Solar's and CREA's arguments ignore the fact that Oregon law regarding general contract interpretation also requires a careful review of the text, context, and circumstances underlying Section 4.3 in the first phase of the analysis.

Under Oregon statutes and case law, a contract interpretation analysis begins with an inquiry as to whether the language of the provision at issue is unambiguous, considering "the text of the provision in the context of the agreement as a whole and *in light of the circumstances underlying the formation of the contract*."[14] If the provision is found to be ambiguous, then the decisionmaker considers extrinsic evidence of the parties' intent to resolve the ambiguity.[15] Finally, if the parties' intent still remains unclear, "the ambiguity is resolved by resort to other relevant maxims of construction."[16] Thus, even if the Commission were to rely solely on traditional contract interpretation principles to discern the meaning of Section 4.3, it would nevertheless be required to give careful consideration of the provision's context and circumstance—in this case, PURPA, the Commission's implementing orders, and the history of the development of the provision—to accurately interpret the text of the PPA itself.[17]

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[12] *See* PNW Solar's Cross-Motion for Summary Judgment at 1-2, 4, 9-10.
[13] *See* CREA's Reply Comments at 3-4, 11-12.
[14] *Batzer Construction v. Boyer*, 204 Or App 309, 317 (2006) (emphasis added); *see also* ORS 42.220 ("In construing an instrument, the circumstances under which it was made, including the situation of the subject and of the parties, may be shown so that the judge is placed in the position of those whose language the judge is interpreting.").
[15] *Madson v. W. Or. Conf. Ass'n of Seventh-Day Adventists*, 209 Or App 380, 383 (2006).
[16] *Id.*
[17] PGE's discussion of the text, context, and circumstances provides information that also could be considered as "extrinsic evidence of the parties' intent" in step two of a general contract interpretation analysis, if the Commission

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Portland, OR 97205

B. Section 4.3 does not authorize the changes proposed by PNW Solar.

As PGE explained in its Motion for Summary Judgment, the text of Section 4.3, the context of the PPA as a whole, and the circumstances under which the standard PPA was drafted, make clear that Section 4.3 authorizes only those Nameplate Capacity Rating increases resulting from necessary upgrades or efficiency improvements to an existing QF. However, PNW Solar argues that the PPA unambiguously permits a QF to increase its Nameplate Capacity Rating,[18] and that decreases also are unambiguously permitted because the PPA does not address them.[19] Neither argument is correct. In addition, neither maxim of construction on which PNW Solar relies applies to interpretation of a PURPA PPA.

1. The context and circumstances of Section 4.3 demonstrate that only Nameplate Capacity Rating increases resulting from necessary upgrades or efficiency improvements to an existing QF are permitted.

Section 4.3 of PGE's standard PPA was revised to comply with Order No. 06-538 in UM 1129,[20] reviewed by the Commission, Staff, and stakeholders,[21] and approved by the Commission as conforming to the Commission's directive.[22] In UM 1129, parties considered whether an operational QF could change its nameplate capacity if upgrades occurred or equipment replacement became necessary.[23] Staff recommended that the Commission "direct the utilities to amend their standard contracts" to allow for "additional generation *resulting from efficiency*

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were to determine that the contract is ambiguous. PNW Solar's assertion that PGE is estopped from arguing that Section 4.3 of the PPA is ambiguous is misplaced, because PGE's prior advocacy in a different case concerned other provisions of the standard contract. *See* PNW Solar's Cross-Motion for Summary Judgment at 8-9. One provision of a contract may be ambiguous while another provision is unambiguous.

[18] PNW Solar's Cross-Motion for Summary Judgment at 6-8.

[19] PNW Solar's Cross-Motion for Summary Judgment at 8.

[20] *See* Order No. 06-538 at 39.

[21] Order No. 07-065; Docket No. UM 1129, Staff's Memorandum (Feb. 1, 2007) ("I find the amended filing complies with Order No. 06-538.").

[22] Order No. 07-065; Order No. 06-538 at 67; *see also* Order No. 14-287 at 13 n.50 (explaining the Commission's approval of PGE's standard PPA following Order No. 06-538).

[23] *See* Order No. 06-538 at 37, Order No. 06-586, App'x A at 4-5 (Issues List).

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improvements or necessary equipment replacement."[24] The Commission ruled that a QF could change its nameplate capacity by upgrading operations,[25] and directed utilities to revise their standard contracts accordingly.[26] As PGE explained in depth in its Motion for Summary Judgment, this context makes clear that Section 4.3 permits only necessary upgrades or efficiency improvements to an existing facility.

PNW Solar disagrees, asserting that the UM 1129 record indicates the Commission intended to permit increases in nameplate capacity occurring at any time. PNW Solar's position is based on a single line from Staff's testimony regarding "[p]ayments for generation resulting from any additional capacity installed after the *effective date*," and the fact that the PPA ties the "effective date" to contract execution.[27] When viewed in context, however, the language upon which PNW Solar relies actually supports PGE's interpretation of Section 4.3. Staff's testimony, quoted above, answered a question regarding "treatment of increased QF output *resulting from efficiency improvements or replacement of generating equipment*,"[28] which shows that Staff viewed the type of increases under discussion as those resulting from "improvements or replacement" of existing equipment. Regardless of Staff's intent, the single phrase from Staff's testimony quoted by PNW Solar does not outweigh the Commission's articulation of the issue considered and resolution of that issue, the parties' Issues List, and the other language in Staff's testimony quoted above—all of which clearly demonstrate the intent to allow only necessary upgrades and efficiency improvements to an existing QF.

PNW Solar also argues that, by distinguishing between the prices to be paid for nameplate capacity increases up to 10 MW and for increases to over 10 MW, the Commission intended to

[24] Docket No. UM 1129, Staff/1000, Schwartz/64 (emphasis added).
[25] *See* Order No. 06-538 at 39.
[26] Order No. 06-538 at 39, 67.
[27] PNW Solar's Cross-Motion for Summary Judgment at 14; Docket No. UM 1129, Staff/1000, Schwartz/64 (emphasis added).
[28] Docket No. UM 1129, Staff/1000, Schwartz/64 (emphasis added).

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permit any changes "within a specified range,"[29] i.e., any change up to 10 MW. This argument fails to recognize that the Commission discussed *both* (1) permissible increases in Nameplate Capacity Rating, and (2) the prices applicable to a permissible increase—whether up to or over the 10-MW standard-contract threshold.[30] Therefore, the Commission's discussion of applicable prices in no way undermined its decision to allow QFs to change their Nameplate Capacity Ratings only in limited circumstances.

Neither Staff's testimony nor any other portion of the UM 1129 record or Commission decision in Order No. 06-538 supports PNW Solar's interpretation of Section 4.3—that it allows a QF to unilaterally elect to materially revise its Nameplate Capacity Rating at any time while retaining its right to out-of-date avoided cost prices—and as a result, PNW Solar's position should be rejected.

2. The text of Section 4.3 and of the PPA as a whole does not give a QF the unrestricted right to increase its Nameplate Capacity Rating at will.

Even setting aside the Commission's intent behind Section 4.3, the text of that provision is clear and permits increases to a QF's Nameplate Capacity Rating only in certain, limited situations—none of which apply in this case. First, by requiring an "As-built Supplement to specify the actual Facility as built," Section 4.3 allows for immaterial changes to a Facility occurring during the development and construction process, before a QF commences operation.[31] PNW Solar argues that the As-built Supplement requirement refutes PGE's position that Section 4.3 applies only to upgrades to an operational project and indicates that the PPA actually allows changes to a Facility at any time and on any scale.[32] However, this argument fails upon a close reading of the PPA's text.

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[29] PNW Solar's Cross-Motion for Summary Judgment at 13.
[30] Order No. 06-538 at 39.
[31] Stipulated Facts ¶ 4; *see also, e.g.*, Stipulated Facts, Attachment A at 1, Starlight PPA, Section 1.1 (defining As-built Supplement as "supplement to Exhibit A," the Facility description).
[32] *See* PNW Solar's Cross-Motion for Summary Judgment at 6.

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The As-built Supplement requirement permits a QF to provide additional details regarding the description of the Facility once construction is complete, which could include a minor change to the Facility's Nameplate Capacity Rating.[33] Critically, however, the definition of "supplement" suggests a minor change,[34] and therefore the As-built Supplement, by definition, does not permit a QF to undertake a wholesale modification to the Facility. In addition, PNW Solar's reading, in which the As-built Supplement allows wholesale changes prior to construction, would undermine the size specification in the Recitals and the size warranty in Section 3.1.7 of the PPA.[35] Such a reading is necessarily inappropriate because contracts must be interpreted to give effect to all provisions.[36] Therefore, while the As-built Supplement requirement allows for limited revisions to a Facility prior to construction, it does not allow for wholesale changes in project size such as those proposed by PNW Solar in this case.

In addition, the text of Section 4.3 authorizes only those increases to an operational QF's Nameplate Capacity Rating that result from necessary upgrades or efficiency improvements.[37] By listing examples of permissible Nameplate Capacity Rating changes—those resulting from "replacement, modification, or addition of *existing equipment*"[38]—Section 4.3 makes clear that only upgrades to existing facilities are authorized. PNW Solar ignores these specific examples and argues that Section 4.3 allows a QF to increase its Nameplate Capacity Rating at will, so long as it provides prior written notice to PGE.[39] However, if Section 4.3 permitted any increase in Nameplate Capacity Rating at any time, as PNW Solar believes, there would have been no reason

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[33] Stipulated Facts ¶ 4; *see, e.g.*, Stipulated Facts, Attachment A at 1, Starlight PPA, Section 1.1 (defining As-built Supplement as "supplement to Exhibit A," the Facility description); Attachment A at 19, Starlight PPA, Exhibit A (Description of Seller's Facility).
[34] https://www.merriam-webster.com/dictionary/supplement.
[35] *See, e.g.*, Stipulated Facts, Attachment A at 1, 8, Starlight PPA, Recitals ("Seller intends to construct . . . a solar energy generation facility . . . with a Nameplate Capacity Rating of 4,000 kilowatt") and Section 3.1.7 ("Seller warrants that the Facility has a Nameplate Capacity Rating not greater than 10,000 kW.").
[36] ORS 42.230.
[37] Stipulated Facts ¶ 4.
[38] Stipulated Facts ¶ 4 (emphasis added).
[39] PNW Solar's Cross-Motion for Summary Judgment at 7-8.

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to maintain the list of examples. A contract must be interpreted so as to give effect to all "provisions or particulars" and "not to . . . omit what has been inserted."[40] PNW Solar's interpretation violates these instructions and should be rejected.

3. The PPA's silence regarding decreases in Nameplate Capacity Rating does not mean PNW Solar may decrease its size at will.

PNW Solar argues that "decreases to the Nameplate Capacity Rating are unambiguously permitted without notice" because the PPA addresses only increases.[41] This argument is illogical and should be rejected. First, it appears to assume that the parties have not entered into a *binding agreement*, committing themselves to a set of terms. The logical extension of PNW Solar's position would permit PGE or a QF to unilaterally change the Contract Price contained in the PPA at any time, simply because the PPA does not expressly state that the price cannot be changed. In reality, by executing an agreement, the parties bound themselves to the terms therein, and such terms may not be altered except in the narrow ways explicitly permitted under the contract.

Second, PNW Solar's position ignores the PPA's foundational Recitals, which describe that PNW Solar intends to construct and operate a facility *with a specified Nameplate Capacity Rating*.[42] The Recitals—along with Exhibit A to the PPA, which specifies the Facility's output[43]—demonstrate that the parties committed to a project of specified size that is not subject to future, unilateral changes. By specifying the Facility's size, the PPA clearly anticipates that the project will remain at that size unless modified pursuant to the contract, and the contract does not provide any means for permissible decreases. Notably, given the clear recitation of PNW Solar's intent to construct a facility of a particular size in the Recitals,[44] PNW Solar's argument that there is no

[40] ORS 42.230.
[41] PNW Solar's Cross-Motion for Summary Judgment at 8.
[42] *See, e.g.*, Stipulated Facts, Attachment A at 1, Starlight PPA, Recitals.
[43] *See, e.g.*, Stipulated Facts, Attachment A at 19, Starlight PPA, Exhibit A (Description of Seller's Facility).
[44] *See, e.g.*, Stipulated Facts, Attachment A at 1, Starlight PPA, Recitals ("Seller intends to construct . . . a solar energy generation facility . . . with a Nameplate Capacity Rating of 4,000 kilowatt").

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extrinsic evidence of its intent is irrelevant, because PNW Solar's intent was made explicit in the contract.[45] In sum, the circumstances, text, and context of Section 4.3 reveal that it is subject to only one reasonable interpretation and allows PNW Solar to increase capacity only for necessary upgrades or efficiency improvements to existing equipment.[46]

4. Neither of the maxims of construction discussed by PNW Solar applies to interpretation of a PURPA PPA.

Because the meaning of Section 4.3 is clear from the text, context, and circumstances, the Commission need not resort to the maxims of construction relied upon by PNW Solar. Importantly, both maxims PNW Solar urges the Commission to apply are irrelevant to the interpretation of a PURPA PPA. PNW Solar first argues that Section 4.3 was included for the benefit of QFs and should therefore be construed in their favor and against PGE as the drafter.[47] However, application of this maxim would be counter to PURPA and Commission precedent. PURPA requires that customers remain financially indifferent, and in implementing PURPA, the Commission seeks to balance this requirement with encouraging QF development.[48] Therefore, it is inappropriate—and in fact illegal—to construe a PURPA PPA in a manner that benefits a QF at the expense of customers, who must, by law, remain indifferent.[49]

PNW Solar next asserts that any ambiguity should be resolved against PGE, because "PGE drafted this contract."[50] This maxim plainly does not apply to a PURPA PPA, because a utility's standard contract is drafted at the Commission's direction, and is subject to the Commission's

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[45] *See* PNW Solar's Cross-Motion for Summary Judgment at 11. PGE respectfully requests that the Commission decline to consider PNW Solar's assertion that PGE never told PNW Solar it would not be permitted to change its projects' Nameplate Capacity Ratings. PNW Solar's Cross-Motion for Summary Judgment at 15. The Stipulated Facts actually demonstrate that, "[d]uring negotiations the parties had no discussions about whether or not the PPAs allowed PNW Solar to increase or decrease the Nameplate Capacity Rating for any of its solar facilities." Stipulated Facts ¶ 3.

[46] *See Yogman v. Parrott*, 325 Or 358, 361 (1997).

[47] PNW Solar's Cross-Motion for Summary Judgment at 17.

[48] Order No. 18-025 at 7.

[49] *See* Order No. 18-025 at 7.

[50] PNW Solar's Cross-Motion for Summary Judgment at 17.

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review, revision, and approval.[51] Here, the Commission required PGE to revise Section 4.3 to implement Order No. 06-538 and approved the revised provision,[52] and therefore, the Commission should not construe this provision against PGE.

C. Important public policy considerations support PGE's interpretation of Section 4.3.

If the Commission remains undecided regarding the appropriate interpretation of Section 4.3 after reviewing the circumstances, text, and context described above, it should interpret the PPA consistent with PURPA and with the Commission's obligations thereunder. PURPA requires that the rates electric consumers pay for their output be "just and reasonable,"[53] and limits the rates that a utility must pay to the utility's avoided cost.[54] The Commission has made clear that:

> [O]ne critical feature of our implementation of PURPA, including (but not limited to) the terms and conditions of our regulated PURPA contracts, is the need to ensure that ratepayers remain financially indifferent to QF development. While standard contract rates, terms, and conditions allow for streamlined QF contracting, "[a]t the same time, however, we recognize the need to balance our interest in reducing [QF] market barriers with our goal of ensuring that a utility pays a QF no more than its avoided costs for the purchase of energy."[55]

Therefore, the customer-indifference standard underpins the Commission's PURPA-related decisions and should guide the Commission's interpretation of standard PPAs.

Here, PGE's customers would not remain indifferent if PNW Solar were permitted to construct facilities materially different than the parties contracted for, while maintaining the outdated September 2015 avoided cost price.[56] PNW Solar's proposed size changes would result in a net 2.5 MW increase in the generation PGE is required to purchase, costing PGE's customers an additional $5,354,282.[57] Moreover, if all similarly situated QFs increased their Nameplate

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[51] *See* Order No. 06-538 at 8; Order No. 14-287 at 13.
[52] Order No. 06-538 at 39, 67; Order No. 07-065.
[53] 16 U.S.C. § 824a-3(b).
[54] 16 U.S.C. § 824a-3(b), (d); 18 C.F.R. § 292.304; *see* Conference Report to accompany H.R. 4018 at 98 (Oct. 6, 1978) (stating that PURPA intended to set an "upper limit" on price utilities can be required to pay).
[55] Order No. 18-025 at 7 (quoting Docket No. UM 1129, Order No. 05-584 at 16 (May 13, 2005)).
[56] *See, e.g.*, Stipulated Facts, Attachment A at 1, Starlight PPA ("Form Effective September 23, 2015").
[57] Stipulated Facts ¶ 14.

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Capacity Ratings to the applicable standard-contract threshold, PGE and its customers could be exposed to an additional 186 MW of unplanned-for generation at outdated avoided cost prices.[58] By requiring PNW Solar—and all other QFs—to keep their commitments regarding facility size or to enter new PPAs when they revise their size, the Commission will ensure that customers pay the utility's most up-to-date avoided cost prices.

CREA asserts that it would be inconsistent with federal law to interpret PURPA contracts with the goal of reducing the expenses passed on to customers.[59] CREA's argument is misplaced because PGE asks the Commission to interpret the PPAs consistent with PURPA's mandate that customers pay no more than the utility's avoided cost and therefore remain indifferent—not with the aim to reduce customer expenses to the lowest possible level. CREA also argues that PGE's complaint undermines the certainty to which QFs are entitled under PURPA rules and policy,[60] and asserts that PGE is asking the Commission to reopen or amend the executed PPAs.[61] These arguments misunderstand PGE's position in this case. PGE agrees that PPAs result in binding contractual rights. Here, PGE asks the Commission to *interpret* the PPAs that the parties have entered and to require PNW Solar either to adhere to the terms of the agreement or to execute new agreements with the revisions it seeks. Adoption of PGE's position would provide both QFs *and* utility customers with the certainty to which they are entitled under an executed PPA.

PNW Solar argues that QFs must be allowed to change their Nameplate Capacity Rating—at any time and for any reason—because to do otherwise would be inconsistent with PURPA and the Commission's policy of encouraging QF development.[62] In support of this position, PNW Solar details numerous hypothetical reasons that a QF might need to change its Nameplate

[58] *See* Stipulated Facts ¶ 15 (figure arrived at by calculating the total possible increases for all contracted, preoperational QFs in the queue, according to the applicable thresholds for standard contracts).
[59] CREA's Reply Comments at 8.
[60] CREA's Reply Comments at 9, 11.
[61] CREA's Reply Comments at 4, 8.
[62] *See* PNW Solar's Cross-Motion for Summary Judgment at 18.

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Capacity Rating after executing a PPA, and suggests that disallowing QFs to do so at will would harm QFs' business objectives.[63] This position must be rejected for several reasons. First, these arguments are utterly unsupported by any facts in the record—as PNW Solar concedes[64]—and the Commission cannot base a policy decision in this case on PNW Solar's conjecture as to facts that have not been offered.[65]

Second, the result advocated by PNW Solar would represent a wholesale change in the Commission's PURPA policy that has never been suggested or considered in any forum in this state. Even if the Commission wished to entertain such a policy, it could do so only in a generic proceeding with all stakeholders' participation and after a full evidentiary proceeding. It certainly should not do so in this complaint proceeding between PGE and a single QF developer.

Finally, as discussed above, the Commission balances the objective of encouraging QF development with the fundamental requirement of customer indifference,[66] and PNW Solar's proposed new policy would expose customers to significant, unplanned-for generation and costs. The Commission may not go to such lengths in encouraging QF development that PGE and its customers are harmed.

PNW Solar also appears to argue that its PURPA right to sell its output to PGE at the avoided cost prices applicable at the time the obligation is incurred would be violated if the Commission prohibits it from changing its size under the existing PPAs and instead requires it to negotiate new PPAs.[67] This argument is unfounded. PNW Solar correctly states that a utility must purchase a QF's output at the avoided cost prices in effect when a QF incurs a legally enforceable obligation (LEO) to sell its power to the utility.[68] The Commission has made clear that "a LEO

[63] *See* PNW Solar's Cross-Motion for Summary Judgment at 20-21.
[64] PNW Solar acknowledges that "the record in this proceeding does not include any specific examples." PNW Solar's Cross-Motion for Summary Judgment at 20.
[65] *See generally* Stipulated Facts.
[66] *See, e.g.*, Order No. 18-025 at 7.
[67] PNW Solar's Cross-Motion for Summary Judgment at 21.
[68] *See* PNW Solar's Cross-Motion for Summary Judgment at 21 (citing 18 C.F.R. § 292.304(d)).

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exists when a QF signs a final draft of an executable standard contract that includes a scheduled commercial on-line date and *information regarding the QF's minimum and maximum annual deliveries, thereby obligating itself to provide power* or be subject to penalty for failing to deliver energy on the scheduled commercial on-line date."[69] Clearly, a LEO cannot be established before the QF has committed itself to a particular project size.[70]

If PNW Solar changes the project sizes to which it committed when it originally incurred a LEO, it necessarily forfeits its right to sell power to PGE at the avoided cost prices in effect at the time of the original commitment, and may incur a new LEO for the updated project sizes at then-applicable avoided cost prices. Requiring PNW Solar to enter new PPAs after materially revising its projects' sizes will ensure PGE's customers pay the most current avoided costs prices and will not violate PNW Solar's right to sell power to PGE under PURPA.

D. PNW Solar is not entitled to the avoided cost prices in effect on the dates it notified PGE of its desire to change the sizes of its projects.

If the Commission agrees with PGE's interpretation of Section 4.3 and finds that PNW Solar is not entitled to unilaterally change its projects' sizes while maintaining the outdated avoided cost prices, PNW Solar asks the Commission to hold that it is entitled to the avoided cost prices in effect on the day PNW Solar notified PGE of the change.[71] PNW Solar's request and underlying reasoning are problematic for several reasons.

First, as explained above, a QF may not unilaterally alter a key term in a contract while maintaining all other terms that were in effect at the time, especially when other key terms—such as price—have since changed. Instead, PNW Solar has the option to either maintain its current PPAs and construct projects at the contracted-for sizes or to terminate its PPAs and request new

[69] *In the Matter of Staff Investigation Into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 16-174 at 27 (May 13, 2016) (emphasis added).
[70] PGE notes that PNW Solar's project sizes appear to remain in flux. *See* Stipulated Facts ¶ 13.
[71] PNW Solar's Cross-Motion for Summary Judgment at 22.

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ones. PNW Solar could have requested new PPAs at the time it decided to change size, or when PGE informed it that the requested changes were not permitted, but it elected not to do so.

Second, even if PNW Solar had initiated a request for new PPAs when it informed PGE's QF contracting team about its request to change its projects' sizes, it would have been required to proceed through the standard contracting process and would not have established a LEO immediately to the avoided cost prices in effect on that date. As PNW Solar acknowledges, the standard contracting process takes time[72]—generally, a QF can establish a LEO in approximately 45 days.[73] If PNW Solar had initiated a new PPA request for the Butler project on May 8, 2017, when it informed PGE of the requested change, it could not have established a LEO under the standard contracting process until after PGE's avoided cost prices were updated on June 1, 2017.[74] For the Starlight and Stringtown projects, PNW Solar did not inform PGE's QF contracting personnel of its desired size changes until June 23, 2017.[75] Therefore, the *earliest* avoided cost prices to which PNW Solar could have been entitled, if it had pursued new PPAs for the revised capacity projects, are the prices that took effect on June 1, 2017. However, PNW Solar elected not to request new contracts when it informed PGE of its desire to revise its projects' sizes, and therefore it should receive the avoided cost prices in effect at the time it establishes a new LEO for the revised projects.

Finally, to the extent PNW Solar argues it should be permitted to maintain its current avoided cost prices for the originally contracted size of Butler and receive new avoided cost prices only for the increased capacity,[76] this approach already was considered and rejected by the

[72] *See* PNW Solar's Cross-Motion for Summary Judgment at 18-19 n.42.
[73] *See* PGE Schedule 201, Sheet 201-2.
[74] *See In the Matter of Portland Gen. Elec. Co. Application to Update Schedule 201 Qualifying Facility Information*, Docket No. UM 1728, Order No. 17-177 (May 19, 2017) (approving PGE's revised avoided cost prices effective June 1, 2017).
[75] Stipulated Facts ¶ 10.
[76] *See* PNW Solar's Cross-Motion for Summary Judgment at 23.

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Commission in Order No. 06-538.[77] The Commission determined that a QF receives the original avoided cost prices for all permissible increases up to 10 MW.[78] However, as explained in detail above, the increases PNW Solar proposes are *not* permissible under the Commission's order.

E. CREA's improper effort to relitigate the Commission's subject matter jurisdiction should be rejected.

A significant portion of CREA's filing is devoted to challenging the Commission's subject matter jurisdiction.[79] This argument is wholly misplaced, as the Commission's jurisdiction already has been raised and extensively briefed—by both PNW Solar and CREA itself[80]—and both the Administrative Law Judge and the Commission fully analyzed and confirmed the Commission's jurisdiction.[81] Absent an intervening change, a tribunal generally is precluded from re-examining an issue already decided in the same case.[82] CREA has pointed to no such change. Moreover, it would violate both substantive fairness and procedural efficiency to relitigate an issue already raised and clearly decided. The Commission should decline to once again address the issue of its jurisdiction in this case.

II. CONCLUSION

The text of PNW Solar's PPAs, the record in UM 1129, and the Commission's decision in Order No. 06-538 demonstrate that Section 4.3 allows only Nameplate Capacity Rating changes resulting from necessary upgrades or efficiency improvements to existing facilities. None of PNW Solar's or CREA's arguments undermine the clear direction provided by the text, context, and underlying circumstances—nor do they counter the important policy considerations explained by

[77] Order No. 06-538 at 38 (describing Staff's recommendation that a QF receive avoided cost rates in effect at the time of the upgrade for upgraded generation) and 39 (holding that a QF may upgrade its capacity up to 10 MW and continue receiving existing contract price).
[78] Order No. 06-538 at 39.
[79] CREA's Reply Comments at 4-8.
[80] Docket No. UM 1894, PNW Solar's Motion to Dismiss (Sept. 19, 2017); CREA's Motion to Intervene and Response in Support of ALJ Certification (Nov. 27, 2017).
[81] Ruling Denying Motion to Dismiss (Oct. 27, 2017); Order No. 18-025 at 4, 7-8.
[82] *See, e.g., Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002).

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PGE. Therefore, the Commission should find that PNW Solar may not materially revise the Nameplate Capacity Ratings reflected in its executed PPAs while retaining the right to outdated avoided cost prices, and should require PNW Solar to either maintain the project sizes reflected in the executed PPAs or request new PPAs for the revised sizes. PGE respectfully requests that the Commission deny PNW Solar's Motion for Summary Judgment, disregard CREA's repetitive jurisdictional arguments, and grant PGE's Motion for Summary Judgment.

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MCDOWELL RACKNER GIBSON PC

Jordan R Schoonover

Lisa F. Rackner
Jordan R. Schoonover
Shoshana J. Baird
419 SW 11th Avenue, Suite 400
Portland, Oregon 97205
Telephone: (503) 595-3925
Facsimile: (503) 595-3928
dockets@mrg-law.com

Attorneys for Portland General Electric Company

David White
Associate General Counsel
121 SW Salmon Street, 1WTC1301
Portland, Oregon 97204
Telephone: (503) 464-7701
david.white@pgn.com

Portland General Electric Company