BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR 1 LLC, et al., Defendants.	NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, RENEWABLE ENERGY COALITION AND COMMUNITY RENEWABLE ENERGY ASSOCIATION'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGEMENT

I. INTRODUCTION

Pursuant to OAR 860-001-0420, ORCP 47 and Administrative Law Judge ("ALJ") Allan Arlow's November 19, 2018 ruling, intervenors Northwest and Intermountain Power Producers Coalition ("NIPPC"), Renewable Energy Coalition (the "Coalition" or "REC"), and Community Renewable Energy Association ("CREA") (collectively, the "Intervenors" or "Industry Trade Associations"), hereby respectfully submit this Reply in Support of their Motion for Summary Judgment. The Industry Trade Associations, Portland General Electric Company ("PGE") and defendants Alfalfa Solar I LLC, Dayton Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, Riley Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, and Wasco Solar I LLC (collectively, the "Defendants" or "NewSun Parties") each submitted Cross-Motions for Summary Judgment and Responses

to each other. This Reply is in support of the Industry Trade Associations' Motion for Summary Judgment and in response to arguments in PGE's response. Industry Trade Associations continue to assert that the Oregon Public Utility Commission ("Commission") should issue an order finding that the NewSun power purchase agreements ("PPAs") require PGE to pay the fixed prices contained in Tables 6a and 6b of the applicable Schedule 201 for fifteen years after the Commercial Operation Date.

At this point, the NewSun Parties' Motion for Summary Judgment and Response to PGE's Motion for Summary Judgment, as supported by the Industry Trade Associations' Motion and Response, definitively establish that the NewSun PPAs require PGE to pay the fixed prices for fifteen years after the Commercial Operation Date. The contract-specific edits to this fill-in-the-blank standard PPA did not alter the meaning of the fifteen year fixed-price term. This conclusion is compelled with the text and context of the agreements themselves, as well as the recently reaffirmed policy from which those agreements arose. In an effort directly contradictory to clear, longstanding policy on the matter, PGE has selectively quoted the agreements, the applicable caselaw, and the Commission's own orders out of context in an ongoing attempt to avoid this result. These points have already been briefed thoroughly by the NewSun Parties and the Industry Trade Associations.

This case never should have been litigated after UM 1805 Order No. 18-079 at which point any doubt about Commission "intent" was definitively resolved in favor of the NewSun Parties position. PGE's years long extension of all the litigation over the 15-year fixed price term has failed to show any unique aspect of any PPAs which would

cause these standard form contracts to assume a meaning divergent therefrom. Indeed, quite the opposite.

PGE's Response gets many details wrong about the Industry Trade Associations' positions, which are clarified here to some extent. This reply attempts to both correct PGE's mischaracterizations as well as highlight for the Commission the material and adverse consequences that would result if the Commission were to adopt PGE's arguments in this case. For an in-depth discussion, please refer to the Industry Trade Associations' previously filed Motion for Summary Judgment and Response to Cross-Motions for Summary Judgment.

The context in which any contract, including the standard form Schedule 201 PPAs (which the NewSun PPAs are), is drafted has particular relevance to its meaning and whether the contract is ambiguous. This context includes numerous factors, including industry usage of particular terms, which applies in both Uniform Commercial Code ("UCC") contracts and non-UCC contracts. Industry usage here includes PPAs and power contracting generally, as well as the Oregon-specific QF PPA context. The fact that only one market participant (PGE) claims that it has a different interpretation has no relevance to the meaning of such terms in a contract when such terminology is commonly understood a certain way in the given context, especially when that same participant has offered different interpretations in the past and is a party to litigation over the meaning of the contract.

The Industry Trade Associations continue to strongly recommend that the Commission consider the broader implications and consequences that a decision in favor

of PGE would have on the Oregon energy market, the administrative burden, and even the Commission's own authority. PGE's Response and arguments therein make the Industry Trade Associations increasingly concerned about how the regulatory environment for independent power producers will be harmed—and not just in QF/PURPA matters—if the Commission agrees with PGE's reasoning and legal theories. PGE's legal theories essentially amount to 1) an ability to reinvent the law, contract meanings, and Commission policy through a regulated utility's mere assertion, irrespective of policy, contract, and common usage, and also 2) the ability to entangle any contract ever signed with any other related contract ever signed (or not signed) even though it has not been seen by that new party. While this case is very important to the litigants, it is also significant to the market and the Commission's broader authority as a regulator and its role as a venue for reliability and justice. How the Commission resolves these issues will send an important signal to Oregon utilities as to whether the Commission and its policies can be bent and redefined by those the Commission regulates. The Commission's decision in this case will either put an end to some of PGE's most egregious contracting and litigious behavior, in a very clear-cut case, or further embolden PGE to employ even more creative and abusive practices, including efforts by PGE evidencing a belief it can bias the Commission itself by introducing ratepayer impacts into a contract language interpretation that has zero to do with the prices in the contract.

II. REPLY

A. The Commission Should Explicitly Reject PGE's Legal Justifications for Why It Can Unilaterally Set Commission Policy and Impose Unreasonable Additional Burdens on QFs Negotiating PPAs

A ruling in PGE's favor would require a reading of the contract terms that defies the understanding of every other relevant party in the context of the Oregon energy industry, and PGE has identified no one, besides itself, who holds PGE's same interpretation. (Indeed, even PGE implements the commonly understood meaning and contractual structure in its own RFP PPAs to procure power from non-QFs.) The Commission will need to find that the NewSun Parties' contracts clearly and unambiguously provide for 15 years of fixed prices at contract execution, which almost always is less than 15 years after such prices must be paid for delivered power.[1] This will mean that PGE wrote the supposedly "clear and unambiguous" provision inconsistent with the entire industry understanding, and the Commission's order, and that PGE's language escaped the notice of Staff, stakeholders and all interested parties for years afterwards. However, when PGE actually drafted and proposed language that clearly stated that the 15-year term started at contract execution, that change was spotted by both Staff and industry participants, and PGE withdrew their proposal.[2] And, of course, PGE executed other standard form PPAs that filled in the blanks in a way clearly proving the

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[1] PGE's Response identifies one QF that entered into a contract in which power deliveries and contract execution occurred at the same time. PGE's Response to Defendants' and Intervenors' Motions for Summary Judgment at 22, n.117 (Feb. 15, 2019). This is the exception that proves the rule.

[2] CREA-NIPPC-REC/200, Sanger/2, 8.

standard form does not require interpretation per PGE's position, but rather clearly supports the meaning understood by industry and per the NewSun Parties' position.

Regardless of the resolution of this case, the Industry Trade Associations are concerned that the Commission may endorse PGE's position that it merely having stated a supposed meaning of a contract term or Commission policy thereby governs such meaning after execution, irrespective of incorrectness, inconsistency with Commission policy, plain meaning, and/or common industry usage. This will effectively result in the Commission abdicating and undermining its authority, not just as relates to its responsibility to set the terms and conditions of PURPA PPAs but on any regulated matter. Any nuance in a Commission directive, or even plainly understood meaning, could be turned on its head by a utility through its mere assertion. It would be virtually impossible for the Commission to prevent this because it would be expected to anticipate every possible twist on its directions and the utility's proposed contract provisions implementing those directions. While we appreciate the Commission and Staff's careful and thoughtful review of standard PPAs, and other non-QF matters, it is not realistic for the Commission and Staff to anticipate every possible scenario. As such, because the *Commission* sets PURPA contract terms and conditions, the Commission should not allow PGE to affect the meaning of those terms by *offering* or asserting its interpretation as though PGE is willingly negotiating the contract, much less as if PGE is somehow a legal authority on any such matter or interpretation.

In this particular case, the NewSun Parties' representatives pushed back against PGE's interpretation, but that rejection by the NewSun Parties should not be the primary

basis for ruling in favor of the NewSun Parties. The standard contracts themselves are unambiguous and clear given the absence of any explicit language or custom edits to the standard form which contradict their clear meaning, even without the clarity of the final UM 1805 Order, but unquestionably with that order confirming their clear context. But many QFs will not have the strength, resources or courage to stand up to unreasonable utility interpretations on this and other matters, and the Industry Trade Associations strongly urge the Commission to reject PGE's legal theory that it can affect the meaning of a standard contract provision merely by telling a QF what PGE believes the standard contract to mean or PUC policy to be.

The supreme irony of PGE's continued reliance on its own communications to the QFs in this case is that in those very communications, PGE's own attorney, Denise Saunders, repeatedly pointed to the importance of the Commission's "intent" in Order No. 05-584 as the basis for interpreting the standard contracts per PGE's position, as well as successfully depriving the NewSun Parties the full 20 year term they originally requested.[3] Yet even after the Commission clarified in UM 1805 that PGE's attorney had indeed misread the Commission's *intent* in that order, PGE continues to rely on its *assertions* to the QF even after those same assertions have proven to be *in direct*

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[3] PGE/214, True/1 (asserting that "Order No. 05-584 which you cite in your letter makes it clear that the Commission *intended* that term of the standard contracts should not exceed 20 years") (emphasis added); *id.* at 2 ("If the 15 year fixed cost pricing of the 20-year term started on the COD, which can be several years after the execution date, the term of the contract would exceed 20 years. This was clearly not the *intent* of the Commission . . . .") (emphasis added); *id.* ("The Commission clearly did not *intend* to guarantee every project 15 years of fixed prices.") (emphasis added).

contradiction to the Commission's intent as clarified in UM 1805. If PGE's argument prevails on these facts, PGE will quite literally have created a precedent where a utility's *statement* controls over the Commission's own policy and intent *and* over clear meaning of the agreement. How then could *any* Commission related contract be reliably interpreted?

Ultimately, such a ruling in PGE's favor could extend beyond just QFs and PURPA implementation, undermining the authority of the Commission and the reliability, or even understandability, of Commission policies and regulations. It may embolden utilities to assert, per their self-interest, other "interpretations" of Commission directives, whether it be of rules, orders, or other Commission policy statements in other contexts to influence the ultimately policy itself. Participants in the regulated markets—such as direct access, and traditional power supply—will no longer be able to rely on the Commission's orders and its own clarifications of those orders. Instead, utilities will be able to unilaterally change the meaning of contracts and tariffs implementing Commission policy merely by offering the utility's own self-serving interpretation of the policy. This would result in an abdication of the Commission's authority and undermining itself as a regulator and as an arbiter of disputes.

Just as concerning and unacceptable, allowing PGE to rely on or incorporate every prior version of an agreement sets a precedent that a party signing a form agreement cannot rely on the words within the four corners of the agreement and is fundamentally contrary to basic tenets of contract law. That outcome, in addition to broader implications, would defeat the purpose of PURPA standard offer contracts,

which is to eliminate transaction costs. The party signing any agreement would first need to guess that a provision (any provision) could be subject to dispute and then need to read every prior version of that agreement in order for the agreement they signed to be understood and interpreted. A party would never be able to know that what they agreed to meant what it said, which defeats the entire concept of a written contract. The implications for the contracting process itself for QFs would be significant; if there were any pre-contract execution dispute, PGE could attempt to require its counter-party to file a complaint to obtain resolution of a term from the Commission prior to executing the agreement, and argue (regardless of the result) that the QF was not entitled to the avoided cost rates in effect at the time the complaint is filed.

PGE's positions would be beyond burdensome to all concerned, including the adjudicators of such matters, creating a nightmare of non-clarity, discovery wars, and complete unreliability of any such Commission-derived contracts. All of these threaten the financeability of any Oregon power contract, especially for QFs, as it undermines basic contractual reliability—rule of law, access to justice, and enforceability.

More importantly, the Commission should note now that PGE's Motion for Summary Judgment and testimony have been filed that *the facts of this case make clear that there was no special circumstance in the NewSun Parties contracts or contracting process that ever justified this long drawn-out litigation* perpetrated by PGE on the NewSun Parties, Staff, ratepayers, and the Commission. Even after Order No. 18-079, which definitively clarified the policy and intent on this matter, PGE defied that clear resolution—even despite having cited the Commission's intention on the same policy—

with this litigation. The costs, time, administrative, and risk burdens created by PGE's actions are extensive. Even if PGE ultimately loses the litigation in two different PUC proceedings, federal court and the Oregon Court of Appeals (and potentially additional appeals) regarding the 15-year term issue, PGE will have won. The uncertainty and litigation regarding the 15-year term will result in at least some QFs being unable to obtain financing, and PGE will have spent considerable ratepayer dollars achieving its ultimate objective of attempting to avoid its PURPA responsibilities each kilowatt at a time.

More generally, the message PGE has sent with its ongoing efforts in this case to subvert the Commission's contract term policies is clear to QF developers. That is, any disagreement with PGE in the contracting process by the QF is likely to result in years of litigation that PGE will use to tie up the industry. Even when the Commission has explained its policy that should be incorporated into a standard contract by law, the QF exposes itself to lengthy and extremely expensive electronic discovery with PGE just so PGE can roll the dice at ascertaining if anything possessed by the QF might somehow inform the meaning of a Commission-approved form that was not substantively modified on the point in question by the parties. The chilling effect of this risk on development of renewable energy resources by developers in Oregon cannot be overstated. Every little issue and every little disagreement expose the QF to an Orwellian nightmare if the QF dares to even disagree. Ultimately ratepayers will be harmed because projects that could otherwise provide power at or below the utility's avoided cost will ultimately not be

developed. We hope the Commission takes note of these consequences, exposures and burdens for even the simplest of matters, such as this case demonstrates.

Finally, PGE's use of irrelevant financial-impact information should be ignored on the ground that it is nothing more than a thinly veiled attempt bias the Commission against the NewSun Parties with ratemaking considerations inapplicable to long-term PURPA contracts. PGE's witness, Ryin Khandoker, confirms as much himself, explaining in his testimony that he provides this financial impact analysis, not to inform the interpretation of the contracts, but "provide further evidence regarding how the issue of the 15-year fixed price period fits into the Commission's implementation of PURPA, and to provide the Commission a sense of the magnitude of the impact on PGE's customers associated with the parties' differing interpretations of the PPAs."[4] Although PGE's response brief tries to recast this testimony on the *current* financial impact as somehow relevant to the state of mind at the time of development of the renewable forms in 2014, such argument defies logic and the plain statements of the witness offering the testimony.

The Commission cannot reconsider legally binding obligations under PURPA because it no longer likes the prices in them. Nor can PGE. Even so, if the Commission were to require PGE to implement its PPAs in the traditional, industry understood manner from the beginning, PGE would merely be responsible for paying those prices as they were based on a Commission-approved avoided cost calculation at the time those

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[4] PGE/300, Khandoker/5.

PPAs were executed. As such, the Commission should refuse to acknowledge PGE's irrelevant assertions regarding the so-called impacts to ratepayers that could be avoided by simply ruling in PGE's favor. It should clarify that such endeavors to bias the Commission will not be tolerated and create clear precedent to the contrary for future PURPA disputes at the Commission.

In sum, the best path forward is for the Commission to interpret the unambiguous language of the standard form PPAs read in context, as required under *Yogman* step one, an as fully explained in the NewSun Parties and Industry Trade Associations' briefing in this case. There is no need to go further, as the PPAs unambiguously provide that the 15-year fixed-price term commences at the Commercial Operation Date when the facility is actually operational and delivering power and being paid the Contract Price. There is no other logical reading of the PPAs because no price can be paid when the facility is not delivering power and therefore the QF is deprived of its option to select a renewable fixed-price for a 15-year term.

B. The Energy Industry's Usage of the Language at Issue in This Case Provides Relevant Context Within Which PGE's Standard PPA was Drafted

The NewSun PPAs are interpreted within the PURPA regulatory contracting context. Under *Yogman* step one, when determining whether a contract is ambiguous the contract must be read in context.[5] Contrary to PGE's assertions, trade usage is relevant

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5 *Yogman v. Parrott*, 325 Or 358, 361 (1997).

context under which may be interpreted even in non-UCC contracts.[6] In the *Lone Rock* case, one factor considered in resolving a contract dispute on summary judgment was that certain phrases "ha[ve] a distinct meaning within the context of the timber industry."[7] In another case, evidence was taken on the issue of industry understanding and the court found that "[c]ourts infer that members of a vocation employ its trade terms in their technical sense whenever they use them."[8] Further, the Oregon courts have not decided on the issue regarding whether the sale of electricity is a sale of goods governed by the UCC or a sale of services under the common law.[9] In either event, the Commission does not need to resolve that issue today because, while a summary judgment motion should be resolved as a matter-of-law, the cases cited herein illustrate that the meaning of terms as used and unsterstood in a particular industry is relevant both in deciding a summary judgment motion and in ruling on evidence.

The fact that one litigant argues for different understanding is not sufficient to find that the phrase does not have an industry meaning where the phrase is a technical

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6 *See Lone Rock Timberland Co. v. Nicholls*, 6:11-cv-6274-TC, 2012 U.S. Dist. LEXIS 95511 (July 10, 2012).

7 *Id*. at 10.

8 *Dorsey v. Oregon Motor Stages*, 183 Or 494, 513 (1948).

9 *Klamath Off-Project Water Users, Inc. v. PacifiCorp*, 237 Or App 434, 444-445 (2010) ("Whether the UCC applies to a contract for the sale of electricity has not been addressed in Oregon, and the question lacks consensus across the country *Compare U. S. v. Consolidated Edison Co. of N. Y*., 590 F Supp 266, 269 (SDNY 1984) (finding that 'electricity is not considered 'goods'" and the UCC is not applicable to contracts involving the sale of electricity), *with In re Pacific Gas and Elec. Co*., 271 BR 626, 639 (ND Cal 2002) (concluding that electricity is a good for the purposes of the UCC).").

term and that litigant "is a member of the industry which employs it as a part of its vocabulary."[10] In *Dorsey*, the court took evidence on the meaning of a contested phrase in an agreement.[11] The appellant in that case said that "in his opinion, the contested phrase did not possess the meaning attributed to it by the other witnesses."[12] However, because the court found that the phrase was a "technical term" and the appellant "[wa]s a member of the industry which employs it as a part of its vocabulary," the court inferred that members of a vocation will use trade terms in their technical sense whenever they use them.[13]

In this case, as the unrebutted testimony of three experienced experts established, it should be inferred that Schedule 201's generalized descriptions of the fifteen-year fixed price period are used in the technical sense since that sense is employed by the energy industry and PGE is a member of that industry. The Commission's expertise is relevant because it is familiar with the industry context and technical terms employed in the industry. As illustrated more fully in the Industry Trade Associations' Motion for Summary Judgment, the word "term" has commonly been used in the industry to describe the power purchase and sale period, a period which for a new generation facility begins operating and delivering power subsequent to when the facility is built, even though the

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10 *Dorsey*, 183 Or at 513.
11 *Id.*
12 *Id.*
13 *Id.*

PPA may become effective before that time.[14] The Industry Trade Associations held this understanding as evidenced by their complaint in UM 1805. Both other Oregon utilities implemented provisions that employ a use of the term consistent with this understanding.[15] Staff supported this understanding by opposing a proposal by PGE to change PGE's standard PPA to state that the 15-year fixed price term applied "*immediately following the effective date*" noting that such a change was substantive.[16] Even the Commission clarified its understanding in Docket No. UM 1805 consistent with this interpretation.[17] PGE seems to be the only industry participant in Oregon that holds a different understanding. Therefore, despite PGE's dubious "difference of opinion," the Commission should infer that PGE used the fixed price term in accordance with its technical sense understood and implemented by all other parties in the industry because PGE is a part of that industry.

III. CONCLUSION

In this case, the language of the PPAs interpreted within in the context of the energy industry in which the parties operate unambiguously provide for 15 years of fixed pricing from the Commercial Operation Date. The Commission should not give PGE, the ability to merely claim or assert a different understanding of terms commonly understood to have a different meaning within that industry and thereby give itself a

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14 Industry Trade Associations' Motion for Summary Judgment at 9-10 (Jan. 29, 2019).

15 *Id.* at 16-19.

16 *Id.* at 4, 19.

17 *Id.* at 8.

unilateral right to impose its individual interpretation on its counter-parties. As such, the best path forward is to reject PGE's arguments that would allow it to affect contract meanings and grant the Industry Trade Associations' motion for summary judgment.

Dated this 1st day of March 2019.

Respectfully submitted,

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