BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	)	**REPLY IN SUPPORT OF PORTLAND GENERAL ELECTRIC COMPANY'S MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

Regardless of which interpretative framework—contract or regulatory—the Commission uses to interpret the ten power purchase agreements attached to the complaint ("NewSun PPAs"), the result is the same. In each NewSun PPA, the fixed-price period covers the "initial 15"[1] years of the PPA. The parties agree that the "PPA itself"[2] begins at execution, even if power purchases can begin later. Under a statutory interpretation methodology, the unbroken administrative history shows that Portland General Electric Company ("PGE") consistently submitted, and the Commission consistently approved, PPAs that begin the fixed-price period at execution. From 2005 to 2014, PGE's PPA and its Schedule 201 forms included unambiguous language providing for fixed prices at execution. Certain explicit PPA form language (in former section 5) starting the fixed-price period at "execution" was removed in 2014 as part of an unrelated revision to the text that provided for multiple options for market prices, but unambiguous Schedule 201 language (which is incorporated by reference in the PPA form) remained. Further, the Section 4.5 language from a single vintage of renewable contracts is irrelevant to determining the start of the 15-year fixed-price period. The administrative history demonstrates that in including this provision, workshop participants never intended to alter the start date of the fixed-price period.

Alternatively, under a contract interpretation analysis, the Commission should determine the parties' objective manifestations of intent. During contract discussions, PGE rejected the NewSun Parties' revisions to the PPA forms and defendants "understood"[3] that PGE's offer, in the unrevised PPA forms that defendants signed, provided for 15 years of fixed prices starting at execution. Trade usage of the word "term" is irrelevant, because,

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[1] *See, e.g.,* Compl., Ex. 1 at 27, 30 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No 201-5 and Sheet No. 201-12, describing prices for non-renewable and renewable QFs, respectively) (Jan. 25, 2018).
[2] *See* PGE's Resp. to Defs.' Mot. for Summ. J. ("PGE's Resp.") at 9 (Feb. 15, 2019).
[3] *See* New Sun Parties/100, Stephens/7-8 ("I further understood that the fifteen-years of fixed prices a QF could elect to receive would be the first fifteen years of the twenty-year period of net output sales beginning at COD and that any remaining term of power sales beyond the first fifteen years after COD (which could be up to five additional years) would be at market-rate prices.").

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among other things, PGE affirmatively disavowed any reliance on trade usage during contract discussions, and as used the word "term" is consistent with the unambiguous Schedule 201 language beginning the fixed-price period at execution. Similarly, Section 4.5 is irrelevant, because that provision, by its terms, has nothing to do with the start date of the fixed-price period and is therefore also consistent with the unambiguous language in Schedule 201 beginning the fixed-price period at execution.

Recognizing that their position is untenable under either interpretative framework, the NewSun Parties and intervenors cherry pick from the administrative history, and the contracting history. It is in this way that the NewSun Parties simultaneously argue that the Commission must "examine extrinsic evidence of the contracting parties' intent"[4] but reject PGE's reliance on the parties' pre-execution discussions because the "the extrinsic evidence [of intent] is simply irrelevant."[5] Similarly, defendants contend that the Commission should look to "regulatory context"[6] surrounding the drafting of Section 4.5, but should not consider the regulatory context surrounding the Schedule 201 provisions defining the fixed-price period, including the history of PGE's approved PPA forms.[7] There is no support in Oregon law for defendants' and intervenors' selective use of the parties' intentions and selective use of regulatory history.

Instead, under the interpretive framework for regulatory text, the Commission should look to the entire administrative record surrounding the drafting of the provisions establishing the fixed-price period, including the prior versions of PGE's forms and related non-renewable forms covering the same subject matter that the Commission approved at the same time it approved the renewable forms at issue here. Alternatively, under the interpretive framework for contracts, the Commission should consider all the pre-execution extrinsic evidence of both parties' intents, not just the defendants' witness's testimony as

[4] Defs.' Mot. for Summ. J. ("Defs.' Mot.") at 23 (Jan. 29, 2019).
[5] Defs.' Resp. to PGE's Mot. for Summ. J. ("Defs.' Resp.") at 27 (Feb. 15, 2019).
[6] *Id*. at 12.
[7] *Id.* at 20-23.

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to his "beliefs" about what Order No. 05-584 required. In either case, the result is the same: PGE is entitled to judgment as a matter of law because the PPAs begin the fixed-price period at execution.

II. ARGUMENT

A. Defendants and intervenors misread Order No. 18-079, which did not amend or make retroactive Order No. 17-256 or Order No. 17-465.

In Order No. 17-256,[8] as amended by Order No. 17-465,[9] the Commission expressly stated: (1) Order No. 05-584[10] did not set a "triggering event" for the fixed-price period; (2) the Commission "approved" prior PPA forms that began the fixed-price period at the "date of contract execution"; and (3) the requirement that PGE provide for fixed-prices beginning at COD applied only "on a going forward basis."[11] Because the NewSun Parties executed their PPAs prior the issuance of this order, the NewSun Parties do not benefit from the order's pronouncements of a "going forward" requirement for future PPAs.

Ignoring the clear language of Order No. 17-256, the NewSun Parties contend that Order No. 18-079[12] was a "subsequent clarification" that amended Order No. 17-256, applying it retroactively to Order No. 05-584.[13] Similarly, intervenors characterize Order No. 17-256 as a Commission "directive" that applied retroactively to the NewSun Parties' PPAs.[14] Those positions are without support. In Order No. 18-079, the Commission *denied* a request to amend Orders No. 17-256 and 17-465.[15] In Order No. 18-079, the Commission stated for the first time that the policy articulated in Order No. 17-256 was

[8] *Northwest and Intermountain Power Producer's Coalition, Renewable Energy Coalition, and Community Renewable Energy Association v. Portland Gen. Elec. Co.,* Docket No. UM 1805, Order No. 17-256 (Jul. 13, 2017).
[9] Docket No. UM 1805, Order No. 17-465 (Nov. 13, 2017).
[10] *In the Matter of Public Utility Commission of Oregon, Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 (May 13, 2005).
[11] Docket No. UM 1805, Order No. 17-256 at 3-4.
[12] Docket No. UM 1805, Order No. 18-079 (Mar. 5, 2018).
[13] Defs.' Resp. at 2.
[14] NIPPC, REC, and CREA Resp. to PGE's Mot. for Summ. J. ("Intervenors' Resp.") at 11 (Feb. 15, 2019).
[15] Docket No. UM 1805, Order No. 18-079 at 1.

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not a "new" policy, but that Order No. 17-256 "affirmed and made explicit" a policy first adopted in Order No. 05-584.[16] The Commission in Order No. 18-079 said that its policy had been "reflected explicitly in the standard contract forms for PacifiCorp and Idaho Power Company."[17] As described below, the Commission subsequently clarified that Order No. 17-256 was a new policy as to PGE. In Order No. 18-079, the Commission made no alterations to Order No. 17-256, let alone any alterations that retroactively applied this newly-stated policy to executed PGE standard contracts. Indeed, in Order No. 18-079, the Commission confirmed that its prior orders in Docket No. UM 1805 "did not require the interpretation or review of any standard contract form."[18]

The orders from Docket No. UM 1805 that defendants and intervenors rely upon are currently on direct appeal before the Oregon Court of Appeals.[19] In that proceeding, the Commission repeatedly acknowledged that the Docket No. UM 1805 orders, including Order No. 18-079, did not affect executed contracts. The Commission *agreed* with PGE's interpretation of Order No. 05-584 stating: "PGE is correct that Order No. 05-584 did not *require* the 15-year period to begin when the QF began delivering power."[20] The Commission agreed with PGE that its orders "left PGE's existing contracts undisturbed."[21] The Commission further explained that in Docket No. 1805, the Commission affirmed its prior implementation of policy with respect to *other utilities* that did not start the fixed-price period at execution, but that Docket No. UM 1805 "was a change in policy *applicable to PGE*."[22] And again: "The PUC did not adopt a generally applicable policy [in Docket No. UM 1805]; rather, it ordered *a change applicable solely to PGE*."[23] Thus, according

[16] *Id.* at 2-3.
[17] Docket No. UM 1805, Order No. 18-079 at 3.
[18] *Id.*
[19] *Northwest and Intermountain Power Producers Coalition, et al. v. Portland General Electric Company*, Court of Appeals of the State of Oregon, Case No. CA A167707.
[20] Supplemental Declaration of Anit Jindal in Support of PGE's Reply in Support of Mot. For Summ. J. ("Suppl. Jindal Declaration"), Ex. 2 at 22, 24 (*NIPPC v. PGE,* No. CA106707, Respondent's Answering Brief in the appeal of Docket No. 1805 ("Answering Brief") at 16, 18 (Or App Feb. 14, 2019) (emphasis in original).
[21] *Id.* at 28 (Answering Brief at 22).
[22] *Id.* at 22 (Answering Brief at 16) (emphasis added).
[23] *Id.* at 25 (Answering Brief at 19) (emphasis added).

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to this binding legal position from the Commission in Docket No. UM 1805, the Commission only affirmed the policy as to other utilities, but "change[d]" the policy as to PGE.

In addition to those four quotes, in at least nine other places in that appellate record the Commission stated that the orders from Docket No. UM 1805 applied only prospectively and Order No. 05-584 did not of its own force require PGE to offer fixed prices starting at COD:

- "[T]he PUC *did not specify* in its 2005 order when the 15-year period of fixed prices should begin . . . ."[24]

- "Until the PUC issued Order No. 17-256, [the Commission] approved PGE's contracts with QFs that included [a 15-year fixed price period to begin on the date of contract execution]."[25]

- "PGE's standard contract form that it submitted pursuant to Order No. 05-584, and PGE's contracts with QFs that the PUC approved thereafter, may have allowed for the 15-year fixed price period began on the date of contract execution. (ER 3). *In the orders under review in this case, the PUC did not order any changes to those existing contracts*, but it ordered that PGE's future QF contracts unambiguously provide for the 15-year fixed price period to begin when the QF begins generating power."[26]

- "That *prospective change* to PGE's contracts [in Orders No. 17-256, 17-465, and 18-079] represented at most a clarification, and not a misinterpretation, of PUC policy."[27]

- Order No. 05-584 "*did not specify* when that the 15-year fixed price period had to begin … ."[28]

- The PUC "*prospectively* requir[ed] that the 15-year fixed price period in PGE's QF contracts begins when the QF first delivers power to PGE."[29]

- "The PUC's implementation of the statewide policy it established in Order No. 05-584 encompassed both contracts that provided for the 15-year fixed price period to

[24] *Id.* at 18 (Answering Brief at 12) (emphasis added).
[25] *Id.* at 19 (Answering Brief at 13).
[26] *Id.* at 20-21 (Answering Brief at 14-15) (citing Docket No. UM 1805, Order No. 17-256 at 3) (emphasis added).
[27] *Id.* at 21 (Answering Brief at 15) (emphasis added).
[28] *Id.* (emphasis added).
[29] *Id.* at 22 (Answering Brief at 16) (emphasis added).

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begin when the QF began to deliver power, and contracts that *may have provided for that period to begin at contract execution*."[30]

- "When the PUC ordered PGE to change its contracts *on a going-forward basis* to provide that the 15-year fixed price period begin in the same manner as in Idaho Power's and PacifiCorp's contracts, it articulated that, *prospectively*, the PUC's policy would encompass only contracts that provided for the 15-year fixed price period to begin when the QF begins to deliver power to the utility."[31]

- "[T]he PUC ordered PGE to change its standard QF contract form to provide that the 15-year fixed price term for *future standard QF contracts* begins when the QF first delivers power to PGE. That change did not constitute a generally applicable policy, because it applied only to PGE."[32]

In this proceeding, the Commission cannot depart from this officially-stated agency position.[33] The NewSun Parties' and intervenors' position that Order No. 18-079 amended other orders and set a retroactive policy that must be read into every QF contract since 2005 is wrong.

Further, defendants' and intervenors' positions are staked almost entirely on their incorrect interpretation that Order No. 05-584 required PGE to offer PPAs with the 15-years of fixed prices running from COD. Intervenors' response is premised on that (incorrect) belief, and thus intervenors then wrongly contend PGE's interpretation of its own PPA and its offer to defendants in 2015 was "inconsistent with Commission policy."[34] Intervenors also contend that in the PPAs offered by the three utilities, the 15-year fixed price start date "provisions must have a consistent meaning."[35] The premise of intervenors' argument is wrong: as the Commission stated clearly in Order No. 17-256 and in the 13 appellate passages quoted above, Order No. 05-584 did not specify when the 15-year period

[30] *Id.* at 21 (Answering Brief at 15) (emphasis added).
[31] *Id.* at 21-22 (Answering Brief at 15-16) (emphasis added).
[32] *Id.* at 25 (Answering Brief at 19) (emphasis added).
[33] *See* ORS 183.482(8)(b)(B) (stating that an agency order should be remanded if the agency in the order is inconsistent with "an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency").
[34] Intervenors' Resp. at 10.
[35] Intervenors' Resp. at 11.

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began and did not create a policy that required the three utilities to be consistent on that point. Because intervenors' premise is faulty, their entire argument fails.

Defendants' argument similarly begins with the incorrect proposition that "[i]n Order No. 05-584, the Commission first articulated its longstanding policy that utilities must offer fifteen years of fixed prices commencing when a QF becomes operational and is delivering power to the utility."[36] The foundation of defendants' argument, as the Commission repeatedly articulated in the orders in UM 1805 and in the appellate record, is simply wrong.

B. Because the fixed-price period covers the "initial 15" years of the "PPA," and the PPA begins at execution, the fixed-price period must begin at execution as well.

As explained in PGE's motion and its response to defendants' and intervenors' motions, the "PPA" begins at execution, and therefore the "initial 15" years of the "PPA" also begin at execution.[37] The NewSun Parties contend that the "PPA" cannot begin at execution because the defined phrase "Effective Date" from the PPA form was not expressly incorporated into Schedule 201.[38] Their premise that the definitions from one document have to be expressly incorporated into the other to apply is faulty and their argument must be rejected. The Commission can adopt PGE's reasonable interpretation of a contract, even if the Schedule 201 does not explicitly incorporate the definitions from the form PPA.[39] Defendants' and intervenors' proffered definition of a "PPA" in Schedule 201 as beginning with delivery of power[40] is not reasonable because the form PPA states that it begins on execution, and defendants' and intervenors' own witnesses agree that the "PPA itself" begins at execution even if power deliveries begin later.[41] Thus, the only

[36] Defs.' Resp. at 2.
[37] PGE's Mot. for Summ. J. ("PGE's Mot.") at 13-16 (Jan. 29, 2019); PGE's Resp. at 8-10.
[38]. Defs.' Resp. at 17-18.
[39] *See Heathman Hotel Portland, LLC v. McCormick & Schmick Rest. Corp.*, 284 Or App 112, 118 (2017) ("[T]he parties need not have explicitly stated that they were operating under the first option term when the recitals and amendments unambiguously demonstrate that they were.").
[40] Defs.' Resp. at 2; Intervenors' Resp. at 9.
[41] CREA-NIPPC-REC/100, Lowe/3; NewSun Paries/100, Harnsberger/2.

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reasonable interpretation of the "initial 15" years of the "PPA" is 15 years from execution, regardless of whether Schedule 201 expressly incorporated the definition of Effective Date.

Further, the definitions from the PPA need not be expressly incorporated into Schedule 201 to be applicable. When a written instrument refers in specific terms to another writing as containing part of the agreement, the other writing is itself a part of the contract between the parties.[42] In *In re Colen*, the federal Bankruptcy Court applying Oregon law reviewed two simultaneously executed writings, a lease and an option to purchase, and ruled that the undefined term "nonrefundable move in fee" in the lease would be subject to the definition of a similar phrase "nonrefundable fee" in the option.[43] Similarly, under a statutory analysis, related statutes on the same subject matter are construed together.[44] Thus, Schedule 201 must be read together with the NewSun PPA, particularly given that Schedule 201 is an exhibit to each of the NewSun PPAs and the terms of the Schedule 201 are incorporated by reference into each of the NewSun PPAs.

The Schedule 201 forms attached to the NewSun PPAs define "PPA" as "Power Purchase Agreement."[45] The Schedule 201 provides that the term "Standard PPA" includes the eight available PPA forms, including the two PPA forms that the NewSun PPAs use (Renewable In-System and Off-System Variable PPAs).[46] Thus, because the Schedule 201 and the PPA form have to be construed together, the term "PPA" in Schedule 201 cannot begin on some date other than the Effective Date of each NewSun PPA. Even ignoring the PPA form, Schedule 201 itself states that the "PPA" begins at execution. Schedule 201 states: "A Seller must *execute* a *PPA* with the Company *prior to delivery* of power to the Company."[47] Thus, by its own terms, Schedule 201 states that the PPA begins at "execut[ion]" and "prior to delivery," regardless of whether Schedule 201 incorporated the

[42] *Weber v. Anspach*, 256 Or 479, 483 (1970) (citation omitted) (stating rule).
[43] *In re Colen*, 516 BR 618, 626 (Bankr. D. Or. 2014).
[44] *See, e.g.*, *State v. Klein*, 352 Or 302, 309 (2012) (a statute's context includes a "related statute").
[45] Compl., Ex. 1 at 25 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-1).
[46] *Id.* (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-2).
[47] *See, e.g.* Compl., Ex. 1 at 24 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-1) (emphasis added).

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definition section of the PPA form.[48] Thus, the only reasonable definition of the start date of the "PPA" is execution.

Without elaboration, the NewSun Parties assert that PGE's Schedule 201 "uses the same generalized language as other Oregon utilities' tariffs" when defining the start date of the fixed-price period.[49] That is incorrect; neither Idaho Power nor PacifiCorp refers to the initial years of the "PPA" for the start date of the fixed-price period. The fixed-price period in the other two utilities' schedules refer to "contract term" and "contract year," not to the "PPA."[50]

To the extent those other utilities' forms are relevant at all, they support PGE's common-sense definition of "PPA" as beginning at execution. The PacifiCorp schedule provides that the "power purchase agreement" is "final and binding" once "executed by both parties."[51] PacifiCorp's PPA form similarly provides that the "POWER PURCHASE AGREEMENT" is "entered into this [execution date]" and "[t]his Agreement shall become effective after execution by both Parties."[52] The Idaho Power standard contract forms contain nearly identical language as the PacifiCorp forms, but uses the defined term "Energy Sales Agreement" to describe the power purchase agreement.[53] Thus, no Oregon utility has adopted the NewSun Parties' illogical definition of "PPA" as beginning years after execution of the PPA itself.

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[48] *Id.*
[49] Defs.' Resp. at 18.
[50] *See* CREA-NIPPC-REC/101, Lowe/ 4 (Pacific Power Oregon Standard Avoided Cost Rates at 4); CREA-NIPPC-REC/102, Lowe/9 (Idaho Power Co.'s Schedule 85 Cogeneration and Small Power Production Standard Contract Rates).
[51] CREA-NIPPC-REC/101, Lowe/11 (Pacific Power Oregon Standard Avoided Cost Rates at 11).
[52] *Id.* at 21 (Pacific Power Oregon New Firm QF PPA at 1 and Section 2.1).
[53] Declaration of Greg Adams in Support of Defs.' Mot. for Summ. J. ("Adams Declaration"), Ex. F at 15, 27 (*In the Matter of Public Utility Commission of Oregon, Staff Investigation Into Qualifying Facility Contracting and Pricing,* Docket No. UM 1610, ldaho Power Co.'s July 3, 2014 Application for Approval of its Replacement Compliance Filing with Order No. 14-058, Schedule 85 at Original Sheet 85-5 and Agreement at 1) (Jan. 29, 2019).

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C. The unbroken administrative history establishes that, until Order No. 17-256, PGE's standard PPAs always began the fixed-price period at execution.

1. The administrative history is relevant.

a) Statutory interpretation rules apply, and thus the administrative history is relevant.

Preliminarily, the NewSun Parties and intervenors contend that the Commission must disregard PGE's prior, Commission-approved standard contract forms when interpreting PGE's 2015 Commission-approved standard contract forms at issue here because they wrongly contend that contract interpretation rules apply, not statutory interpretation rules.[54] In Oregon, contract provisions that incorporate legislatively-approved text are interpreted according to the rules of statutory construction.[55] Oregon courts apply statutory construction rules to administrative rules incorporated into a contract.[56] Thus, in parallel to interpreting contract text approved by the legislature, form contract text approved by an administrative agency should be interpreted using the rules of statutory and regulatory construction. It makes sense not to use the tools used for interpreting contracts and instead use the tools for interpreting regulations if the Commission is not seeking to find the intent of the parties that signed the contract.[57]

Although Oregon courts have not addressed the interpretative standard for Commission-approved contract forms, the District of Oregon federal court applying Oregon law has repeatedly held that utility-drafted, Commission-approved tariffs are also

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[54] Defs.' Resp. at 20-21; Intervenors' Resp. at 13-15.

[55] *See Schmidt v. Underwriters At Lloyds Of London,* 191 Or App 340, 343 (2004) ("Where language appears in the contract because the legislature requires it, courts must necessarily determine the meaning intended by the legislature.") (citation omitted).

[56] *See State v. Hogevoll*, 348 Or 104, 109-10 (2010) ("In construing an administrative rule, we apply the same analytical framework that applies to the construction of statutes.") (citation omitted); *see also Coats v. State ex rel. Dep't of Transp. ex rel. Bureau of Labor & Indus.*, 188 Or App 147 (2003) (interpreting contract that incorporated administrative rules under statutory construction methodology).

[57] *See Fox v. Country Mut. Ins. Co.*, 327 Or 500 (1998) ("[W]e attempt to determine the legislature's intention in enacting that statute rather than the parties' contractual intention[.]") (citations omitted).

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interpreted under Oregon's statutory construction rules.[58] That federal court, applying the rules of statutory construction to interpretation of a utility-drafted, Commission-approved tariff, examined the record in that case for "history that illuminates Verizon's intent in drafting the language at issue" and "the PUC's intent in approving it."[59] Similarly, the Commission should determine the intent of the standard contract forms' drafters and its own intent when approving the standard contract forms. Here, PGE is clear and consistent about its intent.[60] Also, under a statutory interpretation analysis, prior versions of the same statute are relevant in interpreting the current version; thus prior versions of PGE's PPA are relevant.[61]

Intervenors raise the false specter of increased "negotiation and transaction costs" if the Commission analyzes prior approved versions of PGE's approved PPAs as context for interpreting the NewSun PPAs.[62] The Oregon Supreme Court has already implicitly considered and rejected that argument. In *Fox v. Country Mutual Ins. Co.*, the Oregon Supreme Court stated that to interpret legislatively mandated text included in an automobile insurance contract between a consumer and an insurance company, it would interpret the legislature's intent, not the parties' intent, and to do so, it would apply statutory interpretation methods.[63] The court noted that methodology includes analyzing "other provisions of the same statute and other related statutes, as well as relevant judicial constructions of those statutes[, and] … judicial constructions of earlier versions of relevant

[58] *Facaros v. Qwest Corp.*, No. CIV. 10-6343-HO, 2011 WL 2270588, at *3 (D. Or. June 7, 2011) ("The court must analyze the tariff as it would interpret any statute under the principles of statutory construction." (citing *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993)); *Verizon Nw., Inc. v. Main St. Dev., Inc.*, 693 F Supp 2d 1265, 1271-72 (D. Or. 2010) ("In the absence of authority specifying whether Oregon courts interpret utilities tariffs merely as contracts or also as having the force of law like statutes, the Court will apply Oregon's rules of statutory construction . . . ." (citing *PGE v. BOLI*)).
[59] *Verizon Nw., Inc.*, 693 F Supp 2d at 1274.
[60] PGE/100, Macfarlane/30.
[61] *See, e.g.*, *Montgomery v. City of Dunes City*, 236 Or App 194, 199 (2010) ("Changes in the text of a statute over time are context for interpreting the version at issue in a particular case[.]").
[62] Intervenors' Resp. at 14.
[63] *Fox*, 327 Or at 506.

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statutes[.]"[64] This Commission, following the precedent in *Fox*, should also consider prior versions of the same Commission-approved PPA to come to the right result here.

b) Even if contract interpretation rules apply, PGE's prior standard contract forms are still relevant.

Defendants and intervenors cite Oregon case law on interpreting contracts and state that prior drafts are only relevant if exchanged between the parties.[65] But this is a distinction without a difference in this case. PGE's prior contract forms are matters of public record, and most are easily-accessible from the Commission's website.[66] Here, the undisputed record shows that the NewSun Parties in fact reviewed prior PGE PPAs when determining the meaning of the terms of the PPA forms at issue. In his emails to PGE, Jake Stephens stated that he looked through PGE's contracting "history" and searched for PGE "precedent" to support a 15-year fixed-price term starting at the Commercial Operation Date.[67] Thus, defendants in fact relied on prior PPA forms for evidence of intent. Similarly, defendants rely on prior PGE PPAs in interpreting their PPAs here.[68] Thus, those prior PPA forms are admissible extrinsic evidence of the meaning of the contracts because those prior contracts were available, discussed and reviewed by both parties and therefore are "circumstances under which [the contract] was made."[69]

PGE consistently submitted and the Commission consistently approved standard contract forms that began the fixed-price period at execution.

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[64] *Id.* (internal quotation marks and citations omitted).
[65] Defs.' Resp. at 19; Intervenors' Resp. at 14.
[66] *See generally In the Matter of Portland General Electric Co., Information Filing of Qualifying Facility Contracts or Summaries per OAR 860-029-0020(1)*, Docket No. RE 143 (Nov. 30, 2011) (docket summary available at https://apps.puc.state.or.us/edockets/docket.asp?DocketID=19098).
[67] NewSun Parties/117, Stephens/1 (November 19, 2015, Email from Jake Stephens to Bruce True).
[68] Defs.' Resp. at 24-25.
[69] 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.").

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c) The same Commissioners who issued Order No. 05-584 reviewed and approved PGE's standard contract forms that began the fixed-price period at "execution."

To comply with Order No. 05-584, PGE submitted standard contract forms in 2005.[70] In Section 5 on "Contract Price," those forms provided "If Seller chooses the [fixed-price option], it must mark below a single second option from [the list of market price calculation methodologies] for all Contract Years in excess of 15 until the remainder of the Term."[71] That 2005 PPA form defined "Contract Year" as each 12-month calendar year "falling at least partially in the Term of this Agreement."[72] The 2005 PPA defined "Term" as beginning on the Effective Date and ending on the Termination Date,[73] the same definition that appears in the NewSun PPAs.[74] The 2005 PPA defined the "Effective Date" as "execution by both Parties,"[75] the same definition that appears in the NewSun PPAs.[76] The 2005 Schedule 201 provisions defining the fixed-price period were nearly identical to the Schedule 201 provisions in the NewSun PPAs.[77] The only difference was the subsequent elimination of certain methods of calculating market price and the replacement of the general word "contract" with the more specific "PPA." In sum, this 2005 PPA explicitly provided that the QF would receive fixed prices for the first 15 "Contract Years," which coincided with the "Term," which began at "execution."[78] The same Commissioners who issued Order No. 05-584 and established the 15-year fixed-price period then approved PGE's standard contract form that explicitly started the 15-year fixed-price period at contract execution.

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[70] PGE/102, Macfarlane/1 (PGE's July 12, 2005, Compliance Filing, PGE Advice No. 05-10 in Docket No. 1129, Standard Contract PPA and Schedule 201).
[71] *Id.* at 26 (Compliance Filing, Standard Contract PPA at Section 5).
[72] *Id.* at 21 (Compliance Filing, Standard Contract PPA at Section 1.6).
[73] *Id.* at 23 (Compliance Filing, Standard Contract PPA at Section 1.24).
[74] Compl., Ex. 1 at 6 (Alfalfa Solar I LLC PPA at Section 1.38).
[75] PGE/102, Macfarlane/21, 24 (Compliance Filing, Standard Contract PPA at Sections 1.7 and 2.1).
[76] Compl. Ex. 1 at 2,7 (Alfalfa Solar I LLC PPA at Sections 1.8 and 2.1).
[77] *Compare* PGE/102, Macfarlane/7 (Compliance Filing, Standard Contract PPA, Schedule 201 at Original Sheet No. 201-4) *and* Compl., Ex. 1 at 30 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-12).
[78] PGE/102, Macfarlane/21, 23, 24 (Compliance Filing, Standard Contract PPA at Sections 1.6, 1.7, 1.24, and 2.1).

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As described in PGE's summary judgment motion, in 2014, PGE removed the explicit language from Section 5 of the standard PPA's definition of "Contract Price" in response to an irrelevant modification to market-price calculation methodology.[79] The unambiguous language in Schedule 201 remained and indeed was made clearer, because after 2014 Schedule 201 referred to the "initial 15" years of the "PPA," not just the initial 15 years of the "contract."[80] This unbroken administrative history demonstrates that PGE's standard contract forms have always begun the fixed-price period at execution.

d) The language in PGE's standard PPA forms from 2005 to 2014 explicitly began the fixed-price period "execution."

The NewSun Parties observe that the because each "Contract Year" in PGE's standard contract forms from 2005 to 2014 covered each calendar year within the "Term," then technically the fixed-price period in these forms begins on January 1 of the year of execution and not on the execution date itself.[81] The NewSun Parties cannot benefit from an apparent calendar error in the calculation of the fixed-price period in these PPA forms, because the salient point remains that those forms measured the fixed-price period from the year of "execution," not the Commercial Operation Date.

Those contracts can be interpreted to mean only what they say, that Section 5 of those prior PGE PPA forms explicitly begins the 15-year fixed-price period at "execution," not COD. Defendants' contention that a calendar error means that all of PGE's executed PPAs, and the PPA form itself, mean something contrary to their plain language[82] is illogical and is not a reasonable interpretation of the contracts. Defendants' position is also contrary to the rule in ORS 42.230 that "[i]n the construction of an instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained

[79] PGE's Mot. at 21-22; *see* PGE/106, Macfarlane/1 (PGE's November 25, 2014 Compliance Filing in Docket No. 1610).
[80] PGE/106, Macfarlane/72 (PGE's Nov. 25, 2014 Compliance Filing in Docket No. 1610, Schedule 201 at Sheet No. 201-12) (redline showing change)
[81] *See* Defs.' Resp. at 23-24.
[82] Defs.' Resp. at 24.

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therein, not to insert what has been omitted, or to omit what has been inserted[.]"[83] Defendants' contention would require the Commission to reject ORS 42.230 and omit from Section 5 of those older PPAs that the 15-year period of fixed prices runs with the Contract Years, which start at execution.

e) PGE consistently executed PPAs that explicitly began the fixed-price period at "execution."

The only evidence of intent regarding those prior PPA forms confirms that PGE in fact executed PPA forms that explicitly began the fixed-price period at "execution." PGE's contracting official responsible for PURPA contracts, Robert Macfarlane, repeatedly testified that prior versions of PGE's standard contract forms began the fixed-price period at execution.[84] PGE's executed PPAs are on file with the Commission and are subject to official notice in this case.[85] Of the approximately 100 standard PPAs on file with the Commission, only two QFs revised the Commission-approved terms concerning the 15-year fixed price period's start date when executing their PPAs.[86] The others did not.[87]

In both of these outlier PPAs cited by defendants, the QFs altered the provisions of PGE's standard PPA forms to explicitly begin the fixed-price period at the Commercial Operation Date. For instance, in the OneEnergy Solar contract the QF wrote in an entirely new provision into the standard PPA form that set the fixed-price period as "the first 15 years following the Commercial Operation Date."[88] Similarly, in the PaTu PPA the definition of "Contract Year" is altered to cover each calendar year "commencing upon the Commercial Operation Date" instead of the Effective Date.[89] Because the PaTu PPA set

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[83] ORS 42.230.
[84] PGE/100, Macfarlane/13-16; PGE/400, Macfarlane/4-5.
[85] OAR 860-001-0460(1)(d) ("The Commission or ALJ may take official notice of the following . . . [d]ocuments and records in the files of the Commission that have been made a part of the files in the regular course of performing the Commission's duties.")
[86] PGE/213, True/1 (2010 PaTu PPA); CREA-NIPPC-REC/103, Lowe/1 (2014 OneEnergy Oregon Solar LLC PPA).
[87] *See, e.g.* Docket No. RE 143, PGE Standard PPA executed on September 23, 2011, with Country Village Estates (Nov. 30, 2011), *available at* https://edocs.puc.state.or.us/efdocs/RPA/re143rpa155411.pdf ; Docket No. RE 143, PGE Standard PPA executed on December 17, 2012, with Conduit 3 Hydroelectric Project, LLC (Sep. 19, 2014), *available at* https://edocs.puc.state.or.us/efdocs/RPA/re143rpa133154.pdf .
[88] CREA-NIPPC-REC/103, Lowe/8 (2014 OneEnergy Oregon Solar LLC PPA at Section 5).
[89] PGE/213, True/2 (2010 PaTu PPA at Section 1.6).

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the fixed-price period as the first 15 "Contract Years," that executed PPA set the fixed-price period as beginning at the Commercial Operation Date.[90]

These two outlier PPAs, which altered the terms of PGE's standard contract forms, are of no help to the NewSun Parties. When the NewSun Parties cited these outlier PPAs and requested similar revisions to their own standard PPAs, PGE rejected the request and stated that it accepted those other QFs' revisions in "error."[91] If anything, these exceptions prove the general rule that PGE's unaltered standard contract forms provide for fixed prices starting at execution.

f) The Commission scrutinized and approved PGE's standard contracts that began the fixed-price period at execution.

The NewSun Parties contend that the Commission should ignore its own prior approvals of PGE's PPA forms because the Commission did not "scrutiniz[e]" the PPA forms and instead performed only a "cursory" review.[92] The NewSun Parties are wrong. In Order No. 05-584, the Commission ordered utilities to file standard contracts "that are consistent with the resolution of issues in this order or past orders."[93] Upon receiving the utilities' initial filings, the Commission began an exhaustive investigation that lasted 14 months and covered 80 separate issues to determine whether utilities' standard contract forms indeed complied with Order No. 05-584.[94] In 2007, after this investigation, the Commission approved the utilities' standard contract forms.[95]

In subsequent years, the Commission developed new standard contract requirements, which required utilities to revise their standard contract forms. The Commission then reviewed and approved the utilities' revised filings for compliance with

[90] *Id.* at 9 (2010 PaTu PPA at Section 5).
[91] PGE/210, True/1 (November 20, 2015, Email from Bruce True to Jake Stephens, including several prior emails between them). *See also* PGE/200, True/5 ("I recall telling Mr. Stephens several times by phone and once in person that the 15- years of fixed prices starts at execution of the PPAs."); New Sun Parties/100, Stephens/18 ("[True] told me PGE interprets its contract forms to not allow for payment of fixed prices for a period longer than fifteen years after the date of execution.").
[92] Defs.' Resp. at 22.
[93] Docket No. UM 1129, Order No. 05-584 at 41.
[94] PGE/100, Macfarlane/17-18.
[95] *See* Docket No. UM 1129, Order No. 07-065 at 1 (Feb. 27, 2007).

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the Commission's orders.[96] As the Commission recently stated, its approval of standard contract forms establishes that those forms are "consistent with our own orders and rules to implement state and federal PURPA policy."[97] In Oregon, the presumption is that the Commission will abide by the law, not ignore it when carrying out an official duty such as reviewing standard contract forms for compliance with prior orders.[98] The NewSun Parties' attempts to malign the Commission's review and approval process as "cursory" and lacking "necessar[y] scrutin[y]" must be rejected.[99]

The NewSun Parties attempt to support their mistaken view of this administrative history by noting that the Commission does not approve *executed* standard contracts.[100] The NewSun Parties confuse executed standard contracts with standard contract forms, the latter of which the Commission reviews and approves as complying with prior orders.

The NewSun Parties also observe that the administrative record does not reveal any discussion of the start date of the fixed-price period in Docket No. UM 1129.[101] But this history confirms that PGE's explicit language beginning the fixed-price period at execution was not controversial. With the aid of stakeholders, the Commission investigated these forms for 14 months and resolved 80 different compliance issues.[102] The fact that no one raised the start date of the fixed-price period confirms that no participant during this investigation, including the Commission itself, saw the start date as actually conflicting with Order No. 05-584.

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[96] *See* PGE/100, Macfarlane/20 (describing four subsequent orders that required revisions to other standard contract provisions).
[97] *In the Matter of Portland General Electric Co., v. Pacific Northwest Solar, LLC,* Docket No. UM 1894, Order No. 18-025 at 6 (Jan. 25, 2018).
[98] *See, e.g.*, ORS 40.135(1)(x) (Oregon evidentiary presumption that "[t]he law has been obeyed"); ORS 40.135 (1)(j) (Oregon evidentiary presumption that an "official duty has been [] performed"); *State Highway Comm'n v. R. A. Heintz Const. Co.*, 245 Or 530, 539 (1967) (presumption that an official duty has been performed); *State ex rel. Livingstone v. Williams*, 45 Or 314, 329-30, (1904) (municipal judge is presumed to have "regularly performed" her "official duty" in the "absence of any averment to the contrary").
[99] Defs.' Resp. at 22.
[100] *Id.*
[101] *Id.*
[102] PGE/100, Macfarlane/16-17.

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The NewSun Parties also state that no Commission order "acknowledg[ed]" or "endors[ed]" a fixed-price period as beginning at execution.[103] Again, that is inaccurate. From 2005 to 2014, the Commission reviewed and approved PGE's standard contract forms, which explicitly began the fixed-price period at execution. In Order No. 16-175, the Commission expressly acknowledged that the start date of the fixed-price period in PGE's standard contract forms differed from the start date in the other utilities' standard contracts.[104] In that order, the Commission stated that Idaho Power's schedule "unambiguously provides that the 15-year period commences at the time [of] the QF's 'Operation Date.'"[105] The Commission then stated that the PacifiCorp's standard contract contained "similar" language, but that PGE's standard contract "differs with regards to when the 15-year period commences."[106] Then, in Order No. 17-256, as amended by Order No. 17-465, the Commission stated it reviewed and approved PPA forms that began the fixed price period at execution: "Oregon utilities have filed, and we have approved, standard QF contracts that have used, as the triggering event, both the date of contact [sic] execution and the date of power delivery."[107] Thus, the Commission explicitly "approved" standard contracts that began the fixed-price period at "execution."

Finally, the NewSun Parties contend that PGE disavowed reliance on prior standard contract forms.[108] This contention is wrong and irrelevant. As discussed in PGE's response brief, PGE disavowed reliance on the two outlier, executed contracts that altered the PPA forms' plain terms.[109] PGE has never disavowed reliance on earlier forms to

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[103] Defs. Resp. at 21.
[104] *In the Matter of Idaho Power Co., Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Change, and for Change in Resource Sufficiency Determination,* Docket No., UM 1725, Order No. 16-175 (May 16, 2016).
[105] *Id.* at 2.
[106] *Id.* at 3. Intervenors misleadingly selectively quote from Order No. 16-175 at page 8 of their response brief. Quoting selectively, they contend that "the Commission clarified that the price to be paid 'during the first 15-year period following commercial operation, is the rate that existed at the time of signing.'" That quote was actually concerning only Idaho Power's Schedule 85, as repeatedly stated in that paragraph in the order, and was not a general policy statement as intervenors' selective quoting implies.
[107] Docket No. UM 1805, Order No. 17-256 at 3; *see* Docket No. UM 1805, Order No. 17-465.
[108] Defs.' Resp. at 18-20.
[109] PGE's Resp. at 36-37.

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interpret later revisions. Regardless, Oregon Supreme Court precedent states that prior versions of regulations are relevant administrative history. PGE's pre-execution statements could not negate this rule of law.

D. The Parties' discussions confirm that the fixed-price period begins at execution in each PPA.

1. Although they disagreed with PGE's interpretation of the Commission's orders, the NewSun Parties executed PPAs on terms "acceptable to PGE."

As discussed in PGE's motion, after initially disagreeing, the NewSun Parties accepted PGE's offer of PPAs that begin the fixed-price period at execution. Contrary to the NewSun Parties' assertions, PGE's position does not presume that its interpretation of the PPA forms is correct. Under a *contract interpretation* analysis, the relevant question is whether the NewSun Parties objectively manifested their intent to accept the terms offered by PGE.[110] Here, PGE rejected the NewSun Parties' interpretation of the PPA forms, and PGE rejected the NewSun Parties' request for revisions to the PPA to mirror those in the OneEnergy Solar LLC PPA to provide that the 15-years begins at COD. After those rejections, the NewSun Parties "understood" that "PGE was not going to agree to change its position regarding the fixed-price period."[111] The NewSun Parties signed the PPAs with this understanding. It is black-letter law that signing a contract is an objective manifestation of agreeing to the terms of the contract.[112]

The NewSun Parties now contend that they never agreed to PGE's terms because their cover email transmitting the signed PPAs expressed disagreement with PGE's interpretation.[113] Tellingly, the NewSun Parties do not quote the emails they are describing, which in fact state that the NewSun Parties agreed to contract terms "acceptable

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[110] *See, e.g., Kaiser Found. Health Plan of the Nw. v. Doe,* 136 Or App 566, 572 (1995), *opinion mod on recon,* 138 Or App 428 (1996) (looking to party's conduct to determine if she "manifested an objective acceptance").
[111] NewSun Parties/100, Stephens/27-28.
[112] *Title & Tr. Co. v. Nelson*, 157 Or 585, 592 (1937) ("The purpose of a signature to an agreement, such as the one involved here, is to evidence or express assent to and acceptance of the terms of the instrument.")
[113] Defs.' Resp. at 29.

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to PGE."[114] In relevant part, Stephens stated "[w]hile we don't agree with PGE's position and interpretation on the matters of the outside allowable COD and termination date and the length of fixed pricing, *changes acceptable to PGE have been made* to COD and termination date."[115] With the understanding that PGE would offer a PPA that began the fixed-price period only at execution, Stephens signed the PPAs on terms "acceptable to PGE."[116] Thus, although defendants objected to PGE's offer and incorrectly believed that Order No. 05-584 required PGE to give defendants a different offer, the NewSun Parties objectively manifested an intent to accept PGE's offer of 15 years of fixed prices starting at execution by signing the PPAs without the changes they requested concerning the 15-year periods' start date.

Further, in emails attaching signed versions of the other nine PPAs, Stephens expressed disagreement only as to whether the *Commission's orders* required PGE to offer PPAs that began the fixed-price period at the Commercial Operation Date; it was not a disagreement as to the meaning of the contract. In relevant part, Stephens' emails stated that each NewSun Party "disagree[s] on the *OPUC requirements* as relates [sic] term length and fixed pricing period."[117] Stephens made no mention of a continuing disagreement as to the PPAs' actual terms, only whether "OPUC requirements" required something more. In Docket No. UM 1805, the Commission rejected the NewSun Parties' interpretation of "OPUC requirements," ruling that PGE could "lawfully" offer standard contracts that began the fixed-price period at execution.[118]

2. Extrinsic evidence of the circumstances surrounding a contract is relevant to determine the existence of an ambiguity.

Extrinsic evidence is admissible at the first stage of contract analysis to determine the existence of ambiguity. The NewSun Parties' contrary argument relies on cases that

[114] *See* NewSun Parties/125, Stephens/2 (December 18, 2015, Email from Jake Stephens to Bruce True).
[115] *Id*.
[116] NewSun Parties/100, Stephens/31-32.
[117] NewSun Parties/129, Stephens/1 (December 18, 2015, Email from Jake Stephens to Bruce True) (emphasis added).
[118] Docket No. UM 1805, Order No. 17-256 at 1.

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Oregon's appellate courts have overruled or rejected. For instance, the NewSun Parties cite the Ninth Circuit case *Webb v. Nat'l Union Fire Ins. Co.*,[119] for the proposition that Oregon law does not permit extrinsic evidence at the first stage of contract analysis.[120] But the Oregon Court of Appeals has repeatedly and expressly rejected *Webb*, and held that extrinsic evidence of the circumstances underlying the formation of a contract is relevant in determining the existence of ambiguity.[121] Oregon state appellate courts decide Oregon law. Because the Commission's decisions are directly reviewable by the Oregon Court of Appeals, it must follow the Court of Appeals' and Oregon Supreme Court's decisions as binding precedent. The contrary rule from the Ninth Circuit is not binding precedent and has been repudiated by numerous subsequent Oregon decisions.

Similarly, the NewSun Parties cite a 1990 Oregon Court of Appeals case for the rule that the Commission can look only to the four corners of a contract when determining whether a contract is ambiguous.[122] That case did not address whether extrinsic evidence is admissible at the first step of contract interpretation, and both before and after that decision, the Oregon Supreme Court stated that a court "may consider parol and other extrinsic evidence to determine whether the terms of an agreement are ambiguous."[123] The rule cited by the NewSun Parties is not the law in Oregon, and has not been for 25 years, if ever.[124]

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[119] *Webb v. Nat'l Union Fire Ins. Co.*, 207 F3d 579, 582 (9th Cir 2000).
[120] Defs. Resp. at 26-27.
[121] *Batzer Const., Inc. v. Boyer*, 204 Or App 309, 315 (2006); *Oregon Trail Elec. Consumers Co-op, Inc. v. Co-Gen*, 168 Or App 466, 479 n.10 (2000).
[122] *Edwards v. Times Mirror Co.*, 102 Or App 440, 445 (1990).
[123] *Abercrombie v. Hayden Corp.*, 320 Or 279, 292 (1994).
[124] *See State v. Gaines*, 346 Or 160, 173 n.8 (2009) ("[I]n deciding whether an ambiguity exists, the court is not limited to mere text and context, but may consider parol and other evidence extrinsic to the contract.") (citing *Abercrombie*, 320 Or at 292); *Bernard v. First Nat'l Bank of Oregon*, 275 Or 145, 155 (1976) ("It is well settled that the parol evidence rule does not exclude evidence offered to aid the court in its interpretation of the language chosen by the parties.") (citations omitted); *ACN Opportunity, LLC v. Employment Dep't*, 362 Or 824, 839 (2018) ("As part of that context [at step one of contract interpretation], a court may consider 'the circumstances under which the instrument was made, including the situation of the subject and of the parties.'") (quoting *Abercrombie*, 320 Or at 292).

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3. The integration clause does not bar extrinsic evidence to interpret the PPAs' terms.

It is black-letter law that an integration clause does not bar a court from looking to extrinsic evidence to determine if a contract term is ambiguous and to resolve ambiguity. As the Court of Appeals stated in *Oregon Trail Elec. Consumers Co-op, Inc. v. Co-Gen* ("*OTECC*"), when interpreting a negotiated PPA that contained an integration clause: "The fact that the terms are final does not resolve what the terms mean. Extrinsic evidence therefore may be considered to determine whether a term is ambiguous . . . even if the contract contains an express integration clause."[125] In *OTECC*, the Court of Appeals considered a negotiated PPA with an integration clause and examined the parties' statements during negotiations when interpreting the PPA notwithstanding the integration clause.[126] So too here. The Commission may look to the parties' discussions to determine if the PPAs are ambiguous and to resolve any ambiguity.

E. Section 4.5 does not contradict PGE's interpretation of Schedule 201, and Section 4.5 is silent about the start date of the fixed-price period.

The NewSun Parties contend that PGE is seeking reformation of the PPAs, but of course PGE is not asking for that relief Instead, PGE's position is (1) that Section 4.5, which provides for ownership of RPS Attributes, does not provide for the start date of the 15-year period for fixed-prices; (2) that the NewSun Parties are entitled to retain all Environmental Attributes during the Sufficiency Period and during any period in excess of the initial 15 years of the PPA, and (3) that PGE's interpretation of the PPAs—that 15-years of fixed prices start at execution—is not contradicted by Section 4.5.

Preliminarily, the NewSun Parties contend that PGE interprets the PPA forms to mean the QF can only "*begin* owning the RPS Attributes fifteen years after the Effective

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[125] *OTECC*, 168 Or App at 479 n.10 (citation omitted); *see also Taylors Coffee Shop v. Taylor*, 56 Or App 419, 422 (1982) ("Whether or not the . . . clause is ambiguous, parol evidence is admissible to explain the circumstances under which the lease was made. This evidence cannot vary the terms of the written agreement, but it can place the judge 'in the position of those whose language [the judge] is interpreting.'") (quoting former ORS 42.220).

[126] *See* 168 Or App at 475.

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Date."[127] That is not correct; PGE does not take that position. PGE does not dispute that the NewSun Parties retain the Environmental Attributes if they make power sales during the Renewable Resource Sufficiency Period, which in the NewSun PPAs runs from execution through the end of 2019.

The NewSun Parties also contend that PGE's interpretation of Schedule 201 conflicts with the first sentence of Section 4.5, which states: "During the Renewable Resource Deficiency Period, Seller shall provide and PGE shall acquire the RPS Attributes for the Contract Years as specified in the Schedule and Seller shall retain ownership of all other Environmental Attributes (if any)."[128] That is not correct; PGE's interpretation is consistent with what Section 4.5 provides in both its first and second sentences: that ownership of the RPS Attributes is "as specified in the Schedule" and "in accordance with the Schedule."[129] Thus, Schedule 201 provides the relevant outward limitation on the transfer of RPS Attributes from defendants to PGE. Schedule 201 provides, quite clearly, that the Sellers (here, defendants) "with PPAs exceeding 15 years . . . will retain all Environmental Attributes generated by the facility for all years up to five in excess of the initial 15."[130]

Defendants contend that those words in section 4.5—"as specified in the Schedule" and "in accordance with the Schedule"—do not modify the words that immediately precede them in the schedule (contrary to the normal grammatical understanding), but instead modify only the words at the start of the sentences, the terms Renewable Resource Sufficiency Period and Renewable Resource Deficiency Period.[131] A careful look at the actual words in the PPAs shows that the NewSun Parties' interpretation is unreasonable, and that PGE's three-part position is reasonable.

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[127] Defs.' Resp. at 14 (emphasis added and omitted).
[128] Compl., Ex. 1 at 10 (Alfalfa Solar I LLC PPA at Section 4.5).
[129] *Id.* at 10-11.
[130] *Id.* at 30 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-12).
[131] Defs.' Resp. at 14-15.

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There are five sentences in Section 4.5 and in Schedule 201 that provide for ownership of Environmental Attributes. The first two are from Section 4.5, back to back:

1. "During the Renewable Resource Deficiency Period, Seller shall provide and PGE shall acquire the RPS Attributes for the Contract Years as specified in the Schedule and Seller shall retain ownership of all other Environmental Attributes (if any)."[132]

2. "During the Renewable Resource Sufficiency Period, and any period within the Term of this Agreement after completion of the first fifteen (15) years after the Commercial Operation Date, Seller shall retain all Environmental Attributes in accordance with the Schedule."[133]

The next two are from the third paragraph on page 12 of Schedule 201, back to back:

3. "Sellers will retain all Environmental Attributes generated by the facility during the Renewable Resource Sufficiency Period."[134]

4. "A Renewable QF choosing the Renewable Fixed Price Option must cede all RPS Attributes generated by the facility to the Company during the Renewable Resource Deficiency Period."[135]

And the last sentence is from the last paragraph from page 12 of Schedule 201:

5. "Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price and will retain all Environmental Attributes generated by the facility for all years up to five in excess of the initial 15."[136]

What is immediately clear, first, is that the words "as specified in the Schedule" and "in accordance with the Schedule" in the first two sentences modify the words immediately preceding them, *i.e.* who retains the attributes and when, and not, as defendants propose, merely define the dividing date between the Renewable Resource

[132] Compl., Ex. 1 at 10 (Alfalfa Solar I LLC PPA at Section 4.5).
[133] *Id.* at 10-11 (Alfalfa Solar I LLC PPA at Section 4.5).
[134] *Id.* at 30 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-12).
[135] *Id.*
[136] *Id.*

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Sufficiency and Deficiency Periods. Defendants' position, as a matter of grammar, is wrong.

Second, the three sentences in the Schedule 201 clearly provide when PGE acquires and defendants retain ownership of the Environmental Attributes. Thus, defendants' proposition that Section 4.5 looks to Schedule 201 solely to find the dividing date between Sufficiency and Deficiency periods is contradicted by those three sentences in Schedule 201.

The five sentences, read together, provide for ownership of the Environmental Attributes as follows. Sentence 3 (from Schedule 201) and parts of Sentence 2 ("During the Renewable Resource Sufficiency Period . . . Seller shall retain all Environmental Attributes in accordance with the Schedule") both provide that defendants retain the attributes during the Sufficiency Period. Sentence 1 (from Section 4.5) and Sentence 4 (from Schedule 201) both provide that defendants must cede the RPS Attributes to PGE during the Deficiency Period, without any time limitation. Those sentences provide that ownership of the Environmental Attributes depends on the Sufficiency/Deficiency Period, regardless of when execution and COD occur.

The middle part of Sentence 2 and Sentence 5 introduce a time limitation as to Environmental Attribute ownership. Sentence 2 provides that 15 years after COD, defendants retain the Environmental Attributes. That sentence does *not* preclude them from obtaining the Environmental Attributes before 15 years from COD. And then Sentence 5 provides that for "Sellers with PPAs exceeding 15 years[,]" those Sellers "retain all Environmental Attributes generated by the facility for all years up to five in excess of the initial 15." That means, and can only mean, "initial 15" years *of the PPA* because "PPA" starts the sentence. And the PPA starts at execution.[137] PGE's interpretation—that Sentence 5 provides both up to five years of Mid-C prices and up to five years of Environmental Attributes being retained by defendants after the initial 15 years of the PPA

[137] PGE's Resp. at 9-10.

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after execution—is required by the plain text of Schedule 201, and it is consistent with and is not contradicted by Section 4.5.

At most, there is a redundancy in that both Section 4.5 and Schedule 201 provide that defendants retain the environmental attributes in the last few years of the PPA. Contrary to the NewSun Parties' assertions, any potential redundancy between the Schedule and the PPA's discussion of Environmental Attribute ownership is not a "fatal"[138] contradiction, even under a contract analysis. The NewSun Parties confuse redundancy with contradiction. As the NewSun Parties' own case law states, courts must reconcile the provisions of a contract "if it is at all possible."[139] Thus, provisions discussing the same subject matter may be "redundant" but both will be given effect if they are not "irreconcilably contradictory."[140] For instance, in *Gemstone Builders, Inc. v. Stutz*, a contract defined the claims subject to arbitration in two separate paragraphs. One paragraph used language broader than the other. The Court of Appeals held that the narrower paragraph, which only described a subset of the claims subject to arbitration, was merely "redundant" because it described claims already included in the broad paragraph.[141] Similarly, here, Section 4.5 is merely redundant because it describes QF retention of Environmental Attributes for years that are already covered by Schedule 201's provisions on QF retention of Environmental Attributes. Alternatively, if the Commission applies statutory construction principles to the PPAs, it is well-established that "in legal drafting, redundancy is a fairly common phenomenon."[142]

The NewSun Parties also read importance into the following sentence of Section 4.5: "The Contract Price includes full payment for the Net Output and any RPS Attributes transferred to PGE under this Agreement."[143] This sentence merely states that the Contract Price fully compensates the QF for any RPS Attributes it transfers. The sentence says

[138] Defs.' Resp. at 13.
[139] *New Zealand Ins. Co. v. Griffith Rubber Mills,* 270 Or 71, 75 (1974) (citation omitted).
[140] *Gemstone Builders, Inc. v. Stutz*, 245 Or App 91, 94 (2011).
[141] *Id.* at 97.
[142] *Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 195 (2009).
[143] Defs.' Resp. at 15.

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nothing about how to calculate the "Contract Price," and whether the Contract Price is the fixed price or the Mid-C Index price, let alone the start date of the fixed-price period. Instead, the defined term "Contract Price" directs the reader to the price "as specified in the Schedule,"[144] confirming that Schedule 201, and not Section 4.5, defines the start date of the fixed-price period. The NewSun Parties' focus on Section 4.5 is a red herring.

F. The NewSun Parties erroneously contend that there are two different "terms" in the PPA and the Schedule.

The NewSun Parties' textual argument hinges on the counter-intuitive idea that the word "Term" as used in the PPA form means something different than the "term" as used in Schedule 201. The NewSun Parties point to use of the word "term" in the provision of Schedule 201 providing that fixed prices are "available for a maximum term of 15 years."[145] But this provision cannot define the start date of the fixed-price period because it says nothing about when the "maximum term" of fixed prices begins. Use of the generic phrase "*a* maximum term" does not invoke *the* term of the contract. In any event, use of the qualifier "available for" means that at most fixed pricing is "available for" a maximum period of power purchases of 15 years.

Nonetheless, the NewSun Parties contend that this Schedule 201 provision defines the start date of the fixed-price period, and the use of the word "term" means that the fixed-price period begins at the Commercial Operation Date.[146] As discussed in PGE's response brief, the trade usage evidence that the NewSun Parties proffered is irrelevant and inadequate because it (1) does not discuss Oregon or PURPA;[147] (2) does not establish a "uniform" trade usage of the word "term;"[148] and (3) was rejected by PGE during contract discussions.[149] Because PGE rejected the trade usage meanings during discussions, defendants' and intervenors' trade usage evidence of the meanings of the words in the

[144] Compl., Ex. 1 at 2 (Alfalfa Solar I LLC PPA at Section 1.6).
[145] Defs.' Resp. at 7-9.
[146] *Id.* at 9.
[147] *See* PGE's Resp. 17.
[148] *Id.* at 17-18.
[149] *Id.* at 15-16.

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NewSun PPAs is inadmissible under Oregon Supreme Court precedent. Trade usage "evidence . . . is admissible and the contract will be construed according to that meaning *if it is further proved that the words were used and understood in that sense*."[150] Here, there is no dispute: PGE did *not* use and understand the words in the NewSun PPAs to have the industry usage meanings that defendants' and intervenors' witnesses now ascribe to the terms in the PPAs.[151]

As discussed below, the purported trade usage testimony must be rejected for the additional reason that it contradicts the language of the NewSun PPAs.

1. The definition of "Term" from the PPAs applies to Schedule 201.

As discussed above, when a written instrument refers in specific terms to another writing as containing part of the agreement, the other writing is itself a part of the contract between the parties.[152] Here, Schedule 201 explicitly refers to the PPA, and both were entered into as part of the same transaction. Thus, the defined terms of the PPA apply to Schedule 201.[153] The Commission should not interpret Schedule 201 as inexplicably contradicting the definition of "Term" in the PPA, which begins at "execution."

The NewSun Parties read importance into the failure to capitalize the word "term" in Schedule 201. But in Oregon, the failure to capitalize a defined word when using it, does not render the definition inapplicable. In *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, a construction contract between a contractor and a property owner defined "the date of Substantial Completion" as the date the architect provided a certificate of substantial completion.[154] A separate accrual provision stated that a claim for breach of contract accrued on "the date of substantial completion."[155] The Court of Appeals rejected

[150] *Bernard*, 275 Or at 155 (emphasis added).
[151] PGE/214, True/1 (Dec. 14, 2015, PGE letter to defendants stating, "In your letter you argue that PGE's treatment of this issue is different than that of other utilities. However, as you know, PGE is only obligated to follow its own Commission-approved contracts and schedules, not those of other utilities.").
[152] *Weber*, 256 Or at 483 (citation omitted); *supra*, Argument § II.B.
[153] *Colen*, 516 BR at 626 (using defined term from one writing to interpret provisions of another).
[154] *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, 254 Or App 24, 29, *aff'd*, 355 Or 286 (2014).
[155] *Id.* at 28.

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the argument that the accrual clause intended to incorporate a "more general definition" of substantial completion, when the building was available for use.[156] The NewSun Parties attempt to distinguish *Sunset* by contending that the court did not discuss capitalization.[157] But the court held that the definition of "the date of Substantial Completion" applied to a provision describing only "the date of substantial completion."[158] That holding would not be possible if lack of capitalization rendered a definition inapplicable. Authority from other jurisdictions confirms that a failure to capitalize a defined term when using it does not render a definition inapplicable.[159]

Further, in this case, the NewSun Parties themselves did not read any importance in the failure to capitalize a defined term when using it in a PPA. The NewSun Parties initially filled out PPA forms that terminated at the end of the 20th "contract year," which Stephens himself admits meant "Contract Year."[160] Similarly, the Idaho Power schedule states that fixed prices begin "after the end of the fifteenth (15th) contract year,"[161] and the NewSun Parties apparently agree that this schedule provision refers to the defined phrase "Contract Year" from the PPA.[162] The law and the NewSun Parties' own real-world application of it to Oregon PPAs demonstrates that Schedule 201's failure to capitalize "term" is inconsequential.

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[156] *Id.* at 29.
[157] Defs.' Resp. at 8-9.
[158] *Id.* at 28.
[159] *See BE & K Eng'g Co., LLC v. RockTenn CP, LLC*, No. CIV.A. 8837-VCL, 2014 WL 186835, at *15 (Del. Ch. Jan. 15, 2014), *judgment entered sub nom. Be&k Eng'g Co., LLC v. Rocktenn Cp, LLC* (Del. Ch. 2014), *and aff'd,* 103 A3d 512 (Del. 2014) (rejecting argument that failure to capitalize case "project" in an engineering contract barred application of the defined term "Project"); *Paragon Tax Grp., LLC v. Broadview Networks Holdings, Inc.*, 503 F Appx 161, 162 (3d Cir. 2012) (rejecting argument that failure to capitalize "refund" in a tax preparation services contract barred application of defined term "Refund").
[160] NewSun Parties/100, Stephens/16-17.
[161] Adams Declaration, Ex. F at 19 (Docket No. UM 1610, ldaho Power Co.'s July 3, 2014 Compliance Filing with Order No. 14-058, Schedule 85 at Original Sheet 85-5).
[162] Defs.' Mot. at 62 (interpreting Idaho Power's schedule as providing "fifteen years of fixed prices after operations or expected operations").

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2. The parties agreed that the definition of "Term" from the PPA forms applies to Schedule 201.

Separately, the NewSun Parties' trade usage evidence must be rejected because the parties agreed that the "term" in Schedule 201 begins at execution. This agreement that "term" in Schedule 201 begins at execution arose because the word "term" in Schedule 201 has temporal limitations. Schedule 201 defines the "TERM OF AGREEMENT" as "Not less than one year and not to exceed 20 years."[163] By contrast, the "Term" in the PPA begins on the effective date, but has no explicit temporal limitations in the blank PPA form itself.[164] During contract discussions, the NewSun Parties contended that the "term" in Schedule 201 did not coincide with the "Term" of the PPA, and each QF could therefore select any "Term" length in the PPA form. As Stephens states in his testimony, "I was not, and am not aware, of any provision of the form contract that specified that the agreement could not exceed any particular length."[165] Consistent with that reading, the NewSun Parties sought PPAs with a "Term" that began at execution but extended 20 years after the Commercial Operation Date for a total "Term" of more than 20 years.[166]

In response, PGE explained that, consistent with Schedule 201's 20-year maximum, the contract term in the form PPA "must run no more than 20 years from EXECUTION, not commercial operation."[167] PGE's position necessarily linked the "Term" of the PPA to the "term" of Schedule 201. Stephens initially disagreed, and informed PGE "in [his] view, the contract forms and Schedule 201 plainly contemplated that a QF would receive twenty-year terms starting on the Commercial Operation Date."[168] Again, because the "Term" of the PPA begins at execution and the "term" in Schedule 201 is "not to exceed 20 years," Stephens' interpretation makes sense only if those words have

[163] Compl., Ex. 1 at 36 (Alfalfa Solar I LLC' PPA, Schedule 201 at Sheet No. 201-24).
[164] *See id.* at 6 (Alfalfa Solar I LLC PPA at Section 1.38).
[165] NewSun Parties/100, Stephens/14.
[166] *Id.* at 17.
[167] New Sun Parties/111, Stephens/1 (October 21, 2015, Email from Bruce True to Jake Stephens) (emphasis in original).
[168] NewSun Parties/100, Stephens/18.

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different meanings as used in the PPA and Schedule 201. But PGE disagreed again and explained that the "end date should be the 20th anniversary of the effective date, not the 20th contract year in Section 2.3."[169]

Thus, PGE's position was that the 20-year temporal limitation from Schedule 201's definition of "term" applied to the PPA. Defendants ultimately conceded the point. Stephens submitted PPA forms with a "Term" that "would not extend more than twenty years past the Effective Date."[170] Stephens admits that he conceded this point "to obtain fully executed PPAs with PGE before [PGE's] new rates went into effect." [171] In their briefing, the NewSun Parties admit that they "deci[ded] to forego their attempt to obtain the twenty-year contract term," singular and lower-case, to mean a term of 20 years from COD.[172] Thus, there is no question that the NewSun Parties agreed during discussions that the "term" in the Schedule 201s and the "Term" in the NewSun PPAs were the same 20-year contract term. Because the "Term" of the NewSun PPAs explicitly begins at "execution,"[173] the "term" of Schedule 201 does as well.

None of defendants' and intervenors' trade usage witnesses testified that the 20-year "Term" of a PPA begins on a different date than the 15-year "term" of fixed prices. Instead, the trade usage witnesses testified that a PPA has a single "term," which normally begins with commercial operations.[174] But here, the 20-year contract "Term" began at execution, not at the Commercial Operation Date. The trade usage witnesses did not testify to any industry practice in which a PPA defines the "Term" as beginning at execution, but then still used the phrase "term" to describe a period beginning at the Commercial

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[169] *Id.*; NewSun Parties/112, Stephens/1 (October 28, 2015, Email from Bruce True to Jake Stephens); NewSun Parties/113, Stephens/1 (October 28, 2015, Email from Bruce True to Jake Stephens); NewSun Parties/114, Stephens/1 (October 28, 2015, Email from Bruce True to Jake Stephens).
[170] NewSun Parties/100, Stephens/25.
[171] NewSun Parties/100, Stephens/24.
[172] Defs.' Resp. at 30.
[173] Comp., Ex. 1 at 6 and 7 (Alfalfa Solar I LLC PPA at Section 1.38 and Section 2.1).
[174] NewSun Parties/100, Stephens/8 (defining "term of the PPA" as "*the* power purchase/sale period") (emphasis added); NewSun Parties/200, Harnsberger/2 (defining "term" as "*the* period during which the facility is operating and expected to be delivering and selling power") (emphasis added); CREA-NIPPC-REC/100, Lowe/3 (same).

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Operation Date. The trade usage witnesses' evidence regarding different contract language does not apply here because in the NewSun PPAs, the term begins at execution.

Further, it is black-letter law that trade usage cannot vary written contract language.[175] For instance, in *Asbury Transportation Co. v. Consolidated Freightways Corp. of Delaware*, the parties to a truck lease disagreed over whether the lessor or the lessee paid fuel taxes. The lease stated that the truck owner would pay all "maintenance and/or operating expenses."[176] The parties disagreed about whether the fuel taxes were an "operating expense."[177] To explain the definition of "operating expense" the lessor offered undisputed evidence that in the commercial trucking industry the custom and practice was for the owner of the equipment to pay all fuel taxes.[178] The Court of Appeals held that this trade usage evidence was inadmissible.[179] The lease and extrinsic evidence of the parties' intent showed that the lease incorporated by reference the lessor's contract with a union.[180] The union contract provided that the lessor paid fuel taxes.[181] Thus, the terms of this other writing applied and could not be contradicted by the trade usage evidence.[182]

The *Asbury* analysis is directly applicable to this case. Schedule 201 refers specifically to the "Standard Power Purchase Agreement."[183] The parties' contract discussion history demonstrates that the definition of "Term" from the PPA applies to Schedule 201. The "Term" of the PPA begins at "execution."[184] Thus, defendants' and intervenors' trade usage evidence cannot vary these written provisions and create a Schedule 201 "term" that begins at the Commercial Operation Date.

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[175] Restatement (First) of Contracts § 247 (1932) ("[I]f the words of their agreement read in the light of accompanying circumstances warrant the conclusion that they did not contract with reference to the usage, it is not applicable.")
[176] *Asbury Transp. Co. v. Consol. Freightways Corp. of Del.*, 263 Or 53, 61 (1972).
[177] *Id.* at 60-61.
[178] *Id.* at 61.
[179] *Id.* at 63.
[180] *Id.* at 59-60.
[181] *Id.* at 61.
[182] *Id.*
[183] Compl. Ex. 1 at 25 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-1).
[184] *Id.* at 6, 7 (Alfalfa Solar I LLC PPA at Section 1.38 and Section 2.1).

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3. Post-execution revisions to PGE's standard contract forms are not relevant.

The NewSun Parties point to post-execution revisions to PGE's PPA forms that unambiguously provide for a 20-year "term" beginning at the Commercial Operation Date in Schedule 201, and a "Term" in the PPA that begins at execution but also ends 20 years after the Commercial Operation Date.[185] These materially-different provisions from other standard contracts are irrelevant to the NewSun PPAs. The NewSun PPAs did not explicitly provide for different definitions of "Term" in the PPA and "term" in the Schedule 201. In fact, the parties agreed to apply a single definition of "Term" and "term" across both documents. Further, the apparent distinction between the "Term" and "term" in the revised forms is a distinction without a difference even within those forms, because the "Term" and "term" both extend 20 years after COD, and the fixed-period in those forms explicitly begins at "Commercial Operation Date."[186] Regardless, post-execution conduct can be used only to resolve an ambiguity at step 2 of a contract interpretation analysis; post-execution conduct is inadmissible at step 1.[187]

G. The NewSun Parties' interpretation of their PPAs would result in the NewSun Parties receiving more than fifteen years of fixed prices.

The NewSun Parties have backtracked from their original position that the fixed prices "become relevant only after"[188] the Commercial Operation Date, because power deliveries only begin at commercial operations. Now the NewSun Parties admit that they committed to sell their "Net Output" starting at "execution" not at commercial operations.[189] The NewSun Parties also agree that this Net Output includes months of initial deliveries and test energy prior to the Commercial Operation Date.[190] The NewSun

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[185] Defs. Resp. at 8-9.
[186] PGE/108, Macfarlane/9, 36 (PGE's July 20, 2017 Compliance Filing in Docket No. UM 1805, Standard Renewable Off-System Variable PPA at Sections 1.38 and 2.1, and Schedule 201 at Sheet No. 201-12).
[187] *See Brunick v. Clatsop County*, 204 Or App 326, 338 (2006) (holding that post-execution course of dealing not admissible to establish ambiguity).
[188] Defs.' MSJ at 38 ("[t]he fixed prices provided for by the PPAs . . . become relevant *only after* the Facility is developed and achieves commercial operation.").
[189] Defs. Resp. at 9.
[190] *Id.* at 10.

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Parties admit that these pre-COD deliveries receive fixed prices.[191] The NewSun Parties contend that these pre-COD fixed prices are somehow not part of the fixed-price period.[192] But accepting the NewSun Parties position would mean that the QFs receive fixed prices for more than 15 years. Such a result is contrary to Order No. 05-584, which stated that "standard contract prices should be fixed for only the first 15 years of the 20-year term."[193]

Further, the NewSun Parties new admissions expose additional weaknesses in their trade usage witnesses' testimony. The NewSun Parties' trade usage experts testified that the fixed prices should begin only after commercial operations because power deliveries begin only at commercial operations. Harnsberger testified "before operations commence, no price is paid at all for electricity not delivered."[194] Similarly, John Lowe testified that "power purchases occur . . . after the point of operations."[195]

But as the NewSun Parties now admit, their own experts are wrong.[196] The QF receives fixed prices for months prior to the commercial operation date. Thus, it was perfectly sensible for PGE to file, and the Commission to approve, a PPA that began the fixed price period at execution, not at the Commercial Operation Date. The NewSun Parties only recently acknowledged the existence of these provisions, and their experts failed to consider them.

H. The Commission can consider PGE's economic impact evidence without engaging in ratemaking.

PGE's citation to economic impact evidence does not force the Commission to engage in ratemaking. As PGE successfully argued in its opposition to the NewSun Parties' motion to strike this evidence, the magnitude of the economic impact to PGE's customers makes it implausible that PGE and the Commission implicitly and silently changed the start date of the fixed-price period from execution to the Commercial

[191] *Id.*
[192] *Id.*
[193] Docket No. UM 1129, Order No. 05-584 at 20.
[194] NewSun Parties/200, Harnsberger/5.
[195] CREA-NIPPC-REC/100, Lowe/7.
[196] *See* Defs. Resp. at 9-10.

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Operation Date in the 2014 revisions to PGE's standard contract forms.[197] In *Heathman Hotel Portland, LLC v. McCormick & Schmick Restaurant Corp.*, a hotel entered into a lease with a restaurant with two 10-year renewal options.[198] Each of the renewal options in the original lease carried with them minimum gross sales.[199] A subsequent lease amendment lowered the lengths of the renewal options from ten years to five years, but made no mention of the minimum gross sales.[200] When the restaurant attempted to exercise a renewal option, the parties disputed whether the amendment still conditioned the renewal option on minimum gross sales.[201] The Court of Appeals held that parties would not have "silently delete[d] a condition that appears to have been so important in the original lease."[202] Here, the sheer magnitude of the economic impact suggests that PGE and the Commission would not have "silently" amended the start date of the fixed-price period. In seeking to exclude this evidence, the NewSun Parties confuse proper means of PPA interpretation with improper PPA modification.

I. Intervenors' attacks on PGE's motivations are unfounded and irrelevant.

In their response, intervenors contend that PGE's efforts in this case are secretly motivated by an effort to delay resolution and force the NewSun Parties (and other unspecified QFs) out of business in the interim.[203] The intervenors' assertions are offensive, unfounded and wrong. The NewSun Parties have known about this potential disagreement between the parties since November 2015, but waited until January 2018 to file suit. They wasted time and resources by filing in federal court, which precipitated a time-consuming jurisdictional dispute that the NewSun Parties lost.

[197] PGE's Resp. to Defs.' Mot. to Strike at 8-9 (Dec. 28, 2018).
[198] *Heathman,* 284 Or App 112, 113-14 (2017).
[199] *Id.*
[200] *Id.* at 114-15.
[201] *Id.* at 120-21.
[202] *Id.* at 121.
[203] Intervenors' Resp. at 4-5.

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For one, defendants did not pursue the expedited dispute resolution process available to QFs prior to execution of their PPAs. In Order No. 15-130, the Commission approved the stipulation of (among others) PGE, REC and CREA that QFs will have access to an expedited dispute resolution process for questions of standard PPA formation, a process that that was initially created in 2007 for non-standard PPAs.[204] That order revised Schedule 201 to provide an expedited process "to adjudicate disputes regarding the formation of the standard contract."[205] Despite knowing that they had this expedited process,[206] defendants did not pursue expedited resolution when the dispute arose in November 2015, and in fact continued to execute NewSun PPAs through late June 2016 without ever triggering this process.[207]

Further, the NewSun Parties chose not to intervene in a related matter filed shortly after they executed their PPAs. In December 2016, intervenors in this case filed a complaint in Docket No. UM 1805 asking the Commission to determine whether the Commission's then-existing orders required PGE to offer 15 years of fixed pricing from the Commercial Operation Date in its existing PPAs.[208] The NewSun Parties' parent company, NewSun Energy, participated in an initial prehearing conference in December 2016,[209] but chose not to intervene until the Commission decided the issue in PGE's favor and dismissed the complaint in July 2017.[210] At that point their intervention was untimely, and the Commission correctly denied their motion to intervene.[211]

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[204] Docket No. UM 1610, Order No. 15-130 at 3 ("The stipulating parties agree that a slightly modified version of the dispute process … should be available to QFs and utilities entering into standard contracts."), Appendix A at 3 (Section III.D of the stipulation) (Apr. 16, 2015).
[205] Compl., Ex. 1 at 36 (Alfalfa Solar I PPA, Schedule 201 at Sheet No. 201-24).
[206] Defendants knew of this process in 2015 because it was in the Schedule 201, and because their counsel, Greg Adams, had earlier in 2015 signed the stipulation on behalf of CREA. Docket No. UM 1610, Order No. 15-130, Appendix A at 6.
[207] Compl. ¶ 16 (showing chart of execution dates of the New Sun PPAs).
[208] Docket No. UM 1805, Complaint (Dec. 6, 2016).
[209] Suppl. Jindal Declaration, Ex. 3 at 1 (Docket No. UM 1805, ALJ Prehearing Conference Memorandum (Dec. 22, 2016)).
[210] Docket No. UM 1805, Order No. 17-256 at 4; Docket No. UM 1805, NewSun Solar Projects' Joint Petition to Intervene Out of Time (Sep. 8, 2017).
[211] Suppl. Jindal Declaration, Ex. 4 at 3 (Docket No. UM 1805, Order No. 17-418 at 3 (Oct. 16, 2017)).

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The NewSun Parties then delayed matters further by filing in federal district court, when this Commission has primary jurisdiction over interpretation of standard contracts.[212] This errant filing created a protracted jurisdictional dispute that PGE ultimately won.[213] After it won the jurisdictional dispute, PGE agreed to an expedited schedule in this case.[214] The unbroken record demonstrates that the NewSun Parties caused any delays, not PGE. Intervenors' attacks on PGE are offensive, inaccurate, and irrelevant.[215]

J. PGE is not taking inconsistent positions in different proceedings.

Intervenors also contend that PGE is taking inconsistent positions in this case compared to a different proceeding—the *Bottlenose Solar* cases. Intervenors failed to mention that the other matter concerns a different issue entirely than the issue here: that "a QF must proceed through the Section 201 process and reach the point where it is entitled to an executable PPA before it can establish a LEO."[216] There is no question in this case with the NewSun Parties as to whether they pursued, or were precluded from pursuing, the 201 process and whether and when they had an executable PPA. The disagreement at issue here—when the 15-year fixed price period begins—was irrelevant to whether and when defendants had executable PPAs and LEOs. As defendants (wrongly) contend, the PPAs they signed (*i.e.* an executable PPA) entitled them to the interpretation they seek, hence the issue in dispute here is completely different than the issue in *Bottlenose Solar* where those QFs claimed that they had a LEO before finishing the 201 process with PGE and before receiving an executable PPA. That situation is fundamentally different from the situation

[212] Docket No. UM 1931, Order No. 18-174 at 3-5 (May 23, 2018).
[213] *See id.* at 6.
[214] Docket No. UM 1931, Parties' Joint Mot. to Set Procedural Schedule at 1 (noting "the parties' agreement to litigate on an expedited basis") (Nov. 16, 2018).
[215] Intervenors' unfounded *ad hominem* attacks accusing PGE of causing "delay and uncertainty [to] benefit PGE's shareholders" and its hyperbole that PGE is trying to be "all three branches of government" (among other baseless accusations), see Intervenors' Resp. at 3 & 5, point to the need for the Commission and ALJs, in the future, to more closely scrutinize whether to grant intervenor status to parties that do not have separate and independent interests from the original parties to the proceeding, and instead are merely re-stating one existing party's position without adding any substantive argument.
[216] *Bottlenose Solar, LLC v. Portland General Electric Co.*, Docket No. UM 1877, PGE's Resp. in Opposition to Complainants' Motion for Leave to File a Supplemental Response at 8 (Sept. 28, 2018), *available at* https://edocs.puc.state.or.us/efdocs/HAC/um1877hac144142.pdf.

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here, and nothing precluded the NewSun Parties from triggering the expedited dispute resolution process when they received executable PPAs or after they signed them.[217]

III. CONCLUSION

The Commission should grant PGE's motion for summary judgment. The text that the defendants receive Mid-C Index prices after the "initial 15" years of the PPA is unambiguous. The history of PGE's approved PPA forms shows that there is no ambiguity concerning that text, and the parties' pre-execution discussions also remove any ambiguity from the PPAs that PGE offered and defendants accepted. Order No. 05-584, contrary to intervenors' and defendants' positions, did not require PGE to offer PPAs with the 15-years starting at COD, and, consistent with what PGE was allowed to do, PGE offered PPAs with 15-years of fixed prices commencing at execution. The Commission should enter an order declaring that in the NewSun PPAs, the 15-years of fixed-prices commenced at execution.

DATED this 1st day of March, 2019.

Respectfully submitted,

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[217] Docket No. 1610, Order No. 16-174 at 3 & 27-28 (May 13, 2016) (stating rule for when a LEO is formed and stating that "[a] QF *should* alert us of a dispute [during the contracting process] by filing a complaint." (emphasis added)).

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, DAYTON SOLAR I LLC, FORT ROCK SOLAR I LLC, FORT ROCK SOLAR II LLC, FORT ROCK SOLAR IV LLC, HARNEY SOLAR I LLC, RILEY SOLAR I LLC, STARVATION SOLAR I LLC, TYGH VALLEY SOLAR I LLC, WASCO SOLAR I LLC, Defendants.	**SUPPLEMENTAL DECLARATION OF ANIT JINDAL IN SUPPORT OF PORTLAND GENERAL ELECTRIC'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

I, Anit Jindal declare:

1. I am complainant's attorney, and I make this declaration in support of Portland General Electric's Reply in Support of Motion for Summary Judgment. The following statements are true and correct and, if called upon, I could competently testify to the facts averred herein.

2. Attached as **Exhibit 2** is a true and accurate excerpt of a copy of the Respondent's Answering Briefing, filed in the appeal of Public Utility Commission of Oregon, Docket No. UM 1805, *Northwest and Intermountain Power Producers Coalition, et al. v. Portland General Electric Company,* Court of Appeals of the State of Oregon, Case No. CA A167707 (Feb. 14, 2019).

3. Attached as **Exhibit 3** is a true and accurate copy of *Northwest and Intermountain Power Producer's Coalition, Renewable Energy Coalition, and Community Renewable Energy Association v. Portland Gen. Elec. Co.,* Docket No. UM 1805, ALJ Prehearing Conference Memorandum (Dec. 22, 2016).

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4. Attached as **Exhibit 4** is a true and accurate copy of *Northwest and Intermountain Power Producer's Coalition, Renewable Energy Coalition, and Community Renewable Energy Association v. Portland Gen. Elec. Co.,* Docket No. UM 1805, Order No. 17-418 (Oct. 16, 2017).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 1st day of March, 2019.

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By: */s/ Anit K. Jindal*
Anit K. Jindal, OSB #171086

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FILED February 14, 2019 11:17 AM
Appellate Court Records

IN THE COURT OF APPEALS OF THE STATE OF OREGON

NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, COMMUNITY RENEWABLE ENERGY ASSOCIATION, RENEWABLE ENERGY COALITION, and THE PUBLIC UTILITY COMMISSION OF OREGON, Respondents, v. PORTLAND GENERAL ELECTRIC COMPANY, Petitioner.	Public Utility Commission of Oregon No. UM1805 CA A167707

RESPONDENT'S ANSWERING BRIEF

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

Continued...

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RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE CASE

Respondent Public Utility Commission (PUC) accepts petitioner Portland General Electric Company's (PGE's) statement of the case, except to the extent that the PUC supplements the facts in its argument below.

Summary of Argument

The PUC ordered PGE to modify its standard form for contracting with certain Qualifying Facilities (QFs, which generate power that, pursuant to federal and state law, PGE must purchase) to provide, on a going forward basis, that the 15-year period during which PGE must purchase power at a fixed rate begins when the QF begins generating power. The PUC did not order any changes to contracts that PGE had previously entered into with QFs. According to PGE, those contracts provided that the 15-year fixed-price period began at contract execution, which may be up to three years before a QF begins generating power. PGE seeks judicial review of PUC's order.

To effect the change to PGE's future QF contracts, the PUC directed PGE to revise its standard form contract on file with the PUC to comply with the PUC's order that the 15-year fixed-price period begins "when the QF transmits power to the utility." PGE complied, the PUC issued orders approving those compliance filings, and PGE did not seek judicial review of those orders.

This case is moot because PGE did not seek judicial review of the PUC orders approving its compliance filings. Because PGE changed its standard contract form in those filings to comply with the orders on review in this case, and because it is now too late for PGE to seek judicial review of those compliance filings, a decision by this court in this case will have no practical effect on the rights of the parties.

In any event, the PUC's orders on review (its initial order and two orders on reconsideration) are supported by substantial reason and, if they established new policy, the PUC permissibly did that. The PUC explained that the prices paid to QFs "are only meaningful when a QF is operational and delivering power to the utility," and that the ordered change to PGE's future QF contracts was consistent with the PUC's statewide policy concerning QF contracts that it adopted in 2005. To the extent that the change that the PUC ordered to PGE's future QF contracts was a change in PUC policy, the PUC may make such a change in a contested case order. Accordingly, if this court does not dismiss this case as moot, this court should affirm the PUC's orders.

ANSWER TO ASSIGNMENT OF ERROR

The PUC's orders on review, including its directive that PGE prospectively change when the 15-year fixed priced period in its standard QF contracts begins, are supported by substantial reason.

A. Preservation of Error

PGE preserved its claim of error.

B. Standard of Review

This court reviews PUC's orders for legal error and to determine whether the agency's findings of fact are supported by substantial evidence. ORS 183.482(8)(c); *see* ORS 756.610(1)(a) (PUC orders "subject to judicial review under the provisions of ORS 183.480 to 183.497"). The court reviews the conclusions that an agency draws from its findings of fact for substantial reason, "which means that the agency's conclusions must reasonably follow from the facts found." *Kay v. Employment Dept.*, 292 Or App 700, 703, 425 P3d 502 (2018);

ARGUMENT

The PUC ordered PGE to prospectively modify its standard form contracts for certain Qualifying Facilities (QFs)—facilities that generate renewable power that PGE is required by federal and state law to purchase—to provide that the 15-year period during which PGE must pay certain QFs a fixed price for the power they sell to PGE begins on the date the QF begins transmitting power.[1] Previously, PGE's standard form contract arguably allowed for the 15-year fixed-price period to begin on the date that PGE and the

[1] The contracts at issue in this case are available to QFs with a capacity of up to 10 megawatts. (ER 2).

QF executed the contract, which may occur up to three years before the QF begins transmitting power.[2] PGE's challenge to PUC's order is moot, because PGE did not seek review of PUC's orders approving PGE's filings with the PUC that changed its contracts to provide that the 15-year term begins when the QF begins generating power. In any event, the PUC's order is supported by substantial reason.

A. Since 2005, electric utilities in Oregon have been required to enter into contracts with QFs for 20-year terms that include a fixed-price period of 15 years.

1. PUC reexamined its policies applicable to QFs in 2005.

In 2005, the PUC reexamined its policies under the federal Public Utility Regulatory Policies Act of 1978 (PURPA). That Act encourages resource competition and development of cogeneration and renewable energy technologies by QFs. Order No. 05-584 at 6;[3] *see generally Snow Mt. Pine Company v. Maudlin*, 84 Or App 590, 593-96, 734 P2d 1366, *rev den*, 303 Or 591 (1987) (describing regulatory framework). The PUC sought to balance the competing goals of accurately pricing QF power and ensuring that QFs would

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[2] In an order pertaining to PGE's contracts that is not under review in this case, PGE and QFs agreed that "the scheduled commercial operation date chosen by the QF must be within three years of the date of the execution of the standard contract[.]" (ER 4).

[3] PGE included excerpts of Order No. 05-584 in the appendix of its opening brief. A copy of the entire 60-page order is available at https://apps.puc.state.or.us/orders/2005ords/05-584.pdf.

be able to obtain financing. Order No. 05-584 at 19-20. The Oregon Department of Energy recommended that the term of QF contracts should be 20 years, with a 15-year fixed price period, in order to make it more likely that QFs would be able to obtain financing for their projects. *Id.* at 20. The PUC adopted that recommendation for QFs that generate up to 10 megawatts, while larger QFs would have to enter into negotiated contracts with the utility. *Id.* The PUC directed the utilities to file a standard contract form to be included in their tariffs on file with the PUC. Order No. 05-584 at 20, 59.

All three electric utilities operating in Oregon filed tariffs to comply with that order. Idaho Power's and PacifiCorps' standard contracts each provided that the 15-year fixed price period available to QFs generating up to 10 megawatts began when the QF began to deliver power to the utility. *See* Order No. 16-175 at 2-3 (available at https://apps.puc.state.or.us/orders/2016ords/16-175.pdf) (describing contracts). In contrast, PGE's tariff, Schedule 201, did not unambiguously provide that the 15-year fixed price period began on the date that the QF began to generate power. (Rec 311 (Schedule 201), 331 (standard contract)).

2. Complainants challenged PGE's standard contract.

This case began when complainants[4] filed a complaint under ORS 756.500(1) alleging that PGE's practice of beginning the 15-year period of fixed prices from the date of contract execution violated PUC orders and policy.[5] (Rec 16). They sought rulings that PGE's standard contract required the 15-year fixed price period to begin on the date the QF began delivering power to PGE and, alternatively, an order requiring PGE to revise its standard contract to conform to that principle. (*Id.*).

Complainants and PGE filed motions for summary judgment. (Rec 231, 267). Complainants sought a ruling that "the 15 years of fixed prices run from the time a facility delivers its net output rather than upon contract execution." (Rec 261). PGE sought a ruling that the PUC's "existing orders" allowed the

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[4] Complainants Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association and Renewable Energy Coalition each represent, or consist of, non-utility owned renewable power generators in Oregon. (Rec 4-5).

[5] ORS 756.500(1) provides:

> Any person may file a complaint before the Public Utility Commission, or the commission may, on the commission's own initiative, file such complaint. The complaint shall be against any person whose business or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or regulation of which is conferred upon the commission. The person filing the complaint shall be known as the complainant and the person against whom the complaint is filed shall be known as the defendant.

15-year fixed price term to commence on the date of contract execution. (Rec 301).

The difference in when the 15-year fixed price period begins is significant, because a QF may not begin to generate power for up to three years after execution of the contract. (ER 4, n 5). Accordingly, because payments begin when the QF begins to generate power, the QFs received 15 years of fixed prices under Idaho Power's and PacifiCorps' standard QF contracts. Under PGE's, QFs received the fixed price for as little as 12 years.

3. PUC ordered a prospective change to PGE's standard contract.

In Order No. 17-256, which is one of the orders on review in this case, the PUC granted PGE's motion for summary judgment and thus did not grant complainants' request that PGE's existing QF contracts should be interpreted to require 15 years of fixed prices beginning when the QF first delivered power to PGE. (ER 1, 4). But the PUC also concluded that, "on a going forward basis, [PGE must] offer standard contracts in which the 15-year period of fixed prices begins on the date that a QF begins to transmit power to the utility." (ER 1). It directed PGE to file revisions to its "Schedule 201 which shall include a revised standard contract [Power Purchase Agreement] with language * * * that the 15-year term of fixed prices commences when the QF transmits power to the utility." (ER 4).

4. PGE filed a revised standard contract as directed in Order No. 17-256.

PGE filed revisions to its tariff Schedule 201 in compliance with Order No. 17-256. The PUC issued orders approving those compliance filings. Order No. 17-346 (SER 1); Order No. 17-373 (SER 8). Each order included a notice that PGE could request reconsideration by the PUC or judicial review under ORS 183.484 (review of order in other than a contested case). (SER 1, 8). PGE did not seek reconsideration or review of either order.

5. Complainants and PGE each filed petitions for reconsideration, and PGE thereafter petitioned for judicial review.

After the PUC approved PGE's changes to its Schedule 201, the PUC issued two orders on reconsideration of Order No. 17-256. In the first order on reconsideration, Order No. 17-465, the PUC denied complainants' request for rehearing or reconsideration, but it exercised its authority under ORS 756.568[6] to amend Order No. 17-256 to clarify that it did not examine the specific terms of PGE's existing QF contracts.[7] (ER 9). It concluded that PGE's contracts

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[6] ORS 756.568 provides, in pertinent part:

> The Public Utility Commission may at any time, upon notice to the public utility * * * and after opportunity to be heard as provided in ORS 756.500 to 756.610, rescind, suspend or amend any order made by the commission.

[7] PGE subsequently filed a complaint seeking PUC's interpretation of the contracts. PUC opened a separate docket, UM 1391, on that complaint.

Footnote continued...

"may have" provided for the 15-year fixed price period to begin on the date of contract execution. (ER 9).

PGE then filed a request for rehearing or reconsideration, or to amend, Order No. 17-465. PGE asked the PUC to examine and interpret PGE's standard contract form and its contracts that were in effect prior to the revision to its Schedule 201 that PGE made in response to Order No. 17-256. (Rec 1809-10). In Order No. 18-079, the PUC denied PGE's request. (ER 14).

PGE then filed this judicial review proceeding, seeking review of Order No. 17-256 and the two orders on reconsideration, Orders Nos. 17-465 and 18-079.

B. This judicial review proceeding is moot.

This case is moot because the outcome will have no practical effect on the rights of the parties. *See Homestyle Direct, LLC v. Department of Human Services*, 354 Or 253, 260, 311 P3d 487 (2013) ("A justiciable, nonmoot case is one in which 'the parties to the controversy * * * have adverse legal interests and the court's decision in the matter [will] have some practical effect on the rights of the parties.'" (quoting *State v. Snyder*, 337 Or 410, 418, 97 P3d 1181 (2004)).

(...continued)
PUC's UM 1391 docket summary, including links to the filing in that case, is available at https://apps.puc.state.or.us/edockets/docket.asp?DocketID=21241.

As described above, PGE did not seek judicial review of the orders approving its changes to its Schedule 201 (Order No. 17-346 and Order No. 17-373). Consequently, even if this court were to reverse the orders on review, PGE's revised Schedule 201, which includes a provision that the 15-year fixed priced period begins on the date that the QF begins transmitting power, will remain in effect.

PGE may argue that, if this court reverses the orders on review, it could ask the PUC to exercise its discretion under ORS 756.568 to rescind Orders Nos. 17-346 and 17-373. *See Industrial Customers of Northwest v. PUC*, 240 Or App 147, 164, 246 P3d 1151 (2010) (ORS 756.568 grants the PUC "broad discretion"). But whether the PUC would exercise that discretion is speculative. *See Dept. of Human Services v. A. B.*, 362 Or 412, 427-30, 412 P3d 1169 (2018) (speculative consequences of judgment not sufficient to make dismissal for mootness inappropriate). Moreover, whether a reversal of the PUC's orders in this case would compel the PUC to rescind those orders also is speculative because, as noted, the requirement that the 15-year fixed price period begins when the QF begins to generate power applies to the other two electric utilities operating in Oregon. PGE has not asserted that that requirement is unlawful, nor has PGE asserted that the PUC cannot order a prospective change to PGE's contracts.

Thus, regardless of the outcome of this case, PGE must continue to offer QF contracts in accordance with its revised standard contract. This court should therefore dismiss this case as moot.

C. The PUC explained why the 15-year fixed price period in PGE's standard QF contract should begin when the QF first delivers power.

1. The PUC's orders are supported by substantial reason.[8]

Substantial reason supported the PUC's order that PGE's standard QF contracts prospectively provide that the 15-year fixed price period begins when the QF begins delivering power to PGE. *See Jenkins v. Board of Parole*, 356 Or 186, 208, 335 P3d 828 (2014) (substantial reason requires that board connect facts to result, "and that there be no indication * * * that the board relied on evidence that is not substantial evidence"). The substantial reason requirement is minimal. *See Mendacino v. Board of Parole*, 287 Or App 822, 838, 404 P3d 1048 (2017), *rev den*, 362 Or 508 (2018) (order based on substantial reason even where agency "did not overtly address the countervailing evidence"). For example, the board's order in *Jenkins* satisfied the substantial reason requirement although it merely set forth the governing statute and rule, recited applicable criteria, and identified facts from the petitioner's psychological

[8] Although the two orders on reconsideration also are on review in this case, the PUC made the ruling that PGE challenges in Order No. 17-256.

evaluation that the board relied on in determining that the petitioner suffered from a PSED. *Jenkins*, 356 Or at 213.

The PUC's decision in this case implemented the policy that it established in Order No. 05-584. That order explained that a reason for the 15-year fixed price period was to make it more likely that QFs would be able to obtain financing for their projects. Order No. 05-584 at 20. Such financing was a necessity in light of the fact that a QF's project would not begin to deliver power, and thus income, for as much as three years after it entered into the QF contract, because QFs typically begin construction only after they have secured a buyer for renewable energy that they will generate. But the PUC did not specify in its 2005 order when the 15-year period of fixed prices should begin. (ER 2-3 (Order No. 17-256, describing Order No. 05-584)). In Order No. 17-256, the PUC explained that the 15-year period should begin when the QF begins to deliver power, because the prices are only meaningful when a QF is operational and delivering power to the utility," and that "to provide a QF the full benefit of the fixed price requirement, the 15-year term must commence on the date of power delivery." (ER 4).

The PUC thus connected the facts to the result. Order No. 05-584 set the context for the complaint in this case. The PUC stated in that order that a goal for establishing 20-year contracts with fixed prices for the first 15 years was to facilitate QFs' ability to obtain financing. In Order No. 17-256 in this case, the

PUC explained that PGE's form contract, which may have resulted in QFs being paid a fixed price for as little as 12 years, did not fully implement that goal. The PUC, like the board in *Jenkins*, connected the applicable law and policy (here, PURPA and Order No. 05-584), and the facts (requirement of a 15-year fixed price period), to its conclusion (that the fixed price period must begin when the QF begins to generate power). Thus, the PUC's order was supported by substantial reason.

2. The PUC's orders comported with the policy it established in 2005.

The PUC did not change its policy in this case and, even if it did, it properly did so. After the PUC issued Order No. 05-584, PGE filed a standard form contract—its Schedule 201—that may have provided for the 15-year fixed price period to begin on the date of contract execution. (Rec 310 (Schedule 201), Rec 319 (standard contract form)). Until the PUC issued Order No. 17-256, it approved PGE's contracts with QFs that included that term. (ER 3). In Order No. 17-256, the PUC described the change that it was ordering PGE to make as a clarification of its policy:

> We take this opportunity, however, to clarify our policy in Order No. 05-584 to explicitly require, on a going-forward basis, to provide for 15 years of fixed prices that commence when the QF transmits power to the utility.

(ER 4). In its second order on reconsideration (Order No. 18-079), the PUC described Order No. 17-256 as "affirm[ing] our policy that the 15-year fixed price period begins with commercial operation." (ER 11).

PGE disagrees with the PUC's characterization of its orders on review as clarifying or affirming the policy it established in Order No. 05-584. (App Br 24). PGE asserts that the PUC's orders are not based on substantial reason because PUC misinterpreted its prior policy, for three reasons. But, as argued below, each of PGE's arguments fails.

a. Order No. 05-584 established the term of QF contracts to be 20 years, with the first 15 years at a fixed price.

PGE first argues that the orders under review in this case are not supported by substantial reason because they were based on a misinterpretation of the policy established in the PUC's 2005 order. (App Br 24). But PUC did not misinterpret its policy.

As described above, in Order No. 05-584, the PUC balanced the competing goals of accurately pricing QF power and ensuring that QFs would be able to obtain financing by establishing a 20-year contract term, with the price for the first 15 years fixed. Order No. 05-584 at 20. PGE's standard contract form that it submitted pursuant to Order No. 05-584, and PGE's contracts with QFs that the PUC approved thereafter, may have allowed for the 15-year fixed price period began on the date of contract execution. (ER 3). In

the orders under review in this case, the PUC did not order any changes to those existing contracts, but it ordered that PGE's future QF contracts unambiguously provide for the 15-year fixed price period to begin when the QF begins generating power.

That prospective change to PGE's contracts represented at most a clarification, and not a misinterpretation, of PUC policy. Order No. 05-584 established that QF contracts have a 20-year term, with the first 15 years at a fixed price. (Order No. 05-584 at 20). However, that order did not specify when that the 15-year fixed price period had to begin, which resulted in PGE taking a different approach than the other two electric utilities operating in Oregon. Both Idaho Power's and PacifiCorp's QF contract forms, unlike PGE's, unequivocally provided that the 15-year fixed price term began when the QF began to generate power, and that the fixed price to be paid is the price that existed at the time of contract execution. *See* Order No. 16-175 at 2-3 (describing contracts).

The PUC's implementation of the statewide policy it established in Order No. 05-584 encompassed both contracts that provided for the 15-year fixed price period to begin when the QF began to deliver power, and contracts that may have provided for that period to begin at contract execution. When the PUC ordered PGE to change its contracts on a going-forward basis to provide that the 15-year fixed price period begin in the same manner as in Idaho

Power's and PacifiCorp's contracts, it articulated that, prospectively, the PUC's policy would encompass only contracts that provided for the 15-year fixed price period to begin when the QF begins to deliver power to the utility.

Even if that marked a change for PGE, it was not a misinterpretation of PUC's policy established in Order No. 05-584. At most, it was a change in policy applicable to PGE.[9] The PUC's decision also was a grant of partial relief to complainants, although the PUC's order did not say that.[10] Either way, as argued above, the PUC articulated its reasoning for prospectively requiring that the 15-year fixed price period in PGE's QF contracts begins when the QF first delivers power to PGE.

b. Order No. 05-584 provided for QFs to receive 15 years of fixed prices.

PGE next argues that Order No. 05-584 allows the 15-year period to run from contract execution and that the PUC got its "reasoning exactly backwards" in this case because it described the 15-year period as providing a benefit to QFs rather than to utilities' customers. (App Br 27, 29). As already noted, after it issued Order No. 05-584, the PUC approved Idaho Power's and PacifiCorps'

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[9] As argued in Section D, below, it was not a policy change but, even if it was, PUC properly made that change in Order No. 17-256.

[10] As described above, complainants alternatively requested that the PUC "order[ ] PGE to file revised standard contracts clearly stating that the 15 years of fixed prices run from the commercial operation date." (Rec 16).

contracts, which provided that the 15-year period began when the QFs began to deliver power. The PUC's approval of PGE's contracts, which may have allowed for the 15-year period to begin on the date of contract execution, thus does not mean that the PUC determined in Order No. 05-584 that the fixed price could not apply to years 16 through 18 of the calendar term of QF contracts.

This court cannot substitute its judgment for the agency's. *See Castro v. Board of Parole*, 232 Or App 75, 83, 220 P3d 772 (2009) (substantial evidence review does not authorize court to substitute its judgment for that of agency); *Shearer's Foods v. Hoffnagle*, 284 Or App 859, 864, 395 P3d 622 (2017), *rev den*, 361 Or 886 (2017) (substantial evidence review includes review for substantial reason). As argued above, the PUC explained in Order No. 17-256 that it ordered PGE to prospectively change when the 15-year fixed price period in its contracts begins to provide the benefit to QFs described in Order No. 05-584—access to financing based on 15 years of fixed prices for power sold to the utility. The PUC thus satisfied the requirement that it provide a connection between the facts found and the result reached. *Jenkins*, 356 Or at 200. PGE may disagree with the PUC's reasoning, but that is not a basis for reversal.

c. The PUC's pre-existing policy allowed for the 15-year fixed price period to begin when a QF delivered power to PGE.

PGE's third argument in support of its contention that the PUC's orders are not supported by substantial evidence is that PGE's contracts that the PUC

approved since 2005 provided for market prices after the first 15 contract years and, thus, "there was no pre-existing Commission policy requiring that the 15-year period begin at scheduled commercial operation." (App Br 32-33). PGE is correct that Order No. 05-584 did not *require* the 15-year period to begin when the QF began delivering power, but neither did the PUC prohibit it. Rather, the PUC permitted PGE to do what it did, just as it permitted Idaho Power and PacifiCorp to take the other approach.

PGE takes issue with the PUC's characterization in its second order on reconsideration (Order No. 18-079) that Order No. 17-256 "affirmed" the policy that it adopted in 2005.[11] But PGE does not explain how that characterization, even if incorrect, demonstrates that the PUC's order in this case is not supported by substantial reason. Regardless whether Order No. 17-256 clarified, affirmed, or changed policy, PUC's order that PGE prospectively change when the 15-year fixed price period in its QF contracts begins was, as argued above, supported by substantial reason. Moreover, as argued below, if that order was a change in policy, the PUC properly ordered that change in this case.

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[11] In Order No. 17-256, the PUC characterized its decision in this case as "clarifying" the policy it adopted in 2005. (ER 4). In Order No. 18-079, it said that Order No 17-256 "affirmed our policy that the 15-year period begins with commercial operation." (ER 11).

D. The PUC properly ordered a prospective change to PGE's standard QF contracts.

PGE argues that, if the PUC announced a new policy in the orders under review, it lacked authority to do so. The PUC did not adopt a generally applicable policy in this case; rather, it ordered a change applicable solely to PGE. Even if that change was a new policy, PUC was authorized to adopt that policy in its orders in this case.

1. Even if the change that the PUC required to PGE's future QF contracts was a change in policy, the PUC properly made that change in its contested case order.

As argued above, the PUC did not adopt new policy in this case, because it has allowed standard QF contracts since 2005 to provide that the 15-year fixed price period begins when the QF first delivers power to the utility. Rather, in this proceeding that was initiated by a complaint filed under ORS 756.500(1),[12] the PUC ordered PGE to change its standard QF contract form to provide that the 15-year fixed price term for future standard QF contracts begins when the QF first delivers power to PGE. That change did not constitute a generally applicable policy, because it applied only to PGE. *See* ORS 183.315(9) (defining "rule" to include "any agency directive * * * of general applicability that implements, interprets or prescribes law or policy").

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[12] ORS 756.500(1) is reproduced above at page 6, n 5.

Even if the PUC's orders in this case constituted the adoption of a new policy as applicable to PGE, the Administrative Procedures Act authorized the PUC to do that in this case. ORS 183.355(6) ("[I]f an agency, in disposing of a contested case, announces in its decision the adoption of a general policy applicable to the case and subsequent cases of like nature the agency may rely upon the decision in disposition of later cases."); ORS 183.310(2)(a) (defining "contested case"); *see Homestyle Direct*, 354 Or at 266 (agency authority to adopt policies in contested case orders). Whether an agency must engage in prior rulemaking depends upon the authority that the legislature delegated to the agency. *See Homestyle Direct*, 354 Or at 266 (agency's authorizing statutes will indicate the process by which agency may adopt policies).

Here, the PUC has been delegated both rulemaking and adjudicative authority, and authority to adopt policies in contested proceedings. *See* ORS 756.060 (rulemaking authority); ORS 756.500 (complaints); ORS 756.515 (investigations); ORS 756.518 ("ORS 756.500 to 756.610 apply to and govern all hearings upon any matter or issue coming before the [PUC] * * * whether instituted on the application, petition or complaint of others or initiated by the commission[.]"); ORS 183.355(6) (authority to adopt policies in contested case orders). The PUC, whose authority is "commensurate with that of the legislature itself," may "make whatever orders it deems justified or required by

the results of its investigations." *Pacific Northwest Bell Telephone Co. v. Katz*, 116 Or App 302, 309 n 5, 841 P2d 652 (1992), *rev den*, 316 Or 528 (1993).

If the change that the PUC ordered PGE to make to its QF contracts on a going-forward basis constituted a change in policy, the PUC's authority to make that change was subject to only two constraints. First, the new policy had to be within the authority delegated to it by law. *See Gearhart v. PUC*, 356 Or 216, 232, 339 P3d 904 (2014) (the PUC's powers and duties "are limited to those expressly authorized or necessarily implied by statute"). It was, because since 2005 Idaho Power's and PacifiCorps' QF contracts included the term that the PUC directed PGE to include in its future QF contracts, and PGE does not assert that the PUC lacked authority to adopt that policy. Second, if the new policy was inconsistent with its prior policy, the order adopting the new policy would be subject to remand "only if the inconsistency is not explained by the agency." *Gordon v. Board of Parole*, 267 Or App 126, 137, 340 P3d 150 (2014), *rev den*, 357 Or 324 (2015). Here, as noted, the PUC explained that it directed PGE to prospectively change its QF contracts to provide the benefit to QFs that underpinned its decision in Order No. 05-584.

Moreover, the PUC has broad authority to alter utility contracts. *See American Can Co. v. Davis*, 28 Or App 207, 223-24, 559 P2d 898 (1977) (describing PUC authority to alter contract between utility and its customer).

Here, the PUC took a more measured step. It left PGE's existing contracts undisturbed and ordered the change to apply only to future QF contracts.

PGE argues that the PUC exceeded the authority delegated to it because its authority in this case was circumscribed by ORS 756.500. In PGE's view, that statute limited the type of relief that the PUC could grant in this case. It contends that the PUC could interpret the terms of the standard contracts, but that it could not make a policy change. (App Br 34). PGE asserts that, to create new policy, the PUC had to initiate an investigative docket under ORS 756.515, as it did in the proceeding that culminated in Order No. 05-584.[13] (App Br 34-35).

PGE's argument fails for two reasons. First, as argued above, the PUC may establish new policy—if that is what it did in this case—in an order in a complaint proceeding under ORS 756.500. *See* ORS 183.355(6) (authorizing adoption of generally applicable policy in a contested case order). Second, the dichotomy that PGE seeks to draw between complaint proceedings initiated under ORS 756.500 and investigations initiated under ORS 756.515 does not

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[13] *See* Order No. 05-584 at 4 ("the Commission opened an investigation related to electric utility purchases from [QFs]"). ORS 756.515(1) grants the PUC broad authority to open an investigation into "any matter relating to any public utility." The PUC's investigatory proceedings "shall be had and conducted in reference to the matters investigated in like manner as though complaint had been filed with the commission relative thereto, and the same orders may be made in reference thereto as if such investigation had been made on complaint." ORS 756.515(3).

exist. ORS 756.515(3) provides that investigations under that statute shall be conducted in the same manner as complaint proceedings and that its orders shall be the same "as if such investigation had been made on complaint." ORS 756.515(3); *see* ORS 756.518 (ORS 756.500 to ORS 756.510 governs all PUC hearings). And orders in cases initiated under both the complaint and investigation statutes are subject to judicial review "as orders under the provisions of ORS 183.480 to 183.497." ORS 756.610(1). The PUC thus may announce new policy in its orders in cases initiated under either ORS 756.500 or ORS 756.515.

2. PGE was on notice that the PUC could make a prospective change in its standard form QF contract.

Finally, PGE argues that the PUC failed to give the parties notice that it intended to set a new policy in this case. (App Br 36). As described above, the complaint, in addition to seeking a declaration that PGE's existing contracts should be interpreted to require that the 15-year fixed price period began when a QF began to deliver power, alternatively requested that the PUC "order[ ] PGE to file revised standard contracts clearly stating that the 15 years of fixed prices run from the commercial operation date." (Rec 16). Whether the PUC's order directing PGE to change its QF contracts on a going-forward basis was a change in policy or a grant of partial relief to the complainants, the complaint provided notice to PGE that such a change was at issue in this case.

CONCLUSION

This court should dismiss this case as moot, or it should affirm the PUC's orders.

Respectfully submitted,

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Oregon Public Utility Commission

ISSUED: December 22, 2016

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1805

NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, COMMUNITY RENEWABLE ENERGY ASSOCIATION, and RENEWABLE ENERGY COALITION, vs. PORTLAND GENERAL ELECTRIC COMPANY, Pursuant to ORS 756.500.	PREHEARING CONFERENCE MEMORANDUM

On December 22, 2016, the Public Utility Commission of Oregon held a prehearing conference in this docket. Representatives appeared on behalf of Northwest and Intermountain Power Producers Coalition; the Community Energy Association; the Renewable Energy Coalition; Portland General Electric Company; Renewable Northwest; NewSun Energy; and the Commission Staff.

Petitions to Intervene

On December 21, 2106, Renewable NW filed a petition to intervene in this docket. No party attending the conference objected to the petition. I find Renewable NW has sufficient interest in the proceedings to participate and that its participation will not unreasonably broaden the issues, burden the record, or delay the proceedings.[1] The petition to intervene is therefore granted.

Procedural Schedule

At the conference, the parties and Staff discussed the appropriateness of addressing the issues raised in the complaint via a declaratory ruling and it was agreed that Staff and the parties would address the issue by filing comments and recommendations with the Commission no later than January 5, 2017.

[1] *See* OAR 860-001-0300(6).

Parties are reminded that attorneys not licensed in Oregon wanting to appear before the Commission in this docket must file an application for admission to appear pro hac vice.[2]

Dated this 22nd day of December, 2016, at Salem, Oregon.

Allan J. Arlow
Administrative Law Judge

Attachment: Notice of Contested Case Rights and Procedures

[2] *See* UTCR 3.170, OAR 860-001-0320.

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

Oregon law requires state agencies to provide parties written notice of contested case rights and procedures. Under ORS 183.413, you are entitled to be informed of the following:

Hearing: The time and place of any hearing held in these proceedings will be noticed separately. The Commission will hold the hearing under its general authority set forth in ORS 756.040 and use procedures set forth in ORS 756.518 through 756.610 and OAR Chapter 860, Division 001. Copies of these statutes and rules may be accessed via the Commission's website at www.puc.state.or.us. The Commission will hear issues as identified by the parties.

Right to Attorney: As a party to these proceedings, you may be represented by counsel. Should you desire counsel but cannot afford one, legal aid may be able to assist you; parties are ordinarily represented by counsel. The Commission Staff, if participating as a party in the case, will be represented by the Department of Justice. Generally, once a hearing has begun, you will not be allowed to postpone the hearing to obtain counsel.

Administrative Law Judge: The Commission has delegated the authority to preside over hearings to Administrative Law Judges (ALJs). The scope of an ALJ's authority is defined in OAR 860-001-0090. The ALJs make evidentiary and other procedural rulings, analyze the contested issues, and present legal and policy recommendations to the Commission.

Hearing Rights: You have the right to respond to all issues identified and present evidence and witnesses on those issues. *See* OAR 860-001-0450 through OAR 860-001-0490. You may obtain discovery from other parties through depositions, subpoenas, and data requests. *See* ORS 756.538 and 756.543; OAR 860-001-0500 through 860-001-0540.

Evidence: Evidence is generally admissible if it is of a type relied upon by reasonable persons in the conduct of their serious affairs. *See* OAR 860-001-0450. Objections to the admissibility of evidence must be made at the time the evidence is offered. Objections are generally made on grounds that the evidence is unreliable, irrelevant, repetitious, or because its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay. The order of presenting evidence is determined by the ALJ. The burden of presenting evidence to support an allegation rests with the person raising the allegation. Generally, once a hearing is completed, the ALJ will not allow the introduction of additional evidence without good cause.

Record: The hearing will be recorded, either by a court reporter or by audio digital recording, to preserve the testimony and other evidence presented. Parties may contact the court reporter about ordering a transcript or request, if available, a copy of the audio recording from the Commission for a fee set forth in OAR 860-001-0060. The hearing record will be made part of the evidentiary record that serves as the basis for the Commission's decision and, if necessary, the record on any judicial appeal.

Final Order and Appeal: After the hearing, the ALJ will prepare a draft order resolving all issues and present it to the Commission. The draft order is not open to party comment. The Commission will make the final decision in the case and may adopt, modify, or reject the ALJ's recommendation. If you disagree with the Commission's decision, you may request reconsideration of the final order within 60 days from the date of service of the order. *See* ORS 756.561 and OAR 860-001-0720. You may also file a petition for review with the Court of Appeals within 60 days from the date of service of the order. *See* ORS 756.610.

ORDER NO. 17 418

ENTERED OCT 16 2017

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1805

NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, COMMUNITY RENEWABLE ENERGY ASSOCIATION, and RENEWABLE ENERGY COALITION, Complainants, vs. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	ORDER

DISPOSITION: PETITION TO INTERVENE DENIED; APPLICATION STRICKEN

I. SUMMARY

In this order, we deny the Joint Petition to Intervene Out of Time filed by Dayton Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, Wasco Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Alfalfa Solar I LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, and Riley Solar I LLC (collectively, "Petitioners"). We also strike Petitioners' Application for Reconsideration or Rehearing of Order No. 17-256.

II. PROCEDURAL HISTORY

In Order No. 17-256, we clarified our prior Order No. 05-584 with regard to the date upon which the 15-year period of fixed prices paid to Qualifying Facilities begins under standard contracts. On July 20, 2017, PGE made a Schedule 201 filing in compliance with that clarification.

On September 8, 2017, the Petitioners jointly filed a petition to intervene out of time and a request for reconsideration of Order No. 17-256.

On September 18, 2017, PGE filed an objection to the Petitioners' request to intervene out of time. Petitioners filed a response to the PGE motion on September 20, 2017. A ruling staying the proceedings was issued that same date.

On October 12, 2017, the Administrative Law Judge certified the decision on the petition to the Commission.

III. POSITIONS OF THE PARTIES AND PETITIONERS

PGE asserts that we lack the statutory authority to grant the Petition under ORS 756.525, because the evidentiary record in the proceeding is closed. Alternatively, PGE argues that, even if we were to find the petition timely, we should still deny the Petition on the grounds that Petitioners' appearance and participation will unreasonably broaden the issues by seeking rulings on numerous contracts' unique language and delay the proceedings. Finally, PGE notes that the original complainants to this proceeding have also filed a request for clarification and reconsideration of Order No. 17-256, thereby providing the Commission the opportunity to address the issues raised by the Petitioners.

Petitioners respond that it was Order No. 17-256, not the initiating complaint, that raised the concerns leading to their filings in this docket. They explain that the initial complaint was prospective only and did not seek interpretations or action relative to executed contracts, and that the Commission order finding past PGE contracts compliant gave rise to their petition. Because the order impacts existing contracts, Petitioners contend they should be allowed to intervene.

IV. APPLICABLE LAW

ORS 756.525(2) provides that

> At any time before the final taking of evidence in a proceeding, any person may apply to the commission for permission to appear and participate in the proceeding. The commission shall determine the interest of the applicant in the proceeding and shall grant the application, subject to appropriate conditions, if the commission determines that such appearance and participation will not unreasonably broaden the issues or burden the record, and otherwise may deny the application.

V. DISCUSSION

The petition to intervene out of time is denied. ORS 756.525(2) allows a party to file a petition to intervene prior to the conclusion of the taking of evidence. Here, the evidentiary record closed prior to our resolution of this matter in Order No. 17-256. Thus, Petitioners may not now seek to intervene for purposes of seeking review of an order. This result is consistent with ORS 183.315(6), which allows only parties to seek judicial review of Commission orders.

We clarify that our decision here does not preclude the Petitioners from seeking other relief from the Commission to address their concerns, including the filing of a complaint under ORS 756.500.

VI. ORDER

IT IS ORDERED that:

1. The Joint Petition to Intervene Out of Time filed by Dayton Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, Wasco Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Alfalfa Solar I LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, and Riley Solar I LLC is denied.

2. The Joint Motion for Clarification and Application for Rehearing or Reconsideration of Order No. 17-256 filed by Dayton Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, Wasco Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Alfalfa Solar I LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, and Riley Solar I LLC is stricken.

Made, entered, and effective OCT 16 2017.

Lisa D. Hardie
Chair

Stephen M. Bloom
Commissioner

Megan W. Decker
Commissioner