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October 16, 2019

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
PO Box 1088
Salem, OR 97308-1088

Re: UM 1931 – Portland General Electric Company v. Alfalfa Solar I LLC, et al.

Attention Filing Center:

Enclosed for filing in the above-named docket is Portland General Electric Company's Response to Defendants' and Intervenors' Applications for Reconsideration.

Thank you for your assistance.

Very truly yours,

Dallas S. DeLuca

920943

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	)	**PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE TO DEFENDANTS' AND INTERVENORS' APPLICATIONS FOR RECONSIDERATION**

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Pursuant to OAR 860-001-0720(4), complainant Portland General Electric Company ("PGE") respectfully submits this response opposing the two October 1, 2019, applications for reconsideration filed by 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 "defendants" or "NewSun Parties") and by Intervenors Northwest and Intermountain Power Producers Coalition, Renewable Energy Coalition, and Community Renewable Energy Association (collectively "Intervenors").

I. SUMMARY

The Public Utility Commission of Oregon ("Commission") should deny both applications for reconsideration because defendants and Intervenors have not identified any errors of law or fact. Instead, they are re-arguing the same points from their six earlier briefs that the Commission has already reviewed and rejected. Additionally, Intervenors have not addressed any issue that would alter the outcome of Order No. 19-255. The Commission should deny the applications because the Commission has already fully explained its reasoning in Order No. 19-255 and does not need to re-address the same arguments again. Because the Commission ruled on cross summary judgment motions and briefing for each motion included three rounds of briefs, defendants and Intervenors are making the same arguments for the fourth time. The Commission has summarily denied similar applications for reconsideration where the Commission concluded that "our prior order addressed each issue essential to our decision."[1] Alternatively, the Commission may elect to take no action on the applications and allow them to be deemed denied.

[1] *Portland Gen. Elec. Co. v. Pac. NW Solar, LLC*, Docket No. UM 1894, Order No. 18-369 at 4 (Oct. 9, 2018).

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II. LEGAL STANDARD

ORS 756.561(1) allows any party in a proceeding to apply for rehearing or reconsideration of an order. OAR 860-001-0720(3) provides that the Commission may, but is not required to, grant an application for rehearing or reconsideration if, among other reasons, "the applicant shows that there is * * * (c) [a]n error of law or fact in the order that is essential to the decision; or (d) [g]ood cause for further examination of an issue essential to the decision."

III. ARGUMENT

A. THE COMMISSION DID NOT COMMIT AN ERROR OF FACT CONCERNING THE START DATE OF THE 15-YEAR FIXED PRICE PERIOD OR THE 20-YEAR LENGTH OF PGE'S COMMISSION-APPROVED PPA FORMS.

In interpreting the NewSun Power Purchase Agreements ("NewSun PPAs") to conclude that the 15-years of fixed prices started at execution, the Commission did not commit any error when it interpreted Section 2.3 and Schedule 201. The Commission considered Section 2.3 of the NewSun PPAs (which NewSun modified from the form PPA) together with the undisputed definitions in Sections 1.38 and 2.1 of the NewSun PPAs (which were not modified from the form PPA), and the Commission concluded as follows:

> For the contracts before us, interpreting the entire agreement by reading Schedule 201 together with the PPA's definitions leads to the conclusion that 15 years of fixed pricing is available from the effective date. *The term of the contract* is a maximum of 20 years, and *commences upon execution by both parties*. In Schedule 201, 15 years of fixed pricing are available for the "initial 15" years of the term.[2]

Defendants, in the first argument in their application for reconsideration, contend that the Commission erred by, according to defendants, not basing the decision on the words of Section 2.3 in the form PPA.[3] Defendants contend that the Commission erred by interpreting the contracts

[2] Order No. 19-255 at 15 (Aug. 2, 2019) (emphases added).
[3] Defendants' Application for Reconsideration ("Defs.' App.") at 4-8 (Oct. 1, 2019).

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that the defendants actually signed instead of relying on the text in section 2.3 of the *form* PPA.[4] Defendants, as they concede, modified the text of Section 2.3 from the *form* PPA when they signed the 10 NewSun PPAs.[5] In their application for reconsideration, defendants contend that the Commission erred in its interpretation of the word "term" in Schedule 201 because, according to defendants, the meaning of "term" in Schedule 201 would be different if the Commission had considered the text in Section 2.3 of the *form* PPA instead of the text in Section 2.3 of the executed NewSun PPAs.[6] According to defendants, the different meaning of the word "term" arises because, they contend, the *form* PPA allows for a term of more than 20 years,[7] a position that PGE rejected (in writing to defendants multiple times) before defendants signed the NewSun PPAs.[8]

As is evident from this convoluted line of reasoning, the alleged "error of fact" is not a mistaken finding of fact made by the Commission but rather defendants' misunderstanding of the Commission's sound interpretation of the PPA and Schedule 201. Defendants infer an error where none exists. In Order No. 19-255, the Commission interpreted the language of the executed NewSun PPAs, including the language of Section 2.3 as completed in the NewSun PPAs. Order No. 19-255, at page 10, accurately quotes the language of Section 2.3 from the NewSun PPAs. There is no basis to conclude that the Commission believed this language was the generic language of the PGE standard contract form rather than the completed language of the NewSun PPAs. The Commission clearly understands that Section 2.3 of PGE's standard contract *form* includes blank

[4] *Id.* at 4.
[5] *Id.* at 5 ("[T]he language of Section 2.3 … was supplied by the NewSun Parties, not by the Commission-approved standard contract templates on which the PPAs are based.").
[6] *Id.* at 6-8.
[7] *Id.* at 7.
[8] *See* PGE's Motion for Summary Judgment ("PGE's Mot. for Summ. J.") at 28 (Jan. 29, 2019) ("NewSun initially submitted altered PPA forms that set the end of each PPA's 'Term' as 20 years from the Commercial Operation Date. PGE explained that the contract term "must run no more than 20 years from EXECUTION, not commercial operation.'"); *see also* NewSun Parties/111, Stephens/1 (Oct. 21, 2015, Email from Bruce True to Jake Stephens stating PGE's position regarding a maximum 20-year term measured from contract execution before any of the NewSun Parties executed any of the NewSun PPAs).

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spaces to be filled in by the parties (see for example, the Commission's block quote of the language of Section 2.3 from the version of the standard contract form filed in 2005, found on page 4 of Order No. 19-255). There is no reason to conclude that the Commission, when it quoted the language of Section 2.3 from the fully-executed NewSun PPAs, mistook that language for the generic language of PGE's standard contract *form*.

Further, defendants' argument is a red herring. The question presented to the Commission was not the total length of the term of the contracts; instead, the question in this proceeding is when does the 15-years of fixed prices commence.[9] The Commission correctly noted that "Section 1.38 defines the 'Term' as 'the period beginning on the Effective Date and ending on the Termination Date.' Section 2.1 defines the Effective Date as the date of execution by both parties."[10] The Commission also correctly noted that "[i]n Schedule 201, 15 years of fixed pricing are available for the 'initial 15' years of the term."[11] The Commission then "conclude[ed] that 15 years of fixed pricing is available from the effective date."[12] The Commission answered the question in the Complaint based on the undisputed text of the NewSun PPAs, including the Schedule 201, and there is no error of fact.

But, even if the Commission had erred (which it did not), defendants are precluded from raising this issue because of the "invited error doctrine."[13] Defendants, in opposition to PGE's motion for summary judgment on this very issue about the total length of the PPAs, stated that the text of Section 2.3 in the *form* PPA was "not relevant." Defendants argued that "the length of the

[9] Compl. ¶ 26 ("PGE requests that the Commission . . . approve PGE's interpretation of the NewSun Solar PPAs that the 15-year fixed-price period is measured from contract execution").
[10] Order No. 19-255 at 14 (quoting NewSun PPAs from sections unaltered from the form PPAs).
[11] *Id.* at 15.
[12] *Id.*
[13] "Under the invited error doctrine, a party who 'was actively instrumental in bringing about' an alleged error 'cannot be heard to complain, and the case ought not to be reversed because of it.'" *State v. Brown*, 272 Or App 321, 324 (2015) (*quoting State v. Kammeyer*, 226 Or App 210, 214 (2009) (*quoting Anderson v. Oregon Railroad Co.*, 45 Or 211, 216-17 (1904))).

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overall term hypothetically possible under Schedule 201 is *not relevant* to the meaning of the NewSun PPAs as completed and executed by the parties."[14] The entire first section of defendants' argument for reconsideration is based on form PPA text that defendants earlier told the Commission was "not relevant." If there was an error (which there was not), defendants were actively instrumental in creating that error because they told the Commission that the Section 2.3 of the *form* PPA was not relevant, a position about which defendants now contend the opposite.

B. DEFENDANTS HAVE NOT POINTED OUT ANY ERRORS OF LAW OR FACT, THEY ARE JUST RE-ARGUING REJECTED ARGUMENTS.

Defendants and Intervenors seek reconsideration on the grounds that Order No. 19-255 allegedly contains errors of law or fact.[15] Except for the argument above, defendants and Intervenors do not raise any new arguments; they simply seek to re-litigate the arguments they raised and lost in their motions for summary judgment or in response to PGE's motion for summary judgment.

The Commission has repeatedly held that a desire to re-argue points already argued at an earlier stage of the proceeding is not *good cause* for further examination of an issue essential to the decision. The Commission has also held that the fact an applicant for reconsideration disagrees with the way the Commission decided the issues previously argued does not represent an error of fact or law justifying rehearing or reconsideration.

In Order No. 97-232, the Commission denied a request for rehearing or reconsideration after concluding that "[t]he arguments [the applicant] makes in the application for reconsideration

[14] Defs.' Resp. to PGE's Mot. for Summ. J. at 6-7 (Feb. 15, 2019) (emphasis added).
[15] Defs.' App. at 1 ("Defendants request reconsideration on the grounds that the Order contains errors of law and fact[.]"); Intervenors' Application for Reconsideration ("Intervenors' App.") at 1 (Oct. 1, 2019) ("[Intervenors] request reconsideration … on the grounds the Order contains errors of law and fact.").

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are similar to those made previously in his briefs, and [therefore] do not satisfy the requirements of ORS 756.561 and OAR 860-014-0095 [now OAR 860-001-0720] for reconsideration."[16]

In Order No. 00-308, the Commission denied an application for rehearing or reconsideration filed by the Industrial Customers of Northwest Utilities ("ICNU").[17] The Commission noted that ICNU claimed to rely on an error of law or fact, but the Commission concluded that ICNU "merely reiterates its prior argument and its disagreement with our decision and its underlying reasoning … and provides no new legal or historical basis for review."[18] The Commission concluded that merely reiterating prior arguments or the applicant's disagreement with the Commission's decision does not present an error of law or fact sufficient to justify reconsideration.[19]

In Order No. 92-1769, the Commission denied applications for rehearing or reconsideration filed by the Citizens' Utility Board and by two ratepayers. The Commission noted that the applicants were reiterating arguments they had already made before the Commission issued the order being challenged, and the Commission denied the applications for rehearing or reconsideration noting that the applicants failed to "offer any new or persuasive arguments for granting a rehearing or reconsideration of the final order."[20]

In Order No. 18-369, the Commission denied an application for rehearing or reconsideration filed by Pacific Northwest Solar LLC ("PNW Solar").[21] The application for

[16] *In the Matter of the Application of Idaho Power Company for Authority to Increase its Rates and Charges for Electric Service to Customers in the State of Oregon*, Docket No. UE 92, Order No. 97-232, 1997 WL 35024972, at *1 (Or PUC June 23, 1997).
[17] *In the Matter of the Application of Portland Gen. Elec. Co. for an Order Approving Deferral of Costs Per Senate Bill 1149*, Docket No. UM 954, Order No. 00-308 (June 9, 2000).
[18] *Id.* at 4-5.
[19] *Id*.
[20] *Dan and June May v. Portland Gen. Elec. Co.*, Docket No. UC 196, Order No. 92-1769, 1992 WL 501195, at *1 (Or PUC Dec. 15, 1992).
[21] Docket No. UM 1894, Order No. 18-369 at 1.

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reconsideration did not assert newly available evidence, allege a change in law, or allege mistakes of fact or law.[22] Instead, the application asked the Commission to comment on hypothetical questions posed by PNW Solar,[23] and the application attacked the reasoning and determinations in the Commission's prior order regarding personal and subject matter jurisdiction and regarding the Commission's contract interpretation methodology and support.[24] The Commission denied the application for reconsideration stating: "we find no good cause to further examine this matter, as our prior order addressed each issue essential to our decision."[25]

Where the Commission is aware of the facts and the law, but simply reaches a different conclusion than that favored by the applicant for rehearing or reconsideration, there is no actionable *error of law or fact* and there is no *good cause* for rehearing or reconsideration. Because defendants and Intervenors are not raising new arguments but rather seeking to reiterate and re-litigate arguments already raised and decided, their applications for rehearing or reconsideration should be denied for failure to satisfy OAR 860-001-720(3).

Indeed, Intervenors Community Renewable Energy Association ("CREA") and Renewable Energy Coalition ("REC") have previously argued to the Commission that an applicant for reconsideration must do more than simply reiterate the position it took in prior briefing. In Docket No. UM 1610, CREA and REC argued in a joint brief opposing an application for reconsideration filed by PGE that "Reconsideration is Not an Opportunity to Simply Re-Litigate Losing Arguments" and stated "the burden on reconsideration requires a party to do more than simply re-argue the same position it lost in the underlying proceeding."[26] As detailed below, the arguments

[22] *Id.* at 4.
[23] *Id.* at 2-3.
[24] *Id.* at 3.
[25] Id. at 4.
[26] *In the Matter of Public Utility Commission of Oregon Staff Investigation into Qualifying Facility Contracting and Pricing,* Docket No. UM 1610, CREA and REC Response to Application for Reconsideration at 6 (July 26, 2016).

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advanced in the applications for reconsideration filed by defendants and Intervenors simply reiterate arguments already made in the previous summary judgment briefing and rejected by the Commission. The Commission should reject the applications for reconsideration because they do not identify any errors of law or fact and simply reiterate prior arguments that the Commission has considered and properly rejected.

1. The Commission already reviewed and rejected defendants' argument concerning the meaning of the word "term" in the Schedule 201.

The Commission did not err when it concluded that the term of the PPA has just one meaning throughout each executed NewSun PPA and rejected defendants' contention that there is a second and different meaning that contradicts the definition of the "Term" of the PPA. The Commission did not err because under Oregon law the Commission "may not read into a contract provisions that simply do not exist."[27] Defendants argue the Commission made an error of law when the Commission concluded that the definition of the word "Term" in the PPAs applies to the period for fixed pricing described in Schedule 201.[28] The Commission should reject this argument for three reasons. First, the Commission's reasoning in Order No. 19-255 is sound and there is no reason for the Commission to modify its decision. Second, defendants have mischaracterized the Commission's reasoning in Order No. 19-255 and are attacking a strawman. Third, defendants are reiterating the arguments they made in their own motion for summary judgment and in response to PGE's motion for summary judgment. The Commission has already considered and rejected those arguments and defendants' application for reconsideration is not an opportunity to reargue legal theories that have already been considered and rejected.

[27] *State v. Thomas*, 281 Or App 685, 693 (2016); *see also* ORS 42.230 ("office of the judge is . . . not to insert what has been omitted").
[28] Defs.' App. at 8-12.

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The Commission correctly decided this issue in Order No. 19-255. The Commission noted that Schedule 201 provides that the renewable fixed price option "is available for a maximum term of 15 years."[29] The Commission further noted that Schedule 201 describes the prices available after the initial 15 years by stating: "Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C index price … for all years up to five in excess of the initial 15."[30] The Commission held that this statement that market-based prices apply after the initial 15 years of a PPA is an implicit reference to the PPA term.[31] The Commission then looked to the definition section of the PPA to determine when the PPA term begins and noted that the PPA term begins at contract execution.[32] The Commission concluded: "For the contracts before us, interpreting the entire agreement by reading Schedule 201 together with the PPA's definitions leads to the conclusion that 15 years of fixed pricing is available from the effective date."[33]

In their application for reconsideration, defendants misconstrue Order No. 19-255 and suggest that the Commission has held that the definition of the word "Term" in Section 1.38 of the PPA must be applied to the phrase in Schedule 201 stating, "This option [the renewable fixed price option] is available for a maximum term of 15 years."[34] But Order No. 19-255 includes no such determination; and defendants' contention that the use of the word "term" in that sentence refers to anything other than the 15-year option, *i.e.* that the 15-years of fixed prices is limited to a 15-year term, defies the logic and grammar of the sentence and is without merit. Rather, in Order No. 19-255 the Commission concluded that the statement in Schedule 201 to the effect that Sellers

[29] Order No. 19-255 at 14.
[30] *Id.*
[31] *Id.* ("Although Schedule 201 does not explicitly define the 'term' during which fixed prices are available, this final quoted sentence implicitly refers to the PPA term in defining the availability of market-based prices after 'the initial 15' years of fixed prices.").
[32] *Id.* (noting Section 1.38 of the PPA defines "Term" as "the period beginning on the Effective Date …" and Section 2.1 defines the Effective Date as the date of execution by both parties).
[33] *Id.* at 15.
[34] Defs.' App. at 10.

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with PPAs exceeding 15 years will receive market prices for all years up to five in excess of the initial 15 is implicitly referring to the PPA term defined by Section 1.38 of the PPA. In other words, Schedule 201 is stating that Sellers with PPAs that have a PPA term exceeding 15 years, will receive market prices for that part of the PPA term following the initial 15 years of the PPA term. This conclusion is logical and does not require the application of the definition of "Term" from Section 1.38 of the PPA to the sentence in Schedule 201 which states that the renewable fixed price option is available for a maximum term of 15 years. Defendants' argument attacks a strawman and should be rejected.

Finally, the argument discussed above and the other arguments made by defendants regarding the definition of "Term" are all arguments that defendants made in their motion for summary judgment, in their response opposing PGE's motion for summary judgment, or in their reply in support of defendants' motion for summary judgment.[35] The Commission rejected these arguments when it granted PGE's motion for summary judgment and denied defendants' motion for summary judgment.[36] As discussed above, an application for reconsideration is not an opportunity to simply reiterate prior arguments. Defendants fail to assert any new arguments or identify any errors of law or fact and the application for reconsideration should be denied.

[35] Defs.' Mot. for Summ. J. at 44-48 (Jan. 29, 2019) (arguing that "term" of the PPA in Schedule 201 is not the defined word "Term" in the PPA but instead has the purported industry meaning); Defs.' Resp. to PGE's Mot. for Summ. J. at 8-9 (same); and Defs.' Reply in Supp. of Defs.' Mot. for Summ. J. at 20-21 (Mar. 1, 2019) (same). *See also* PGE's Mot. for Summ. J. at 13-16 (arguing that the term of the PPA has one meaning, not two different meanings, throughout the contract); PGE's Resp. to Defs.' Mot. for Summ. J. at 13-22 (Feb. 15, 2019) (same); and PGE's Reply in Supp. of PGE's Mot. for Summ. J. at 27-33 (Mar. 1, 2019) (same).
[36] *See* Order No. 19-255 at 13-14.

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2. The Commission already considered and rejected defendants' contentions concerning "industry trade usage."

It is black-letter law that trade usage cannot vary written contract language.[37] In *Asbury Transportation Co. v. Consolidated Freightways Corp. of Delaware*, the Court of Appeals held that trade usage evidence was inadmissible[38] because the lease and extrinsic evidence of the parties' intent showed that the disputed term was already defined and that definition could not be contradicted by a supposed trade usage.[39] And, regardless, there is no trade usage in Oregon regarding a PPA term because all three utilities use a different PPA term, as the Commission recognized in Order No. 16-175. 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—all of which include the word "term"—thus showing that the Commission recognized the lack of uniformity in Oregon.[40] Even after the Commission ordered PGE, on a going forward basis, to offer fixed-prices for 15-year measured from commercial operation, the Commission approved differing approaches that result in all three Oregon investor-owned utilities having a different Commission-approved approach to when the 15-year fixed-price period begins.[41] The Commission did not err because trade usage evidence is

[37] 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.")
[38] *Asbury Transp. Co. v. Consol. Freightways Corp. of Del.*, 263 Or 53, 63 (1972).
[39] *Id.*
[40] *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).
[41] *See Northwest and Intermountain Power Producers Coalition, et al. v. Portland Gen. Elec. Co.*, Docket No. UM 1805, Order No. 17-373 (Sep. 28, 2017) (adopting Staff recommendation to approve PGE's revised standard contract forms providing for 15-years of fixed pricing measured from the scheduled Commercial Operation Date and noting that the other two investor-owned utilities regulated by the Commission use different trigger dates for the 15-year fixed-price period).

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relevant only if the trade usage is "universal in the locality where it obtains"[42] and even if there is a trade usage, it cannot contradict the express words of the contract.[43]

Defendants, again, argue that the Commission should import "industry trade usage" regarding the meaning of the word "term" to contradict the express meaning of "term" in the NewSun PPAs.[44] Defendants' application for reconsideration merely re-argues what they have repeatedly argued in their motion for summary judgment, in their response to PGE's motion for summary judgment, and in their reply supporting defendants' motion for summary judgment that there is an industry trade usage or understanding that the term of a power purchase agreement refers to the period of time after a seller's project begins commercial operation. This issue was extensively briefed by both defendants, Intervernors, and PGE. In Order No. 19-255, the Commission acknowledged the argument[45] but ultimately rejected it because industry usage cannot be used to re-write the unambiguous words of the NewSun PPAs.[46]

Defendants' application for reconsideration seeks to reiterate the same arguments that defendants and Intervenors made in their summary judgment briefing[47] and urges the Commission to find that there was an industry trade usage that somehow requires the Commission to interpret PGE's Schedule 201 and standard PPAs as providing for fixed prices for 15 years measured from

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[42] *Barnard & Bunker v. Houser*, 68 Or 240, 243 (1913) ("it was universal in the locality where it obtains"); *see also Hellbusch v. Rheinholdt*, 275 Or 307, 312 (1976) (a custom or usage exists when "uniform in an actively commercial community[.]") (internal citation omitted).
[43] *Asbury Transp. Co.*, 263 Or at 63.
[44] Defs.' App. at 12-16.
[45] Order No. 19-255 at 8 ("The NewSun QFs next claim that there is a common industry context and understanding that a PPA begins when power is delivered and that evidence from industry experts and a review of contracts and other utilities demonstrate that PGE is taking an outlier and mistaken position on contract interpretation.").
[46] *Id.* at 15 ("The NewSun QFs and Intervenors argue that we should favor industry trade usage over a holistic reading of the entire agreement. We have approved other utilities' standard QF contracts with terms that begin at [commercial operation date (COD)]. However, approval of other utilities' contracts does not override the definition of "term" in PGE's PPA that unambiguously begins on the date of execution by both parties, not the COD.").
[47] Defs.' Mot. for Summ J. at 33-37; Intervenors' Mot. for Summ. J. at 9-12; Defs.' Reply in Supp. Of Mot. for Summ J. at 8-15; Defs.' Reply in Supp. Of Mot. for Summ. J. at 8-15; Intervenors' Reply in Supp. Of Mot. for Summ J. at 12-15.

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commercial operation date ("COD") even though the Commission has found that "the contract can only reasonably be interpreted to provide for fixed prices for 15 years from … contract execution" and "[b]ased on the plain language of the contract, there is not a plausible interpretation indicating the availability of 15 years of fixed pricing from COD."[48] PGE has already provided the Commission with extensive briefing regarding why defendants' trade usage argument must fail, including that the trade usage evidence proffered by defendants and Intervenors is irrelevant and inadequate because it does not address specific language in the PPA, does not discuss Oregon or PURPA, does not establish a "uniform" trade usage of the word "term," and was rejected by PGE during contract discussions.[49] The Commission has considered the extensive arguments on trade usage presented by defendants, Intervenors, and PGE and has determined that defendants and Intervenors cannot use a supposed trade usage to alter the unambiguous language of PGE's PPAs and Schedule 201. The Commission did not make an error of law in Order No. 19-255 because trade usage (even if it existed here, which it doesn't) cannot override the unambiguous text of PGE's PPA and Schedule 201.

Defendants have not pointed out any error of law or fact. Instead, they are merely re-arguing previously considered arguments. The Commission should deny Defendants' request to re-argue the trade usage issue.

3. The Commission already considered and rejected defendants' arguments concerning Section 4.5 of the PPAs.

Defendants' reliance on Section 4.5 also fails. As the Commission correctly determined, Section 4.5 deals with ownership of Environmental Attributes and "does not speak to fixed price

[48] Order No. 19-255 at 13.
[49] *See* PGE's Resp. to Defs.' and Intervenors' Mots. for Summ. J. at 20-21; PGE's Reply in Supp. of PGE's Mot. for Summ. J. at 27-34.

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availability."[50] Thus, the fact that the dates listed in Section 4.5 and Schedule 201 "may or may not align as it relates to . . . the availability of environmental attributes"[51] does not change the unambiguous contract language beginning the fixed-price period at execution.

Defendants have not pointed out any error of law or fact in this reasoning. Instead, they are merely re-arguing previously considered arguments. Defendants raised a perceived inconsistency between Schedule 201 and Section 4.5 in their (1) Motion for Summary Judgment; (2) Response to PGE's Motion for Summary Judgment; and (3) Reply in Support of their Motion for Summary Judgment.[52] Indeed, defendants' arguments and citations on this point are repeated almost verbatim from their own prior briefing.[53] As the Commission correctly decided, the two provisions may or may not differ "with respect to the availability of environmental attributes" but there is no "ambiguity with respect to the availability of fixed prices starting at contract execution."[54] As explained in PGE's briefing, there is no inconsistency between Section 4.5 and Schedule 201 as interpreted by the Commission. The QF still "retain[s] all Environmental Attributes" "after completion of the first fifteen (15) years after the Commercial Operation Date," as required by Section 4.5.[55] In their application for reconsideration, as they did in their Motion for Summary Judgment, defendants create the appearance of inconsistency by rewriting Section 4.5 to include language that bars the QF from retaining the Environmental Attributes in earlier

[50] Order No. 19-255 at 15.
[51] *Id.*
[52] Defs.' Mot. for Summ. J. at 42-43 (arguing that Commission "must reconcile inconsistent provisions" (citing *New Zealand Ins. Co. v. Griffith Rubber Mills*, 270 Or 71, 75 (1974))); Defs.' Resp. to PGE's Mot for Summ. J. at 13 ("PGE's interpretation leads to a direct contradiction with, and would require reformation of, Section 4.5."); Defs.' Reply in Supp. of Defs.' Mot. for Summ. J. at 17 (arguing that PGE's interpretation of the PPAs "[w]ould [c]reate an [i]rreconcilable [c]onflict with Section 4.5 of the PPAs").
[53] *Accord* Defs.' Mot. for Summ. J. at 42-43 (quoting *Hoffman* and *New Zealand Ins.*) *and* Defs.' App. at 17 (same).
[54] Order No. 19-255 at 15 ("Section 4.5 does not speak to fixed price availability and does not indicate when fixed prices are available. … The fact that the date of contract execution and [the] commercial operation date may or may not align as it relates to Schedule 201 and Section 4.5 with respect to the availability of environmental attributes does not create ambiguity with respect to the availability of fixed prices starting at contract execution.").
[55] PGE's Resp. to Defs.' Mot. for Summ. J. at 26-27.

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periods.[56] PGE explained in its summary judgment briefing why there is no inconsistency, and defendants' application for reconsideration makes no attempt to respond to these flaws in their argument.[57] In sum, the Commission did not make an error of law when it determined that defendants cannot inject ambiguity into Schedule 201 by citing to Section 4.5, and defendants' application merely restates arguments that the Commission already correctly rejected.

4. The Commission already considered and rejected defendants' view of the Commission's prior orders in UM 1805.

As the Commission recognized in multiple orders both before and after defendants executed the NewSun PPAs, Order No. 05-584 did not establish a policy concerning when the 15-years of fixed prices must begin.[58] In the briefing in the appeal of UM 1805, the Commission affirmed that defendants are wrong to contend that any such policy was established in Order No. 05-584.[59] Order No. 19-255 does not contain an error of law concerning the Commission's prior orders in Docket No. UM 1805.[60] As with defendants' other arguments, this is an attempt to re-argue issues that were addressed at length in the summary judgment briefing[61] and which have already been decided by the Commission.[62]

[56] Defs.' App. at 18-19 (contending that Section 4.5 states that a QF can only receive Environmental Attributes "starting" 15 years after COD, *i.e.* in no earlier period).
[57] PGE's Resp. to Defs.' Mot for Summ. J. at 26-28.
[58] Docket No. UM 1725, Order No. 16-175 at 3 (May 16, 2016); Docket No. UM 1805, Order No. 17-256 at 3 (July 13, 2017) ("When we concluded that QFs should receive 15 years of fixed prices under standard contracts in Order No. 05-584, we did not specify the date on which that 15-year term begins.").
[59] PGE's Reply in Supp. of Mot. for Summ. J. at 3-7 (quoting Commission's appellate brief extensively).
[60] Defs.' App. at 20-22.
[61] *See* Defs.' Mot. for Summ. J. at 28-29; PGE's Resp. to Defs.' Mot. for Summ. J. at 30-34; Defs.' Reply in Supp. of Defs.' Mot. for Summ. J. at 3-7; PGE's Reply in Supp. of Mot. for Summ. J. at 3-7.
[62] Order No. 19-255 at 17 ("[O]ur regulatory history demonstrates that past decisions neither mandated nor prohibited PGE from developing a contract that provided 15 years of fixed pricing from execution of the contract. Our silence on this issue prior to 2018 is not altered by our conclusion in docket UM 1805, when the specific question was finally before us, that 15 years of fixed prices must be available from COD in order to appropriately balance the policy considerations between QFs and ratepayers that the Commission first introduced in 2005.").

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In Order No. 19-255, and also in the orders issued in UM 1805, the Commission recognized that Order No. 05-584 does not state when the 15-year fixed-price period must begin.[63] Because Order No. 05-584 does not state when the 15-year fixed-price period must begin, it was possible for different utilities to submit and obtain Commission-approval of standard contract forms that use different start dates for the 15-year fixed-price period.[64] The Commission's orders in UM 1805 do not contradict this, they acknowledge it.[65]

PGE's contention in this case has been that regardless of what policy the Commission intended to establish in Order No. 05-584, the Commission did not specify in that order the start date for the 15-year fixed-price period, and PGE's Commission-approved PPAs filed prior to July 13, 2017, (and on which the NewSun PPAs are based) provided for a fixed-price period that is limited to the first 15 years of the PPA term which began at contract execution. In Order No. 19-255, the Commission agreed with this interpretation.[66]

Nothing in the Defendant's application for reconsideration or the orders in UM 1805 demonstrates that Order No. 19-255 contains an error of law. Instead, defendants are simply trying to re-argue their view of Order No. 05-584 and the Commission's orders in UM 1805.[67] A request

[63] *Id.* at 16 ("The decision itself [Order No. 05-584] did not address the potential start date for that 15 years of fixed price availability[.]"); Docket No. UM 1805, Order No. 17-256 at 3 ("When we concluded that QFs should receive 15 years of fixed prices under standard contracts in Order No. 05-584, we did not specify the date on which that 15-term term begins.").
[64] Docket No. UM 1805, Order No. 17-256 at 3.
[65] *Id.*; Docket No. UM 1805, Order No. 17-465 at 4 (Nov. 13, 2017) (modifying language of Order No. 17-256 but retaining conclusion that PGE's Commission-approved contracts do not violate Commission orders, even if the contracts limit the availability of fixed prices to the first 15 years after contract execution, because Order No. 05-584 did not specify when the 15-year fixed-price period begins and the Commission approved PGE's contract forms and therefore approved PGE's approach); Docket No. UM 1805, Order No. 18-079 at 1 (Mar. 5, 2018) (noting that PGE's standard contracts had not violated any statute, rule or Commission order regarding the 15-year fixed price period because the Commission approved PGE's standard contract forms).
[66] Order No. 19-255 at 17 ("We find that the language of the contracts in question favors PGE's interpretation, and that nothing in the regulatory history suggests a different conclusion.").
[67] Defs.' App. at 21 (expressly stating that Defendants' are reiterating the arguments they made in their motion for summary judgment).

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for reconsideration is not an opportunity to re-argue previously argued and decided points and the Commission should deny the application for reconsideration.

Defendants' application for reconsideration concerning the regulatory history should be denied for the separate and additional reason that it fails the requirements of OAR 860-001-0720(3). That rule provides that the Commission may, but is not required to, grant an application for rehearing or reconsideration if, among other reasons, "the applicant shows that there is . . . (c) [a]n error of law or fact in the order that is *essential* to the decision; or (d) [g]ood cause for further examination of an issue *essential* to the decision."[68] The Commission stated in Order No. 19-255 that the regulatory history was not essential to its decision. The Commission stated that it arrived at its conclusions by "looking only to the 'four corners' of the agreement[.]"[69] The Commission stated that "[b]ased on the plain language of the contract, there is not a plausible interpretation indicating the availability of 15 years of fixed pricing from COD. Although *our analysis ends with the conclusion that the contract is unambiguous*, we go on to confirm that nothing in the regulatory history conflicts with our conclusion under the first step of *Yogman*."[70] Because the analysis of the regulatory history was not essential to the decision, defendants' arguments concerning that part of the history fail the requirements under OAR 860-001-0720.

5. The Commission did not err in its interpretation, hence *Yogman* Step Two and Step Three are inappropriate and, in any event, favor PGE.

Order No. 19-255 does not contain an error of law or fact, and the application for reconsideration should be rejected. If the Commission reconsiders Order No. 19-255 and

[68] OAR 860-001-0720(3) (emphases added).
[69] Order No. 19-255 at 15.
[70] *Id*. at 13-14 (citing *Yogman v. Parrott*, 325 Or 358 (1997)) (emphasis added); *also id.* at 15 (same).

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concludes that the NewSun PPAs are ambiguous,[71] then, under Step Two and Step Three of Oregon's method for interpreting contracts, the Commission should affirm summary judgment for PGE for the reasons in PGE's motion for summary judgment. Briefly, PGE made an *offer* that explicitly stated that the 15-years of fixed prices began at execution, and defendants, albeit grudgingly, *accepted that offer*.[72] PGE's evidence in support of its position consists entirely of the defendants' own declarations (*i.e.* defendants' own admissions) plus two pre-contract-execution letters between the parties attached to a PGE declaration.[73] In contrast, defendants' extrinsic evidence is based on its separately submitted statement of facts and concerns an email in January 2013 (*i.e.* before the defendants were formed) in a docket unrelated to the 15-year fixed price period start date where Commission Staff asked PGE to remove a proposed change to its PPA form because the change was outside of the scope of that docket's narrow focus.[74]

Further, under Step Three of *Yogman*, the maxims of construction favor PGE for the reasons stated in the briefs.[75] Specifically, defendants' primary Step Three argument is based on their erroneous assumption that the policy in Order No. 05-584 of setting fixed prices for 15 years was solely for the benefit of QFs.[76] They are in error. The Commission stated that establishing maximum terms for standard PPAs "requires us to balance two goals" and that "[a] primary goal

[71] Defendants essentially conceded that the NewSun PPAs cannot be construed in their favor unambiguously because, at the hearing when asked "is there any language in the PPA that says fixed price starts at COD?" defendants answered, "No, there's nothing in the PPA that specifically says that." (Decl. of Rebecca K. Dodd in Supp. of PGE's Resp. to Defs.' and Intervenors' Applications for Reconsideration, Ex. 1 at 4, Hearing Tr. 35:7-10.)
[72] PGE's Mot. for Supp. J. at 27-31; PGE's Reply in Supp. of Mot. for Summ. J. at 19-20.
[73] PGE's Mot. for Supp. J. at 27-31, fns. 164-68, 175-77, 179; PGE's Reply in Supp. of Mot. for Summ. J. at 19-20, fns. 111, 114-17.
[74] Defs.' Mot. for Summ. J. at 53-60; PGE's Resp. to Defs.' Mot. for Summ. J. at 37-39; Defs.' Reply in Supp. of Mot. for Summ. J. at 22-25.
[75] Defs.' Mot. for Summ. J. at 61-63; PGE's Resp. to Defs.' Mot. for Summ. J. at 41-45; Defs.' Reply in Supp. of Mot. for Summ. J. at 26-28.
[76] Defs.' Mot. for Summ. J. at 61-62 (contending that "Fixed-Price Benefit Was Created" for QFs and ignoring Commission policy of protecting customers from price divergence).

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in this proceeding is to accurately price QF power."[77] The Commission approved a 20-year maximum term but stated that it limited fixed prices to only the first 15 years because of "our desire to calculate avoided costs as accurately as possible[.]"[78] Given that the Commission limited the period of fixed prices to only 15 years of the 20-year term because of its "primary goal" to accurately price power and because of its desire to reduce divergence between fixed prices and actual avoided costs, the party that was intended to benefit from accurate pricing is Oregon customers, not QFs. Hence Step Three weighs in favor of granting summary judgment for PGE and denying defendants' motion for summary judgment.

C. THE INTERVENORS' APPLICATION SHOULD BE DENIED BECAUSE IT DOES NOT POINT TO ANY ERRORS OF LAW OR FACT AND BECAUSE IT ADDRESSES ISSUES NOT ESSENTIAL TO THE DECISION.

OAR 860-001-0720(2)(d) requires that the "application must specify . . . [h]ow the applicant's requested change in the order will alter the outcome[.]" All three of Intervenors' arguments fail this threshold requirement. Their first two arguments concern regulatory history, which the Commission repeatedly stated was not essential to its decision. The third argument seeks a clarification of how the Commission interprets contracts, specifically asking the Commission to not consider regulatory history, which, again, was not essential to the Commission's decision.

A review of Order No. 19-255 quickly reveals that Intervenors' application fails to address any issue that will change the outcome, because the outcome did not rely on the regulatory history. The Commission stated in the first paragraph of its Order that it granted summary judgment for PGE "based on the specific language of the contracts in question[.]"[79] It then stated in the third

[77] *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 at 19 (May 13, 2005).
[78] *Id.* at 20.
[79] Order No. 19-255 at 1.

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paragraph of the Resolution section that "[b]ased on the plain language of the contract, there is not a plausible interpretation indicating the availability of 15 years of fixed pricing from COD. Although *our analysis ends with the conclusion that the contract is unambiguous*, we go on to confirm that nothing in the regulatory history conflicts with our conclusion under the first step of *Yogman*."[80] At the end of *Yogman* Analysis subsection of the Resolution section in the Order, the Commission again stated that its decision was based entirely on the text of the NewSun PPAs, nothing more. The Commission stated, "we reach this conclusion under *Yogman*'s first step, looking only to the 'four corners' of the agreement[.]"[81] The Commission stated it reviewed the regulatory history only because "both parties relied extensively on the regulatory history to support their interpretations."[82]

Intervenors' first and second arguments are based entirely on the regulatory history analysis in the Order. A change to the regulatory history analysis, though, will not alter the outcome of the order. Similarly, Intervenors' third argument is a request to "clarify" the role of regulatory history in Order No. 19-255, and that the Commission "clarify" that "the *Yogman* framework applies to interpretation of PURPA PPAs."[83] But the Order's repeated reference to *Yogman* and its statement that the Commission based its conclusion on the "four corners of the agreement" negates any need for clarification. More importantly, the clarification that the Intervenors seek will *not* alter the outcome. As such, all of Intervenors' arguments fail the threshold requirement of OAR 860-001-0720(2)(d), *viz.* Intervenors fail to address sections of Order No. 19-255 that will alter the outcome, and, therefore, the Commission should deny the application.

[80] *Id.* at 13-14 (emphasis added).
[81] *Id.* at 15.
[82] *Id.*
[83] Intervenors' App. at 15.

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Further, as discussed briefly below, each of the arguments also fails on the merits.

1. The Commission correctly recited the regulatory history of relevant Oregon policy implementing PURPA.

The Commission in Order No. 19-255 concisely recounted the relevant portions of PURPA, Order No. 05-584, the three utilities' first-approved standard PPAs after Order No. 05-584, Order No. 16-129, Order No. 16-175, Order No. 17-256, Order No. 17-465, and Order No. 18-079.[84] The Commission concluded (again) that it was not until UM 1805 in 2017—after these PPAs were signed—that the Commission ordered, on a going-forward basis, that PGE provide standard PPAs where the 15-years of fixed prices commences on the scheduled COD.[85]

Intervenors do not contend that the Commission erred in any specific description of the regulatory history, but instead argue that the Commission erred because the order "infers" (wrongly, according to Intervenors) that the earlier Commission understood what PGE wrote in its first Commission-approved PPAs in 2006.[86] Intervenors' entire argument is summed up in their statement that the Commission "ma[d]e an error of fact by implying that PGE's atypical position was understood and endorsed by the Commission" when the Commission previously approved PGE's form PPAs.[87] Intervenors, in short, are arguing that the prior Commissions and their staff (and all the possible intervenors that could have objected to PGE's proposed PPAs) all were fooled by PGE's earlier compliance filings. Because the Commission erred (according to Intervenors) in making the inference that prior Commissioners understood PGE's earlier PPA compliance filings, it led (according to Intervenors) to the incorrect factual inference that the Commission had not established in Order No. 05-584 a policy on when the 15-year fixed price period commences.[88]

[84] Order No. 19-255 at 3-7, 16-17.
[85] *Id.* at 16 ("Until we clarified our policy on a going-forward basis, the Commission had not established a specific requirement for when the 15-year period of fixed prices must commence.").
[86] Intervenors' App. at 4.
[87] *Id.*
[88] *Id.* at 10.

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The basis for Intervenors' contention, *i.e.* that the Commission and Commission Staff did not understand PGE's prior compliance filings, is simply an insult to prior Commissioners and prior Commission Staff and should be rejected. There is no basis to support Intervenors' contention that prior Commissioners and Staff didn't understand PGE's PPAs, and Order No. 19-255's clear and concise analysis of the three utilities' earlier PPAs forms[89] fatally undermines Intervenors' position.

Intervenors also incorrectly state that the Commission would not have intentionally approved PGE's forms that provided for 15-years of fixed prices commencing at execution.[90] But the Commission did exactly that on October 11, 2016, when it approved[91] the standard PPA forms and Schedule 201 that PGE filed in July 2016, a few months after the Commission stated in Order No. 16-175 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.[92]

As explained above, Intervenors' first argument fails the requirement in OAR 860-001-0720 that the application address an issue that would alter the outcome. Intervenors' first argument also fails because it identifies no error except the supposed "inferred" and "implied" errors. The Order does not make an error of fact when it states (again) that the Commission had not established until 2017 a specific requirement for when the 15-year fixed price period commences.

[89] Order No. 19-255 at 4-5.
[90] Intervenors' App. at 10 ("had PGE's atypical position been clearly articulated and therefore well-understood at the time of the initial compliance filings, it would not have been approved.").
[91] Docket No. UM 1610, Order No. 16-377 (Oct. 11, 2016) (approving standard PPA forms and Schedule 201 that PGE filed on July 12, 2016).
[92] Docket No. UM 1725, Order No. 16-175 (May 16, 2016) ("We note that the standard contract approved by PacifiCorp, dba Pacific Power, contains language similar to Idaho Power's; however, PGE's standard QF contract differs with regards to when the 15-year period commences.").

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2. The Commission correctly concluded that the regulatory history supports its decision.

Intervenors' heading and first sentence for their second argument assert that there is an error of law in Order No. 19-255, but Intervenors do not actually make an argument in this section of their application for reconsideration. Intervenors, in the first paragraph of the section, simply say that the regulatory history supports their position without any subsequent logical or factual or historical support or argument. They instead proceed to disagree with the order because it is "precedent" that they believe will lead to outcomes that their members will disagree with.[93] Because none of this identifies an actual error of law and because revisiting the regulatory history will not alter the outcome (which was based on the text of the NewSun PPAs) and is, instead, an unfounded policy concern going forward, the argument fails to meet the threshold requirements for reconsideration under OAR 860-001-0720.

3. Intervenors fail to identify any error of law or fact in the Commission's explicit statement that it was following the *Yogman* three step process for contract interpretation.

Intervenors' third argument for reconsideration fails for multiple reasons, including that it fails to comply with the Commission's rules. As noted above, OAR 860-001-0720(2)(d) requires that the "application must specify" "[h]ow the applicant's requested change in the order will alter the outcome[.]"[94] The clarification that the Intervenors seek concerning application of *Yogman* will *not* alter the outcome and, therefore, the Commission should deny the application.

Intervenors' application also fails for the separate and additional reason that their request is without merit. Intervenors ask the Commission to reconsider Order No. 19-255 simply to "clarify" that the Commission used the *Yogman* three-step paradigm to interpret the PPAs. But

[93] Intervenors' App. at 11 ("The precedents that the Commission establishes with Order No. 19-255 is . . . ."); *id.* at 12 ("the Order also sets a precedent that . . . .").
[94] OAR 860-001-0720(2)(d).

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Intervenors admit that the Commission already clearly stated that "'we reach this conclusion under *Yogman*'s first step.'"[95] The Commission also stated that "[b]ased on the plain language of the contract, there is not a plausible interpretation indicating the availability of 15 years of fixed pricing from COD. Although *our analysis ends with the conclusion that the contract is unambiguous*, we go on to confirm that nothing in the regulatory history conflicts with our conclusion under the first step of *Yogman*."[96] There is nothing to clarify and thus the argument for reconsideration is moot.

IV. CONCLUSION

The reasons above and in PGE's prior briefing, PGE respectfully requests that the Commission deny the applications for reconsideration.

DATED this 16th day of October, 2019.

Respectfully submitted,

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[95] Intervenors' App. at 13, quoting Order 19-255 at 15.
[96] Order No. 19-255 at 13-14 (emphasis added); *see also id.* at 15 (same).