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February 15, 2019

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
PO Box 1088
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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 Complainant's Response to Defendants' and Intervenors' Motions for Summary Judgment.

Thank you for your assistance.

Very truly yours,

Dallas DeLuca

ALFA-PUC\836596

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

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

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I. INTRODUCTION

The NewSun power purchase agreements ("PPAs") unambiguously provide that each NewSun Party will receive fixed prices only for the "initial 15" years of the PPA. The NewSun Parties fail to provide any reasonable interpretation that this clear, unambiguous text can be read as providing for fixed prices after the "initial 15" years of the PPA. Defendants' own witnesses admit that the PPA begins at execution, even though power deliveries begin years later. Defendants contend the beginning of the fixed-price period should be determined not by the words of the operative provisions, but instead by non-party legal opinions, a PPA provision about Environmental Attribute ownership, and industry customs 30 years ago in other states and countries. The NewSun Parties are incorrect. The PPAs' text, context, and drafting history demonstrate that the "initial 15" years of the PPA begins at execution. Hence, defendants "will receive pricing equal to the Mid-C Index price . . . for all years up to five in excess of the "initial 15" years of the PPA.[1]

The drafting history demonstrates that the NewSun PPAs unambiguously provide for 15-years of fixed prices commencing at execution. That requirement has been written into PGE's PPAs since 2005. In December 2014, in complying with an order that was unrelated to the 15-year fixed price issue, some of the 2005 text explicitly defining the start date of the fixed-price period was removed from the PPA, but the unambiguous Schedule 201 language remained. It is simply not reasonable or credible to assume that PGE would have, in 2014, changed the fixed-price period from commencing at "execution" to commencing at the Commercial Operation Date without any direction from the Commission, without any discussion with the relevant consumer

[1] *See, e.g.*, Compl., Ex. 1 at 30 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-12). The NewSun PPAs are attached to the complaint. (See Complaint Exs. 1-10.) Because the terms at issue in this case are identical across all 10 PPAs, when referring to terms in the executed PPAs, PGE will simply cite to this PPA.

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groups and power producer trade associations, and without changing more directly the applicable text in the PPAs. If PGE had intended to change the trigger from execution to COD, the estimated harm to consumers from that change, based on the approximately 62 PPAs executed with text similar to that in the NewSun PPAs, is $200,000,000.[2] PGE would not have made a change with such large impacts by implication. Instead, PGE would have used express terms, as it did when it implemented the change that the Commission required in Order No. 17-256.

The Oregon Supreme Court and ORS 42.240 both require that any interpretation of a contract must be based on the parties' intention when they signed the contract. Here, the undisputed history of PGE's Commission-approved PPAs removes any ambiguity that PGE's intention, approved by the Commission,[3] was to offer PPAs where the fixed-price period commences at execution. The NewSun Parties disagreed with whether PGE's PPA was compliant with Order No. 05-584,[4] but the NewSun Parties signed the contracts anyway.

For contract interpretation under Oregon law, it is irrelevant that defendants disagreed with PGE as to what the PPA "*should* be" based on the NewSun Parties' interpretation of Order No. 05-584. Neither the Commission nor a court can change a signed contract, even a PPA. Further, the Commission has since rejected the defendants' interpretation of Order No. 05-584: "When we

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[2] PGE/300, Khandoker/2 (estimating range of harm to be from $143 million to $200 million); *and* PGE/301, Khandoker/2 (showing summary of calculations).

[3] In the appeal of Docket No. UM 1805, the Commission stated that "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." Declaration of Anit Jindal in Support of PGE's Response to Defs.' and Intervenors' Mots. For Summ. J. ("Jindal Declaration"), Ex. 1 at 6 (*Northwest and Intermountain Power Producers Coalition et al., v. Portland General Electric*, No. CA106707 (Or App Feb 14, 2019), Respondent's Answering Brief in the appeal of Docket No. UM 1805 at 18) (emphasis in original).

[4] *Re Investigation Related to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 (May 13, 2005).

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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."[5]

Defendants' and intervenors' position is unsupported and unsupportable. Until 2017, the Commission had never required PGE to offer PPAs where the fixed-price period commenced at COD, and starting in 2005 through 2017, PGE offered Commission-approved PPAs where the fixed-price period commenced at execution. Further, the NewSun Parties knew that was PGE's offer because PGE, pre-execution, informed defendants of that multiple times in writing. Here, PGE clearly offered that fixed prices would be available for 15-years measured from execution, PGE rejected defendants' counteroffer of 15-years from COD, and defendants signed the offer that PGE provided.

II. BACKGROUND

A. In Order No. 05-584, the Commission ordered that standard contracts offered by utilities to qualifying facilities include a 20-year contract term with prices fixed for "only the first 15 years" of the term.

During the investigation that preceded Order No. 05-584, the Commission investigated, among other issues, the length of standard contracts and whether to adopt model standard contract forms for all utilities.[6] In setting the standard contract length in that order, the Commission sought to "balance" two competing goals.[7] The Commission's "primary goal" was ensuring that the standard contracts accurately price QF power.[8] As the Commission acknowledged, lengthening the "specified term" of fixed prices posed a problem: "divergence between forecasted and actual

[5] *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 at 3 (July 13, 2017).
[6] Docket No. UM 1129, Order No. 05-584 at 1-2, 17-20, 41-42.
[7] *Id.* at 19.
[8] *Id.*

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avoided costs must be expected" over a lengthy contract term.[9] However, the Commission believed that a short overall contract term conflicted with the Commission's other goal, ensuring that QFs obtain financing.[10]

The Commission ultimately balanced those goals by bifurcating the term of the standard contract. The Commission set "the maximum term" as 20 years but ruled that "standard contract prices should be fixed for only the first 15 years of the 20-year term" with market prices for the "final five years."[11] Limiting fixed prices to "the first 15 years" served the Commission's primary goal in limiting price divergence, while providing market prices for the "final five years," for a total term of 20 years, helped QFs secure adequate financing.[12]

B. In Order No. 05-584, the Commission also declined to adopt a model standard contract form.

The Commission declined to create a model PPA that all utilities must follow and instead determined that each utility "should draft its own standard contract rates, terms, and conditions."[13] The Commission declined to impose a standard form, and the Oregon industry—which consisted of only three utilities—was allowed to adopt different terms as long as the terms were consistent with "present or past decisions" of the Commission.[14]

Thus, individual utilities draft their own standard contract forms, which the Commission then approves as compliant with state and federal laws and regulations and the Commission's prior orders interpreting and implementing those laws and regulations.[15] When the Commission issues

[9] *Id.* at 20.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 41.
[14] *Id.*
[15] *See id.*

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a new order dictating new standard contract requirements, the utilities make compliance filings to obtain Commission approval of revised standard contracts that comply with the requirements of the Commission's new order. The utilities also periodically file revised avoided cost schedules with updated estimates of avoided costs in future years.

C. The Commission approved PGE's standard contracts that set the 15-year period of fixed prices as beginning at contract execution.

Defendants and intervenors have not disputed that the standard contract forms that PGE submitted to the Commission in 2005 and 2007 to comply with Order No. 05-584 provided for 15 years of fixed prices beginning at contract execution.[16] As described in PGE's motion for summary judgment, Section 5 of the 2005 and 2007 PPAs provided that the fixed-price period was available during the first 15 years of the "Term," which explicitly began at "execution." [17] This explicit description of the start date of the fixed-price period in former Section 5 of the PPAs remained unchanged until a December 2014 compliance filing on an unrelated issue.[18] Even after Section 5 was revised in December 2014, PGE's standard contract forms unambiguously provided that the 15 years of fixed prices began at execution. This did not change until PGE was ordered to make a change in 2017 (well after the NewSun PPAs were executed). The Commission has already ruled that PGE's 2005 to 2017 contract forms did not violate any Commission orders.[19]

Although *former* Section 5 of the PGE PPA is not part of the NewSun PPAs, in the NewSun PPAs, in Schedule 201 (Exhibit D to the NewSun PPAs), the Renewable Fixed Price Option is

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[16] By asking the Commission to ignore PGE's earlier PPA forms, defendants and intervenors implicitly admit that the Commission, starting in 2005, approved PPAs that provide that the 15-year period for fixed prices begins at execution.
[17] PGE's Mot. for Summ. J. at 19-21; *see also* PGE/100, Macfarlane/15-16 ("Section 5 … make[s] clear that the Fixed Price Option is available only for the first 15 years following contract execution.").
[18] See PGE/106, Macfarlane/56 (PGE's Nov. 25, 2014 Compliance Filing in Docket No. 1610, Redline Standard Off-System Variable PPA, Schedule 201 at Section 5).
[19] Docket No. UM 1805, Order No. 17-465 at 4 (Nov. 13, 2017) (noting that, prior to Docket No. UM 1805, the Commission "repeatedly reviewed and approved PGE's standard contract forms submitted following our decision in Order No. 05-584 . . . .").

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only "available for a maximum term of 15 years"[20] and "Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price [*i.e.* market prices] . . . for all years up to five in excess of the initial 15."[21] The NewSun PPAs provide that "Contract Price" is the price in Schedule 201.[22] This verbiage in Schedule 201 has been virtually unchanged since PGE's 2005 compliance filings, which explicitly began the fixed-price period at "execution."[23]

D. In Order No. 17-256, the Commission ruled that Order No. 05-584 permitted PGE to offer standard contracts that began the 15-year period of fixed prices at contract execution, but "clarified" its policy to foreclose such a result going forward.

In Order No. 17-256, the Commission confirmed that PGE "lawfully offered standard contracts to operators of qualifying facilities (QFs) that have 15-year periods of fixed prices that begin on the date of execution, rather than on the date that the QF begins to transmit power."[24] The Commission explained that in Order No. 05-584, the Commission "did not specify the date on which that 15-year term begins."[25] The Commission further ruled that Order No. 05-584 presumed that utilities would set their own start dates for the beginning of the fixed-price period, and it was possible and acceptable that the utilities' contract forms would not be "identical" on this point.[26]

Consistent with this reading of Order No. 05-584, the Commission acknowledged that it had approved "standard QF contracts [from different utilities] that have used, as the triggering

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[20] Compl., Ex. 1 at 30 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-12).
[21] *Id.*
[22] *Id.* at 2 (Alfalfa Solar I LLC PPA at Section 1.6).
[23] *See* PGE/102, Macfarlane/7 (PGE's July 12, 2005 Compliance Filing, PGE Advice No. 05-10 in Docket No. 1129, Schedule 201 at Original Sheet No. 201-4); *see also* PGE/100, MacFarlane/13, 14-16. The only change in this text was an amendment replacing the word "contract" with the more specific noun "PPA" in more recent PPA forms, and replacement of multiple market price options with a single "Mid-C Index price." *Compare* PGE/102, Macfarlane/7 with Compl., Ex. 1 at 30 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-12).
[24] Docket No. UM 1805, Order No. 17-256 at 1.
[25] *Id.* at 3.
[26] *Id.*

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event, both the date of [contract] execution and the date of power delivery."[27] The Commission thus concluded that PGE did not violate any prior orders, including Order No. 05-584, and granted summary judgment to PGE.[28]

E. In Order No. 17-465, the Commission granted Complainants' petition for clarification and amended Order No. 17-256 to make clear the Commission had not interpreted any specific PPA in UM 1805.

Complainants in Docket No. UM 1805 moved for reconsideration of Order No. 17-256 and asked the Commission to clarify that it had not interpreted any of PGE's previously effective standard contract forms or any of its executed standard contracts.[29]

The Commission granted the motion in part and amended Order No. 17-256 to make clear that in Docket No. UM 1805 it had not interpreted any of PGE's standard contracts.[30] The Commission left intact the portion of Order No. 17-256 that acknowledged the Commission had previously approved "standard contracts that have used, as the triggering event, both the date of [contract] execution and the date of power delivery."[31] Thus, the Commission continued to interpret Order No. 05-584 as permitting PGE to offer standard contracts with fixed-price terms beginning at execution. The Commission simply amended its order to make clear that during UM 1805 it had not interpreted any particular PGE standard contracts in so ruling.[32]

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[27] *Id.*
[28] *Id.*
[29] Docket No. UM 1805, Complainants' Mot. for Recons. at 1 (Sept. 11, 2017).
[30] Docket No. UM 1805, Order No. 17-465 at 4.
[31] *Id.*; *see also* Docket No. UM 1805, Order No. 17-256 at 3.
[32] *See* Docket No. UM 1805, Order No. 17-465 at 4 ("We recognize that the actual terms of PGE's standard contract forms have varied over time, and we did not undertake a review of all those forms prior to rendering our decision.").

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F. In Order No. 18-079, the Commission denied PGE's motion for clarification and ruled that Order No. 17-256 "affirmed and made explicit" the policy from Order No. 05-584.

In Order No. 18-079, in response to PGE's motion for reconsideration of Order No. 17-465, the Commission reasoned that in mandating that the fixed-price period begins at scheduled commercial operation, it simply "affirmed and made explicit [the] policy adopted in Order No. 05 584."[33] In other words, the policy was not explicit before 2017. Order No. 18-079 was the first instance in which the Commission interpreted Order No. 05-584 as "adopt[ing]" a policy that required PGE to pay QFs 15 years of fixed prices beginning at scheduled commercial operation.[34] The Commission stated that it "stand[s] ready to interpret individual standard contract forms as they are brought to us" to determine the start date of the fixed-price period.[35]

III. ARGUMENT

A. PGE's PPA forms unambiguously provide for 15 years of fixed prices beginning at execution.

1. The fixed-price period covers the "initial 15" years of the "PPA," and the PPA unambiguously begins at execution.

The starting point for contract analysis is the words of the contract.[36] Here, as discussed in detail in PGE's motion for summary judgment, the fixed-price period is restricted by the following language in PGE's Schedule 201 (which is incorporated as part of the NewSun PPAs): "Sellers with PPAs exceeding 15 years will receive [market prices] . . . for all years up to five in

[33] Docket No. UM 1805, Order No. 18-079 at 3 (Mar. 5, 2018).
[34] *Id.*
[35] *Id.*
[36] *State v. Heisser*, 350 Or 12, 25 (2011) ("When considering a written contractual provision, the court's first inquiry is what the words of the contract say, not what the parties say about it.") (citation omitted).

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excess of the initial 15."[37] Thus, by Schedule 201's plain words, the Seller receives fixed prices for only the "initial 15" years of the "PPA."

Defendants and intervenors devote their summary judgment briefing and testimony to attempting to inject ambiguity, and an entirely new *second* definition, into the word "term." But none of that briefing and testimony suggests that the word "*PPA*" is ambiguous. Schedule 201 defines "PPA" as the "Standard Power Purchase Agreement[]."[38] The Power Purchase *Agreement* unambiguously begins at execution: the first sentence of each PPA states "THIS AGREEMENT" is "entered into this [execution date]."[39] Similarly, Section 2.1 of each PPA states "This Agreement shall become effective upon execution by both Parties."[40] Defendants and their expert agree that the PPA begins at execution. The expert, Harnsberger, testified: "I would agree that it is normal in the context of a power purchase agreement that the contract is in effect upon execution . . . ."[41] Intervenors' witness, John Lowe, also testified that "the PPA itself would be effective before" commercial operations.[42]

Similarly, in their motion, defendants repeatedly admit that the PPA begins at execution, prior to commercial operations. They admit that "there is an initial period of a power purchase agreement before power sales begin during which the agreement is in effect"[43] and "all PPAs, . . . are expected to technically be effective at the time of execution."[44] Because the text, context, and

[37] 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).
[38] *Id.* at 25 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-1).
[39] *Id.* at 1 (introductory sentence of Alfalfa Solar I LLC PPA).
[40] *Id.* at 7 (Alfalfa Solar I LLC PPA at Section 2.1).
[41] NewSun Parties/200, Harnsberger/6.
[42] CREA-NIPPC-REC/100, Lowe/3.
[43] Defs.' Mot. for Summ. J. at 35.
[44] *Id.* at 45.

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undisputed evidence all show that the PPA begins at execution, the "initial 15" years of the PPA necessarily begin at execution as well.

Defendants contend that "the phrase 'PPAs exceeding 15 years' in Schedule 201 means power *purchase* agreements that provide for in excess of fifteen years of power *purchases* (i.e., PPAs that expire more than fifteen years after the Commercial Operation Date, which is how a normal industry participant would understand these words)."[45] Defendants do not support this sentence with a citation to any authority except that, in defendants' view, it is consistent with Section 4.5.[46] But, defendants' interpretation of Schedule 201 is contrary to its own witness testimony and to basic grammar. Defendants attempt to rewrite the phrase "power purchase agreements" to mean only "power purchases." The noun in the phrase "power purchase agreements" is agreements, not purchases. It is black-letter law that defendants cannot rewrite a contract after-the-fact.[47] And, again, defendants' own expert admits that the commencement of the PPA predates any power purchases.[48]

Because there is no ambiguity in the word "PPA," there is no ambiguity in the meaning of the term "initial 15" years of the "PPA." Thus, the text that "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"[49] unambiguously precludes fixed prices more than 15 years after execution.

[45] *Id.* at 43.
[46] *Id.*
[47] ORS 42.230.
[48] *See* NewSun Parties/200, Harnsberger/6.
[49] Compl., Ex. 1 at 30 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-12).

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2. The fixed-price period must begin at execution because each PPA provides for delivery of "Net Output" starting at "execution."

The NewSun PPAs require that the NewSun Parties deliver all their "Net Output" in exchange for the "Contract Price" beginning at "execution."[50] In relevant part, the NewSun PPAs each provide that "[c]ommencing on the Effective Date and continuing through the Term of this Agreement, Seller shall sell to PGE the entire Net Output delivered from the Facility at the Point of Delivery."[51] Each NewSun PPA defines the "Effective Date" as the date of "execution by both Parties."[52] Further, the NewSun PPAs provide that "PGE shall pay Seller the Contract Price for all delivered Net Output."[53] Thus, each NewSun Party agreed to sell its "Net Output" to PGE at "execution," and PGE agreed to pay each of them the "Contract Price" for this Net Output.

Instead of explaining these undisputed and unambiguous PPA provisions, the NewSun Parties misrepresent them. Defendants repeatedly contend that their PPAs obligate the NewSun Parties to sell Net Output only after each NewSun Party "achieve[s] commercial operation," not immediately upon execution.[54] They are wrong. The NewSun Parties obligated themselves to sell their Net Output to PGE "[c]ommencing on the Effective Date," which each PPA expressly defined as "execution."[55]

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[50] *See id.* at 2, 4, and 7 (Alfalfa Solar I LLC PPA at Sections 1.6, Section 1.21, and Section 2.1).
[51] *Id.* at 10 (Alfalfa Solar I LLC PPA at Section 4.1).
[52] *Id.* at 2 (Alfalfa Solar I LLC PPA at Section 1.8).
[53] *Id.* at 10 (Alfalfa Solar I LLC PPA at Section 4.2).
[54] Defs.' Mot. for Summ. J. at 12 ("The NewSun PPAs . . . provide that *PGE will only begin purchasing Net Output* from the relevant NewSun Party *once the Facility begins delivering power* to PGE." (emphasis in original)). Similarly, the NewSun Parties contend that "[o]nce the relevant NewSun Party completes development of its Facility *and achieves commercial operation*, it is obligated to sell 'the entire Net Output' of the Facility to PGE." *Id.* at 38 (emphasis added). Finally, the NewSun Parties contend "NewSun PPAs provide that the associated NewSun Party intends to develop a solar electric power generation facility and, upon successful construction and *achievement of commercial operation*, will sell one hundred percent of the net electric power generated by the facility ("Net Output")." *Id.* at 12 (emphasis added).
[55] *Id.* at 7 and 10 (Alfalfa Solar I LLC PPA at Section 2.1 and Section 4.1).

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This is not a mere semantic issue. Each PPA provides for the delivery of Net Output and the payment of fixed prices prior to the Commercial Operation Date. Defendants contend that "[t]he fixed prices provided for by the PPAs . . . become relevant *only after* the Facility is developed and achieves commercial operation."[56] Again, they are wrong. For instance, the term "Start-Up Lost Energy Value" calculates the damages the QF must pay for failure to meet the scheduled Commercial Operation Date.[57] Each PPA calculates Start-Up Lost Energy Value by looking to the difference between market prices and the "Contract Price" "prior to achievement of the Commercial Operation Date." [58] Defendants' interpretation cannot be squared with this unambiguous provision, because under defendants' interpretation "prior to the achievement of the Commercial Operation Date" there is no "Contract Price." A nullity such as that must be avoided when interpreting contracts.[59]

Similarly, each PPA provides for "initial deliveries of Net Output" one month prior to the COD and for delivery of "[t]est energy" during the 60-day "Test Period."[60] PGE's interpretation provides a price for these pre-COD deliveries: the fixed prices in the Renewable Fixed Price Option stated in Schedule 201.[61] By contrast, defendants deny that pre-COD output even exists.

Contrary to defendants' assertions, the fixed prices "become relevant" prior to the COD: during the one-year cure period if a QF fails to meet the scheduled COD, during testing, and during initial deliveries. Defendants' contrary reading of the PPAs would mean either that there are no prices prior to COD, or that the fixed prices apply for more than 15 years, directly contrary to the

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[56] Defs.' Mot. for Summ. J. at 38 (emphasis in original).
[57] Compl., Ex. 1 at 6 (Alfalfa Solar I LLC PPA at Section 1.35).
[58] *Id.*
[59] "A construction of an agreement that renders any part of it meaningless should be avoided." *Oregon Bank v. Nautilus Crane & Equip. Corp.*, 68 Or App 131, 146 (1984) (citation omitted).
[60] *See* Compl., Ex. 1 at 6 and 7 (Alfalfa Solar I LLC PPA at Section 1.39 and Section 2.21).
[61] *Id.* at 30 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-12.)

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Commission's statement in Order No. 05-584 that "avoided costs should not be fixed beyond 15 years."[62]

3. The use of the word "term" in Schedule 201 does not create any ambiguity in PGE's standard contract forms.

(i) Defendants' and intervenors' proposed industry definition of the word "term" must be rejected because it contradicts the definition of that word in both the PPA and the Schedule.

Trade usage cannot be used to contradict unambiguous terms of the contract.[63] When the terms of the contract are inconsistent with the trade usage, "the terms of the contract are evidence of the intentions of the parties to avoid the effect of such usage or custom."[64] Defendants contend that the word "term" in a PPA "commence[s] when the facility is operational or expected to be operational."[65] Intervenors make the same argument.[66] This argument fails at the outset, because the word "Term" is defined in the PPA as beginning at execution.[67]

Here, each PPA defines the word "Term" to "begin[] on the Effective Date," and defines the "Effective Date" as "execution by both Parties."[68] Each PPA attaches Schedule 201 as an exhibit, "the terms of which are hereby incorporated by reference."[69] Further, Schedule 201 speaks only of the "term" of the *agreement*, *i.e.* the PPA. Schedule 201 defines "TERM OF *AGREEMENT*" to mean "Not less than one year and not to exceed 20 years."[70] Similarly, Schedule 201 states, "A Seller must execute a PPA with the Company *prior to delivery* of QF power to the

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[62] Docket No. UM 1129, Order No. 05-584 at 20.

[63] *Boothby v. D.R. Johnson Lumber Co.*, 341 Or 35, 44 (2006) ("Industry practice, however, cannot override the unambiguous terms of the logging agreement."); *see also Lipp v. Mental Health for Children, Inc.*, 107 Or App 296, 299 (1991) (barring industry usage evidence to explain phrase that was defined in the contract).

[64] *Boothby*, 341 Or at 44 (citing *Bliss v. S. Pac. Co.*, 212 Or 634, 640 (1958)).

[65] Defs.' Mot. for Summ. J. at 34.

[66] Intervenors' Mot. for Summ. J. at 16-17.

[67] Compl., Ex. 1 at 6 (Alfalfa Solar I LLC PPA at Section 1.38).

[68] *Id.* at 2 and 7 (Alfalfa Solar I LLC PPA at Section 1.8 and Section 2.1).

[69] *Id.* at 6 (Alfalfa Solar I LLC PPA at Section 1.33).

[70] *Id.* at 36 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-24) (emphasis added).

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Company. The *agreement* will have *a term* of up to 20 years as selected by the QF."[71] Thus, the PPA defines the term as beginning at execution, and Schedule 201 speaks of the "term of agreement" as being the term of the PPA.

Defendants' argument appears to be that the NewSun PPAs contain two terms, one upper-case "Term" in the PPA that begins at execution, and another lower-case "term" in Schedule 201 that begins at the Commercial Operation Date.[72] But where a contract defines a word, the definition applies notwithstanding the failure to capitalize the word when using it.[73] Further, Schedule 201 defines "term" as "TERM OF AGREEMENT"[74] and uses the word "term" when discussing "the agreement." The "agreement" is unambiguously the PPA, so there is no textual basis to think that there is some distinction between the "Term of this Agreement" as that phrase is used in the PPA and the "Term of Agreement" or "term" as used in Schedule 201.

Further, none of defendants' evidence supports the counter-intuitive notion that the word "term" would have a different meaning in different sections of the same contract. Of defendants' and intervenors' three trade usage witnesses, only Harnsberger even responds to the unambiguous definition of "Term" in each PPA. And Harnsberger admits that the distinction between "Term" and "term" is immaterial: "the contract is effective upon execution and therefore the term has commenced technically."[75] Thus, even defendants' expert agrees that by the PPA forms' plain language "the term", singular and lower case, "commenced" upon "execution." Trade usage

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[71] *Id.* at 25 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-1) (emphasis added).

[72] Defs.' Mot. for Summ. J. at 44-48.

[73] See *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, 254 Or App 24, 29 (2012), *aff'd*, 355 Or 286 (2014) (applying defined term "Substantial Completion" to contract provision that referred only to "substantial completion").

[74] Compl. Ex. 1 at 36, Schedule 201-24.

[75] NewSun Parties/200, Harnsberger/6. To be sure, Harnsberger also contends that the start date of the 15-year period described in Schedule 201 "*should* be measured from operation date" (*id.* (emphasis added)), without explaining what words in Schedule 201 would create that understanding if not "term."

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cannot be used to insert a second definition of "term" into the contract because "term" already has an explicit, unambiguous definition.

(ii) Defendants cannot rely on trade usage of the words "term" and "termination" because PGE disavowed reliance on trade usage.

During contract discussions, defendants posited their trade usage theory,[76] PGE rejected application of trade usage to define the "term" and the "Termination Date" [77] and defendants acquiesced by signing the PPAs without the changes they had requested. A trade usage is irrelevant unless the proponent of the trade usage can show "each [party] had it in mind in using the relevant term."[78]

To explain further, defendants contended in December 2015 that PGE's interpretation of its PPA's contract length and fixed-price period was "inconsistent with the purpose of providing 15 years of fixed prices and treatment by other utilities."[79] This is the exact trade usage argument the NewSun Parties advocate now. In response, in mid-December 2015 PGE expressly disavowed application of general trade usage in interpreting PGE's PPAs:

> 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 facilities.[80]

Defendants then executed the PPAs.

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[76] PGE/212, True/3 (December 3, 2015, Letter from Greg Adams to Denise Saunders).

[77] PGE/214, True/2 (December 14, 2015, Letter from Denise Saunders to Greg Adams).

[78] *See VTech Commc'ns, Inc. v. Robert Half, Inc.*, 190 Or App 81, 88 (2003) ("Thus, in order to be relevant, custom and usage evidence would have to show that the parties bargained with reference to that standard; in other words, that *each* had it in mind in using the relevant term.") (emphasis added); *Global Executive Mgmt. Solutions, Inc. v. Int'l Bus. Machs. Corp.*, 260 F Supp 3d 1345, 1376 (D Or 2017) ("custom and usage evidence would have to show that the parties bargained with reference to that standard") (citation omitted).

[79] PGE/212, True/1 (December 3, 2015, Letter from Greg Adams to Denise Saunders).

[80] PGE/214, True/1 (December 14, 2015, Letter from Denise Saunders to Greg Adams).

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PGE rejected defendants' trade usage theory before signing the PPAs. Thus, such trade usage cannot be used now to interpret the NewSun PPAs, and the Commission should reject defendants' contention that trade usage requires that the Commission interpret the PPAs' fixed-price period as starting at COD.[81]

(iii) Defendants have not met their burden of establishing that the trade usage is universal in the relevant locality.

Trade usage evidence is relevant only if the trade usage is "universal in the locality where it obtains."[82] "The burden of establishing custom and usage is on the party asserting it."[83] For example, in *Peace River Seed Co-Operative, Ltd. v. Proseeds Mktg., Inc.*, the Oregon Supreme Court held that evidence of a trade usage in Canada could not be used to interpret an Oregon contract, because there was no evidence that an Oregon company would follow the rule from Canada.[84] Expert evidence and market participant testimony regarding general industry practices is insufficient to establish trade usage where the evidence does not establish that the practices are "universal[]."[85] Defendants do not even attempt to meet the universality requirement, but instead deny its existence. Defendants contend that trade usage need not be "universal;" it only "must be reasonable."[86] Defendants cite this contrary legal rule to the Second Restatement,[87] which is not the law in Oregon.

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[81] Defs. Mot. for Summ. J. at 35 (emphasis omitted).

[82] *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[.]") (citation omitted).

[83] *George v. Sch. Dist. No. 8R of Umatilla Cnty.*, 7 Or App 183, 190 (1971).

[84] *Peace River Seed Co-Operative, Ltd. v. Proseeds Mktg., Inc.*, 355 Or 44, 68-69 (2014).

[85] *Guinasso v. Pac. First Fed. Sav. & Loan Ass'n*, 89 Or App 270, 277-78 (1988) ("expert evidence and borrower testimony concerning savings and loan association practices" was insufficient where the evidence and testimony "lacked the degree of universality required").

[86] Defs.' Mot. for Summ. J. at 33-34 (citing Second Restatement).

[87] *Id.*

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Here, the NewSun Parties' proposed "locality" appears to be every power purchase agreement, including non-PURPA contracts, negotiated anywhere in the world at any time. Their trade usage witness is a California-based attorney with no stated experience in Oregon and no stated experience drafting and negotiating PURPA contracts.[88] Instead, Harnsberger bases his testimony on his experience since 1987 "working on projects throughout the United States as well as Canada and Indonesia, ranging from huge utility scale projects to QFs."[89] Harnsberger further testifies that he has "reviewed and/or drafted dozens of power purchase agreements" without specifying if this experience included standard QF PPAs under PURPA.[90] Similarly, Jake Stephens, a NewSun executive, has no prior experience negotiating PURPA QF PPAs in Oregon.[91] The NewSun Parties present only a single trade usage witness—John Lowe—with any experience with PURPA PPAs in Oregon.[92] But Lowe bases his testimony on his experience in six different states and he never explains whether his testimony is based on experiences in Oregon or those other states.[93] Because the NewSun Parties' trade usage testimony does not describe any trade usage in the relevant locality and trade, Oregon PURPA contracts, the NewSun Parties cannot meet their burden of establishing a uniform trade usage.

Even narrowing the focus to Oregon QF PPAs, the NewSun Parties have failed to establish a uniform trade usage. As the Commission is well aware, prior to 2017, Oregon utilities offered and the Commission approved "standard contracts that have used, as the triggering event, both the

[88] NewSun Parties/200, Harnsberger/1-2.
[89] *Id.* at 1.
[90] *Id.*
[91] NewSun Parties /100, Stephens/1-2.
[92] *See* CREA-NIPPC-REC/100, Lowe/1 (describing experience in Washington, Oregon, California, Idaho, Wyoming, and Utah).
[93] *See id.*

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date of [contract] execution and the date of power delivery."[94] And as explained in greater detail in PGE's motion for summary judgment, PGE consistently offered standard PPAs that begin the fixed-price period at execution, not Commercial Operation Date.[95] Thus, there was no uniformity in the requisite market. Indeed, even after the Commission issued its orders in UM 1805, there is still no uniformity as to the start date of the fixed-price period. PGE begins the fixed-price period at scheduled commercial operations and PacifiCorp begins the fixed-price period at the scheduled initial deliveries for start-up testing purposes.[96] By contrast, only one utility, Idaho Power, begins the fixed-price period at the date of actual commercial operations.[97] As the Commission has acknowledged there is no "uniform, consistent" practice in Oregon.[98]

Regardless, defendants and intervenors cannot establish a uniform definition of the word "term" as beginning at commercial operations, because the defined word "Term" in PGE's and Idaho Power's PPAs begins at execution.[99] Idaho Power's Schedule uses phrases other than "term" (namely "contract length" and "Contract Years") to describe the period beginning at commercial operations.[100] PGE's Schedule 201 definition of the fixed-price period does not include the phrases "contract length" and "Contract Year," therefore any common trade usage of those terms is irrelevant.

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[94] Docket No. 1805, Order No. 17-256 at 3; Docket No. 1805, Order No. 17-465 at 4 ("We recognize that the actual terms of PGE's standard contract forms have varied over time, and we did not undertake a review of all those forms prior to rendering our decision.").

[95] PGE's Mot. for Summ. J. at 19-24.

[96] *See* Docket No. 1805, Order No. 17-373, Appendix A at 4-5 (Sept. 28, 2017) (table outlining effective dates for PacifiCorp, Idaho Power, and PGE and their respective contracts).

[97] *Id.*

[98] *Id.*, Appendix at 5-6.

[99] *See* Declaration of Greg Adams in Support of Defs.' Mot. for Summ. J. ("Adams Declaration"), Ex. F at 39 (Docket No. 1610, ldaho Power Company's Application for Approval of its Replacement Compliance Filing with Order No. 14-058 (July 3, 2014); *see* Compl., Ex. 1 at 26, 27, and 30 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-4, Sheet No. 201-5, and Sheet No. 201-12).

[100] *See* CREA-NIPPC-REC/100, Lowe/12 (describing Idaho Power's contract).

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Defendants and intervenors incorrectly state that PGE's requests for proposals ("RFPs") in 2012 and 2018 defined "term" as "commencing with energy deliveries."[101] In fact, neither of the RFPs defendants cite defines the start date of the "term."[102] Further, a word's use in a request for proposal does not suggest that it has a particular meaning when used in an actual power purchase agreement. RFPs are not formal contracts. Tellingly, defendants do not attach any actual PGE PPAs defining the "term" in this way, ostensibly because they did not find any. In any event, given that the 15-year fixed-price period and 20-year contract term are unique features of PURPA contracts, PGE's non-PURPA RFPs are irrelevant.

(iv) Intervenors misstate Oregon law concerning trade usage because they rely upon UCC cases, which are required by statute to be interpreted differently than non-UCC contracts.

Under Oregon law, to determine the meaning of a word, courts look to its plain meaning.[103] Intervenors wrongly contend, based on just one case, that the Commission (and courts) should resort to "trade usage" definitions instead of plain meaning definitions at the first level of contract interpretation.[104] But that case, *Peace River Seed Co-Operative, Ltd. v. Proseeds Marketing, Inc.*, does not support defendants' position because there the court explicitly stated that it deviated from the normal method of contract interpretation and applied trade usage at the first level because the contract in that case was subject to the Uniform Commercial Code. The Oregon Legislature had

[101] Defs.' Mot. for Summ. J. at 36-37; Intervenors' Mot. for Summ. J. at 10-11.

[102] *See* Adams Declaration, Ex. G at 30 (*In the Matter of Portland General Electric Company, Request for Proposals for Renewable Resources*, Docket No. 1613, PGE's Revised Draft (Sept. 10, 2012)) (stating, without explanation, "The minimum bid term is 10 years, with a start date no earlier than January 1, 2013"); Adams Declaration, Ex. H at 18 (*Portland General Electric Request for Proposals: Renewable Energy Resources – Final* (May 22, 2018)) (stating, without explanation, "The minimum bid term is twenty years.").

[103] *See, e.g.*, *Ortiz v. State Farm Fire & Cas. Co.*, 244 Or App 355, 360 (2011) ("One such 'aid' [to contract interpretation] is the determination whether the relevant terms have a 'plain meaning,' determined by reference to the usual source of ordinary meaning, the dictionary.") (citation omitted); *Laird v. Allstate Ins. Co.*, 232 Or App 162, 170 (2009) (turning to dictionary to determine ordinary meaning of terms); *Mutual of Enumclaw Ins. Co. v. Rohde*, 170 Or App 574, 578-79 (2000) (same).

[104] Intervenors' Mot. for Summ. J. at 15.

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specifically provided that in such cases, trade usage should be referred to at the first step of contract interpretation.[105] By contrast, under traditional common-law contract interpretation principles, trade usage is relevant at step two to resolve an ambiguity, but it cannot be used at step one to interpret the contract or to determine if there is an ambiguity.[106]

This case is not subject to the UCC. No party has claimed that standard PPAs are subject to the UCC, nor, to the best of PGE's knowledge, has any Oregon court ever held that standard PPAs are subject to Oregon's statutes implementing the UCC. Thus, whether and how trade usage applies is a fact-question at the second level of contract interpretation, *i.e.* it is a question that arises only if the contract is ambiguous and it is a question that cannot be resolved on summary judgment where the facts are disputed. Oregon courts are consistent that the question of whether a trade usage exists is an issue of fact.[107]

(v) Defendants and intervenors improperly attempt to apply other utilities' contract provisions and non-party legal opinions under the guise of trade usage evidence.

Defendants contend that the "common industry understanding" required that PGE "offer a fifteen-year fixed-price period and a maximum twenty-year contract term, both of which commence when the QF is operational or expected to be operational."[108] But defendants misunderstand the relevance and scope of trade usage in interpreting a contract. "The only role that custom and usage evidence could play in a breach of contract claim would be to establish the

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[105] *Peace River Seed Co-Op, Ltd.*, 355 Or at 66 ("Although this court previously has looked to dictionary definitions when interpreting the text of a contract, *see, e.g., Yogman v. Parrott*, 325 Or 358, 362-63 (1997), the UCC rejects that approach for commercial contracts.").

[106] *See Lipp*, 107 Or App at 299 (holding that court did not err in excluding trade usage evidence where contract was unambiguous on its face).

[107] *See, e.g., Hellbusch*, 275 Or at 312 ("The question of determining the custom or usage is for the trier of facts."); *Timberline Equip. Co. v. St. Paul Fire & Marine Ins. Co.*, 281 Or 639, 643 (1978) ("[I]f technical words, local phrases or terms of art are used and evidence is properly admitted showing meaning, [construction of a contract] becomes [a question] of fact.").

[108] Defs.' Mot. for Summ. J. at 36.

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meaning that the parties intended for *a particular contractual term*."[109] Thus, a party cannot simply show that certain practices are common in an industry, and then demand that such practices be imported into the contract.[110]

Here, defendants and intervenors vacillate between (i) attempting to define the word "term" using trade usage, and (ii) wrongfully contending that PGE is bound to begin the fixed-price period at commercial operation because other utilities chose to do so.[111] The latter argument is not a proper application of trade usage and should be rejected.[112] Relatedly, defendants and intervenors also introduce testimony from its non-party witnesses interpreting entire passages of the PPA forms without identifying any particular words with a common industry standard.[113] This testimony is also insufficient to establish a trade usage, because it does not define "particular contractual terms." Although extrinsic evidence of the *parties'* intent is relevant in interpreting a contract, the post-hoc legal conclusions of non-party witnesses is not.[114]

(vi) Even adopting defendants' and intervenors' proposed definition of "term," Schedule 201 provides for fixed prices starting at execution.

Defendants and intervenors contend that the word "term" as used in Schedule 201's description of the fixed-price period means "period during which the facility is operating."[115] But adopting (solely for the sake of argument) defendants' proposed definition of "term" does not help defendants' cause. In relevant part, Schedule 201 states that the fixed-price "option is available

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[109] *VTech Commc'ns, Inc.*, 190 Or App at 87-88 (emphasis added).

[110] *See id.*

[111] See Defs.' Mot. for Summ J. at 36 (requiring PGE to conform its PPAs to the practices of PacifiCorp and Idaho Power); Intervenors' Mot. for Summ. J. at 16-17.

[112] *See Bliss*, 212 Or at 640 ("Custom, when available to a party, is used in evidence only as a means of interpretation of a contract and not for the purpose of importing new terms into it.").

[113] *See, e.g.*, CREA-NIPPC-RE/100, Lowe/ 5-6; NewSun Parties/200, Harnsberger/4-5.

[114] *See Spectra Novae, Ltd. v. Waker Assocs., Inc.*, 140 Or App 54, 59 (1996) (rejecting witness testimony because "[d]etermination of the effect of the terms of an agreement, however, is generally regarded as a question of law.").

[115] Defs. Mot. for Summ. J. at 34; s*ee also* Intervenors' Mot. for Summ. J. at 9 (defining term as "when the QF becomes operational and is delivering and selling power.")

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for a maximum term of 15 years."[116] Adopting defendants' definition of "term" revises Schedule 201 to read that the fixed-price "option is available for a maximum [period during which the facility is operating] of 15 years."

Defendants' new definition of "term" resolves nothing. Under PGE's reading, the fixed-pricing is "available" for a "maximum" of 15 years of operations because a QF can begin commercial operations immediately following execution, and for existing QFs commercial operations can coincide with execution.[117]

Unable to explain the relevance of their definition of the word "term" as applied to the actual contract language, defendants attempt to simply rewrite the contract. They contend that Schedule 201 provides that the QF "*will receive* fixed prices 'for a maximum term of 15 years,'" and thus the NewSun Parties' "understanding" was that they would "receive" fixed prices for the first 15 years of operations.[118] But defendants' "understanding" relies on text that appears nowhere in Schedule 201, and those words cannot be added to an executed contract.[119] Schedule 201 says the fixed price option is "available for" a maximum term of 15 years, not that the QF "will receive" 15 years of fixed prices. Defendants' proposed definition of the word "term," even if used, does not require 15 years of fixed prices, and therefore is irrelevant.

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[116] Compl., Ex. 1 at 26, 30 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-4 and Sheet No. 201-12, describing prices for non-renewable and renewable QFs, respectively).

[117] For example, the very first executed standard PPA listed in *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, PGE – Country Village Estates, LLC PPA, (effective Sept. 23, 2011) (available at https://edocs.puc.state.or.us/efdocs/RPA/re143rpa155411.pdf) is for a PPA where the effective date is the same as the COD.

[118] Defs.' Mot. for Summ. J. at 34 (emphasis added).

[119] ORS 42.230.

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4. Section 4.5 of the PPAs does not control the start date for the fixed-price period.

(i) Section 4.5 provides for Environmental Attribute ownership, not power prices.

Section 4.5 does not determine or purport to require any specific prices. Section 4.5 addresses not power prices but Environmental Attribute ownership. In relevant part, Section 4.5 states: "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. The Contract Price includes full payment for the Net Output and any RPS Attributes transferred to PGE under this agreement."[120] Defendants contend that Section 4.5 should be read "collectively" with Schedule 201 as compelling the conclusion that PGE must pay the fixed prices "for fifteen years after the Commercial Operation Date."[121]

Because Section 4.5 says no such thing, defendants contend that the "central bargain" of the PPAs was that the QF transferred the Environmental Attributes "in exchange for renewable-fixed pricing."[122] Defendants are mistaken. As the Commission explained in Order No. 16-174, the Commission "ties REC ownership to utilities sufficiency or deficiency position," not the prices paid to the QF.[123] Thus, the QF does not necessarily retain the Environmental Attributes even when "market prices replace avoided cost prices during the last five years of a 20-year standard contract."[124] Contrary to defendants' asserted "bargain," PGE could, consistent with Commission policy, offer a PPA that required each NewSun Party to transfer the Environmental Attributes to

[120] Compl. Ex. 1 at 10-11 (Alfalfa Solar I LLC PPA at Section 4.5).
[121] Defs.' Mot. for Summ. J. at 39.
[122] *Id.*
[123] Docket No. 1610, Order No. 16-174 at 5 (May 13, 2016).
[124] *Id.*

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PGE during the final five years of the PPA even though the QF was receiving market prices during the final five years. Also, any ambiguity created by the different language in Schedule 201 and Section 4.5 would be an ambiguity as to Environmental Attribute ownership only, not fixed pricing. PGE has already agreed to resolve any potential ambiguity about Environmental Attribute ownership in the NewSun Parties' favor. PGE interprets the NewSun PPAs as permitting the NewSun Parties to retain the Environmental Attributes when the NewSun QFs begin receiving market prices 15 years after execution.

The Commission should reject defendants' arguments based on Section 4.5 because that section is specific to ownership of Environmental Attributes and addresses pricing only by implication. Schedule 201 addresses prices directly. Even if Section 4.5 is inconsistent with Schedule 201, under Oregon law, when interpreting a contract, the specific section—here, Schedule 201 which addresses prices—controls the more general—here, section 4.5, which addresses REC ownership.[125]

Also, even if Section 4.5 is inconsistent with Schedule 201, that does not create an ambiguity in the contract; under Oregon law, courts "do not read ambiguity into a contract by finding that a general and a specific provision cover the same subject matter in inconsistent ways; rather, when one is a more particular provision, it controls because it is taken to be the clearer manifestation of the contracting parties' intent."[126] Here, the PPA directs readers to the "Schedule," not Section 4.5, for a definition of "Contract Price."[127] Schedule 201 discusses

[125] *See* ORS 42.240 ("when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control a general one that is inconsistent with it.").
[126] *Am. Wholesale Prods. v. Allstate Ins. Co.*, 288 Or App 418, 426 (2017).
[127] Compl., Ex. 1 at 2 (Alfalfa Solar I LLC PPA at Section 1.6).

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pricing, and Section 4.5 does not. Thus, Section 4.5 cannot create an ambiguity by implication in the specific provisions devoted to pricing.

(ii) The undisputed extrinsic evidence confirms that the drafting of Section 4.5 was unrelated to when the fixed-price period begins.

The evidence of the drafting history of Section 4.5 confirms that Section 4.5 has nothing to do with the fixed-price period. As explained in PGE's motion for summary judgment, in Docket No. UM 1610 the Commission held workshops with various stakeholders to revise PGE's standard PPA forms.[128] PGE incorporated CREA's suggested edit to Section 4.5, which included the language about the QF retaining Environmental Attributes, but PGE did so only after redrafting Schedule 201 to provide for transfer of Environmental Attributes 15 years after execution.[129] In UM 1610, there were no discussions that the change to Section 4.5 would affect the starting period of the 15 years of fixed prices.[130] PGE's representative during those negotiations testified that he did not understand Section 4.5 as addressing the price to be paid for net output or as changing PGE's approach of limiting the availability of fixed prices to the first 15 years measured from contract execution.[131] Further, the margin comment from CREA suggesting the edits to Section 4.5 made no mention of the fixed-price period, stating instead that QFs needed clarity "to be able to use the attributes that they retain."[132] Thus, the undisputed evidence confirms that the drafting of Section 4.5 addressed Environmental Attribute ownership and nothing else.

Further, the sheer magnitude of the potential economic harm to PGE's customers is compelling extrinsic evidence that PGE and the Commission did not intend to implicitly alter the

[128] PGE's Mot. for Summ. J. at 25.
[129] *Id.* at 25-26.
[130] PGE/400, Macfarlane/5.
[131] *Id.* at 4-5.
[132] CREA-NIPPC-RE/209, Sanger/45 (Attachment to Greg Adams Email dated Sept. 2, 2014, Redline Standard Renewable In-System Non-Variable PPA at Section 4.5).

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provisions regarding fixed pricing when they accepted and approved unrelated changes regarding Environmental Attribute ownership. There are approximately 62 executed PPAs, including the 10 NewSun PPAs, that have the text (or similar text) to that at issue here.[133] Assuming that each of those 62 projects reaches COD three years after execution (and assuming that of those, the 10 NewSun PPAs reach COD four years after execution because the three year date has passed or will pass soon), the estimated of harm to PGE's customers in the 16th through 19th years of those PPAs (the difference between forecasted market prices and the fixed prices in the PPAs for those years) ranges from $143,000,000 to $200,000,000.[134] Defendants' proposed interpretation of the NewSun PPAs and its analysis of the historical changes to PGE's form PPAs is unreasonable because it assumes that such a momentous change occurred without any requirement from the Commission and it assumes that PGE made that change without that topic even being on the agenda for Docket Nos. UM 1394 and UM 1610. Defendants' proposed explanation of the changes to PGE's form PPA in 2014 is facially unreasonable and should be rejected.

(iii) Section 4.5 is consistent with PGE's reading of Schedule 201.

In any event, Section 4.5 is consistent with Schedule 201. In relevant part, Schedule 201 states "Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Price Index and will retain all Environmental Attributes generated by the facility for all years up to five in excess of the initial 15."[135] Because the "initial 15" years of the "PPA" begin at execution, the QF receives fixed prices and retains the Environmental Attributes for all years after these "initial 15" following execution. Because the COD either coincides with or follows the execution date, the

[133] PGE/300, Khandoker/2.
[134] *Id.* at 2; *see also id.* at 3-4 (describing assumptions in making the calculations).
[135] Compl., Ex. 1 at 30 (Alfalfa Solar I LLC PPA, Schedule 201 at Sheet No. 201-12).

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QF also "retain[s] all Environmental Attributes" "after completion of the first fifteen (15) years after the Commercial Operation Date," as required by Section 4.5.[136] There is no inconsistency.

Defendants create the appearance of inconsistency by re-writing Section 4.5. Defendants wrongly contend that Section 4.5 "states that the QF *begins* owning all of the Environmental Attributes fifteen years after the Commercial Operation Date[,]"[137] and "would not retain" them "until" then.[138] But Section 4.5 does not include the exclusionary language used in defendants' descriptions. Instead, Section 4.5 simply says that the QF "shall retain" the Environmental Attributes 15 years after the COD.[139] The phrase "shall retain" does not bar the QF from retaining the Environmental Attributes in earlier periods. Because defendants' interpretation of Section 4.5 relies on words that are not in the PPA, the Commission should reject their arguments.[140]

Also, defendants' restrictive reading of Section 4.5 is inconsistent with the balance of the PPA forms, and therefore must be rejected. The PPAs provide that the QF "retain[s]" the Environmental Attributes during the Renewable Resource Sufficiency Period, even if the Sufficiency Period overlaps with the first 15-years after the COD.[141] Adopting defendants' reading of Section 4.5 as meaning that the QF "begins owning" the Environmental Attributes 15 years after the Commercial Operation Date and does "not retain" them "until" then would create bizarre results. For PPAs where the sufficiency period exists between COD and 15 years after COD, defendants' reading of Section 4.5 would mean that the QF would not even retain the

[136] *Id.* at 10-11 (Alfalfa Solar I LLC PPA at Section 4.5).
[137] Defs.' Mot. for Summ. J. at 56 (emphasis added).
[138] *Id.* at 41-42.
[139] Compl., Ex. 1 at 10-11 (Alfalfa Solar I LLC PPA at Section 4.5).
[140] ORS 42.230 (judge must not omit words from contract or insert words that are not in contract).
[141] Compl., Ex. 1 at 10-11 (Alfalfa Solar I LLC PPA at Section 4.5 provides, in relevant part, that "[d]uring 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." (Emphasis added.)

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Environmental Attributes during the sufficiency period. Defendants' interpretation of Section 4.5, not PGE's, creates inconsistency.

Further, defendants' reading would create different start dates for the fixed-price period in the many PPA forms with identical Schedule 201 language regarding the fixed-price period, and identical PPA provisions regarding Net Output, Contract Price, and the Term, but without this version of Section 4.5. Under defendants' reading, the Section 4.5 language included in PGE's four "renewable standard contract[s]"[142] during only December 2014 to July 2016, created "unambiguous clarity" regarding the start date of the fixed-price period.[143] But this purported "unambiguous clarity" would not appear in: (1) the four PGE non-renewable, standard PPAs the Commission approved in December 2014 and September 2015 simultaneously with the renewable standard PPAs; (2) all PGE standard PPAs pre-dating this December 2014 inclusion of Section 4.5; and (3) all PGE standard PPAs from July 2016 until the Commission's orders in Docket No. UM 1805, which excised the references to Environmental Attribute ownership in any period other than the Renewable Resource Sufficiency Period from Section 4.5. There is no evidence in the record to suggest that the Commission's approval of the revised Section 4.5 was meant to create such a counter-intuitive result. Defendants' reliance on Section 4.5 does not support their position and should be rejected.

(iv) Defendants cannot rely on a Staff recommendation in Docket No. UM 1725 that the Commission rejected.

Defendants cite to a response brief from Staff in Docket No. UM 1725 as supporting their position.[144] Preliminarily, a non-party legal opinion is not admissible to interpret a contract.

[142] *See e.g.*, Defs.' Mot. for Summ. J. at 10. The NewSun Parties describes a "renewable standard contract," but in fact PGE has four renewable standard contracts depending on whether the energy is variable or not, and whether the facility is in-system or out.
[143] *Id.*
[144] Defs.' Mot. for Summ. J. at 43-44.

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Therefore, the Staff's response, which included a brief interpretation of PGE's standard PPA forms, is not relevant, because the *Commission* (not its Staff) must make all conclusions of law. Further, defendants failed to mention that, in its orders in UM 1725, the Commission rejected Staff's interpretation of PGE's standard PPA forms. Defendants' reliance on the rejected Staff opinion is akin to citing a judicial dissent as if it were the law.

In Docket No. UM 1725, the Commission denied a request from Idaho Power to decrease the term of negotiated PPAs from 20 years to 2 years, but elaborated further on the importance of switching to market pricing in the latter years of the contract:

> [Our current] policy provides for 20-year contracts, with prices fixed at avoided cost rates *in place at the time of signing remaining in effect for a 15-year period*, and indexed pricing for the remaining five years, continues to have merit. [145]

The trade industry associations CREA and REC filed a motion for clarification, observing that Idaho Power's PPA forms started the fixed-price period at commercial operations and asking the Commission to confirm a policy that the "15-year term of fixed prices commences when the QF achieves operation."[146] PGE opposed the motion for clarification, observing that its own contracts begin the fixed-price period at execution and asking the Commission to confirm that no such policy existed.[147] The Staff responded to the motion for clarification. In relevant part, Staff disagreed with PGE's interpretation of its own standard PPAs, observing that Staff's review of the documents did "not clearly substantiate" PGE's interpretation of its PPA forms as beginning the fixed-price period at execution.[148] In describing Section 4.5, Staff stated that Section 4.5 was

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[145] *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 Charge, and for Change in Resource Sufficiency Determination*, Docket No. 1725, Order No. 16-129 at 8 (Mar. 26, 2016) (emphasis added).

[146] Docket No. 1725, CREA's and REC's Mot. for Clarification at 4 (Apr. 14, 2016).

[147] Docket No. 1725, PGE's Opp. to Mot. for Clarification at 10 (Apr. 29, 2016).

[148] Adams Declaration, Ex. C at 4 (Docket No. UM 1725, Staff's Resp. to Mot. for Clarification) (May 6, 2016)).

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"inconsistent with PGE's assertion" without explanation.[149] Staff's reasoning was unpersuasive on its face, because Staff provided no explanation for its disagreement with PGE's interpretation of its PPAs.

In any event, in its order granting reconsideration, the Commission rejected Staff's conclusion. The Commission affirmed that "the 15-year period for fixed prices under Idaho Power's standard QF contracts commences at . . . commercial operations," but stated, "PGE's standard QF contract *differs* with regards to when the 15-year period commences."[150] The Commission also declined CREA's and REC's invitation to state a general policy regarding the start of the fixed-price period and ruled concerning only Idaho Power's Schedule 85.[151] In sum, in UM 1725, the Commission (1) spoke about the public interest benefit of limiting the fixed-price period to the first 15 years after execution, (2) refused to confirm the existence of a policy requiring the 15-years of fixed-price payments following commercial operations, and (3) stated that PGE's PPAs did not start the fixed-price period at commercial operations. Defendants elide these rulings by citing to an unpersuasive, inadmissible legal opinion that the Commission correctly rejected.

B. Contrary to defendants' assertions, the Commission's orders in Docket No. UM 1805 did not retroactively "require" PGE to begin the fixed-price period at the commercial operation date in executed PPAs.

1. The Commission's orders in Docket No. UM 1805 do not apply retroactively.

The Commission's orders in Docket No. UM 1805, which were issued after execution of the NewSun PPAs, cannot change the meaning of those PPAs. In Docket No. UM 1805, the complainants asked the Commission to issue an order interpreting PGE's prior contract forms as starting the fixed-price period at COD, the same relief the NewSun Parties seek here. PGE moved

[149] *Id.*
[150] Docket No. 1725, Order No. 16-175 at 3 (May 16, 2016) (emphasis added).
[151] *Id.* at 2-3.

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to dismiss the complaint through summary judgment, and the Commission granted PGE's motion. In its order dismissing the complaint, the Commission ruled: "We find that PGE has lawfully offered standard contracts to operators of qualifying facilities (QFs) that have 15-year periods of fixed prices that begin on the date of execution, rather than on the date that the QF begins to transmit power."[152] On reconsideration, the Commission clarified in UM 1805 that it "did not interpret any terms of [PGE's] standard contract forms or executed contracts,"[153] but that it "stand[s] ready to interpret individual standard contract forms as they are brought to us."[154] Thus, the Commission ruled that PGE's executed PPAs could have "lawfully offered" fixed prices starting at execution,[155] but left open the question of which PGE PPAs offered fixed prices starting at execution.

Defendants incorrectly contend that the orders from UM 1805 turned Order No. 05-584 into a "directive" that supplies context to "*any* standard QF contract implemented by any Commission-regulated Oregon utility at *any* time since 2005."[156] Again, defendants are just wrong. In Docket No. UM 1805, after dismissing the complaint, the Commission also ordered PGE to offer PPAs with fixed prices starting at the scheduled COD "on a going forward basis."[157] The Commission explained that this new ruling was not required by Order No. 05-584 (the initial order creating the 15-year fixed-price period), stating "in Order No. 05-584, we did not specify the date on which that 15-year term begins. Rather, as we later explained in Order No. 06-538, we acknowledged that utilities might not use identical standard contract templates[.]"[158] The

[152] Docket No. 1805, Order No. 17-256 at 1.
[153] Docket No. 1805, Order No. 17-465 at 4.
[154] Docket No. 1805, Order No. 18-079 at 3.
[155] Docket No. 1805, Order No. 17-256 at 1.
[156] Defs.' Mot. for Summ. J. at 28 (emphasis in original).
[157] Docket No. 1805, Order No. 17-256 at 1.
[158] *Id.* at 3.

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Commission took the "opportunity" to "*clarify* [its] policy . . . to explicitly require standard contracts, on a going-forward basis, to provide for 15 years of fixed prices that commence when the QF transmits power to the utility."[159] On reconsideration, the Commission stated that this "policy" was first "made explicit" in Order No. 17-256.[160] Thus, contrary to defendants' assertions, this order "going forward" did not "create a directive"[161] in Order No. 05-584 that provides a controlling context for deciding under the NewSun PPAs when the 15-year period begins. In fact, the Commission underscored that it was not interpreting the meaning of any particular PPA to which PGE was a party.[162] Indeed, PGE appealed application of the orders in Docket No. UM 1805 going forward, and in defending prospective application of this "clarified" policy, the Commission recently agreed that "PGE is correct that Order No. 05-584 did not *require* that the 15-year period begin at scheduled commercial operation."[163]

The case law defendants cite for this retroactive application of the orders in Docket No. UM 1805, in fact, confirms that new legal developments should not be imported into pre-existing contracts. In *Savage v. Grange Mut. Ins. Co.,* the Court of Appeals rejected retroactive application of a new legal requirement to a previously-executed contract.[164] In *Savage*, the defendant sought to retroactively apply a new statute mandating particular levels of coverage into its previously-executed insurance policy.[165] The Court of Appeals rejected this argument and affirmed the "existing" coverage at the time of execution, notwithstanding the later statutory revisions.[166] The

[159] *Id.* at 4 (emphasis added).
[160] Docket No. 1805, Order No. 18-079 at 3.
[161] Defs.' Mot. for Summ. J. at 28.
[162] Docket No. 1805, Order No. 17-465 at 4.
[163] Jindal Declaration, Ex. 1 at 6 (Respondent's Answering Brief in the appeal of Docket No. UM 1805 at 18) (emphasis in original).
[164] *Savage v. Grange Mut. Ins. Co.*, 158 Or App 86, 95-96 (1999).
[165] *Id.* at 95.
[166] *Id.* at 96.

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Court of Appeals reasoned that the new statute did not "alter or eliminat[e] existing coverage obligations."[167] So too here. In Docket No. UM 1805, the Commission concluded that PGE lawfully offered fixed prices starting at execution in its executed contracts, and only required changes to this practice "on a going-forward basis."[168] Because at the time the NewSun Parties executed their PPAs there was no existing requirement that PGE offer 15 years of fixed prices starting at the commercial operation date, no such requirement can be read into their contracts.

2. The Commission's policy statements from Docket No. UM 1805 do not create a presumption in favor of defendants' chosen interpretation.

Defendants also contend that the Commission's unstated "policy," which the Commission first "made explicit" after its QFs signed their PPAs, should apply retroactively "absent unambiguously clear language" in the PPAs to the contrary.[169] Defendants do not cite to any authority to support this self-serving standard, and it is not the law. A "general, uncodified public policy" can be the basis for *avoiding* enforcement of a contractual provision.[170] But unstated public policy interests are no aid in *interpreting* an executed contract.[171] There is no thumb on the scale in favor of the NewSun Parties' chosen interpretation. Any ambiguity should be resolved by extrinsic evidence, not by just adopting the NewSun Parties' interpretation.

Further, the Commission's statements of policy in Docket No. UM 1805 are of limited utility where, as here, those orders are on direct appeal. As the Commission is aware, PGE disagrees that even the unstated policy of Order No. 05-584 was that "QFs should receive 15 years

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[167] *Id.*

[168] Docket No. 1805, Order No. 17-256 at 4.

[169] Defs.' Mot. for Summ. J. at 28-29.

[170] *Harmon v. Mount Hood Meadows, Ltd.*, 146 Or App 215, 221 (1997).

[171] *Wright v. Schutt Const. Co.*, 262 Or 619, 621 (1972), disapproved of by *Ditommaso Realty, Inc. v. Moak Motorcycles, Inc*., 309 Or 190 (1990) ("While the courts cannot create new contract obligations, the courts can, in the interest of public policy, excuse the performance of contractual obligations which are contrary to the public interests.")

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of fixed prices," as the Commission stated in Order No. 17-256.[172] In fact, Order No. 05-584 provided that "standard contract prices should be fixed for the first 15 years of the 20-year term."[173] Because standard contract prices are necessarily "fixed" at contract execution, when the QF incurs its legally enforceable obligation, Order No. 05-584's plain language required 15 years of fixed prices starting at execution. PGE appreciates that in Docket No. UM 1805 the Commission "claif[ied]"[174] its policy on a going forward basis, but because the Commission and PGE are actively litigating the application of this "clarif[ied] policy" even going forward, defendants' attempt to apply it retroactively is misguided. If the Commission retroactively applies the previously-unstated policy it "made explicit" in Docket No. UM 1805 to the NewSun PPAs, and PGE subsequently wins its appeal in Docket No. UM 1805, the parties here will need to relitigate the meaning of the NewSun PPAs all over again.

Indeed, in its answering brief in that appeal, the Commission has acknowledged that its orders in Docket No. UM 1805 stated "a change in policy applicable to PGE"[175] and that "PGE is correct that Order No. 05-584 did not *require* the 15-year period to begin when the QF began delivering power."[176] Because the Commission has already agreed in the direct appeal of Docket No. UM 1805 that its orders there marked a "change in policy" at least as to PGE, there is no pre-existing policy for the Commission to apply here.

[172] Docket No. UM 1805, Order No. 17-256 at 3.
[173] Docket No. UM 1129, Order No. 05-584 at 20.
[174] Docket No. 1805, Order No. 17-256 at 4.
[175] Jindal Declaration, Ex. 1 at 4 (Respondent's Answering Brief in the appeal of Docket No. UM 1805 at 16).
[176] Id. at 6 (Respondent's Answering Brief at 18).

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C. Earlier versions of PGE's Commission-approved PPA forms provide relevant evidence of the NewSun PPAs' meaning.

As discussed in PGE's motion for summary judgment, PGE's first filings complying with Order No. 05-584 explicitly began the 15-year period at execution.[177] Although PGE, in an unrelated amendment, eliminated one section of the PPA that had defined the fixed-price period as beginning at "execution," the Schedule 201 wording that limits the fixed-price period to a "maximum term of 15 years" continued as before.[178]

Defendants and intervenors contend that the Commission should ignore this decade-long unbroken administrative history. They are mistaken. Under a traditional contract analysis, prior drafts of the same agreement are relevant when interpreting it.[179] Intervenors contend that the Commission should not rely on past versions of the same PPA to explain the relevant provisions, because the parties did not negotiate the PPAs' terms.[180] But even if the Commission-approved PPAs are treated like regulations and not negotiated contracts, prior drafts of those same "regulations" are also relevant interpretive aids. Oregon law interprets regulations like statutes,[181] and legislative history, including prior versions of the same statute or regulation, are relevant to interpret the current version.[182]

Intervenors contend it would be unreasonable to require QFs, before signing a PPA, to review prior PPAs that are "not readily available."[183] First, unreasonable or not for a QF to do, it is what the Oregon Supreme Court requires courts (and this Commission) to do when interpreting

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[177] PGE's Mot. for Summ. J. at 20-21.

[178] PGE/106, Macfarlane/72 (PGE's November 25, 2014 Compliance Filing in Docket No. 1610, Redline of Schedule 201 at Sheet No. 201-4, showing that those words existed both before and after the revisions to Schedule 201).

[179] *See Batzer Const., Inc. v. Boyer*, 204 Or App 309, 321 (2006).

[180] Intervenors' Mot. For Summ. J. at 25.

[181] *State v. Hogevoll*, 348 Or 104, 109-10 (2010) (so stating).

[182] *See, e.g., Kohring v. Ballard*, 355 Or 297, 307-08 (2014).

[183] Intervenors' Mot. for Summ. J. at 26.

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a contract. Second, intervenors' concern is unfounded. PGE's prior PPA forms are publicly available and, in most instances, can be downloaded from the Commission website. In fact, before signing the PPAs, defendants found two executed PGE PPAs from 2010 and 2014 that they contended required PGE to modify the 2015 PPA forms.[184] In any event, this same concern would apply any time that statutorily-required language is included in a contract, and Oregon courts still rely on legislative history in such cases.[185] Third, intervenors exaggerate the implications of PGE's position. PGE contends that the Commission should review prior PPA *forms* as an interpretative aid for understanding revisions to those forms over time. Contrary to intervenors assertions, PGE does not contend that the Commission should consider "every prior Commission-related contract ever *executed*."[186]

Relatedly, defendants contend that PGE "disavowed" reliance on prior versions of the same PPA forms as an interpretative aid and thus the Commission should not rely upon them.[187] This is incorrect. During contract negotiations, PGE resisted defendants' reliance on a single, executed PPA, where the QF, One Energy Solar, wrote an entirely new provision into the PPA setting the start date of the fixed-price period at COD. But PGE made clear that it disavowed that specific PPA because it was *contrary to* the PPA form, not because PGE disagreed with reliance on prior PPA forms at all: "On the issue of the contract length and fixed price period, under the current form contract, PGE provides a 15 year fixed price term starting on the Effective Date. The *adjustment* to the term in the OneEnergy Oregon Solar contract was in error."[188] PGE did not

[184] PGE/210, True/2 (November 20, 2015, Email from Bruce True to Jake Stephens, including several prior emails between them).
[185] *E.g.*, *Kohring*, 355 Or at 307-08; *State v. Ziska/Garza*, 355 Or 799, 806 (2014); *State v. Perry*, 336 Or 49, 54-56 (2003).
[186] Intervenors' Mot. for Summ. J. at 25 (emphasis added).
[187] Defs.' Mot. for Summ. J. at 57-58.
[188] PGE/210, True/1 (Nov. 20, 2015, Email from Bruce True to Jake Stephens, including several prior emails between them).

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"disavow" reliance on prior versions of the PPA *forms*, and those forms are useful interpretative aids here.

D. The changes to PGE's PPA forms in Docket No. UM 1396 and UM 1610 are irrelevant because those dockets did not address the start date for the fixed-price period.

Defendants contend that PGE's failure to include more explicit language regarding the start date of the fixed-price period in compliance filings in response to Docket Nos. UM 1396 and UM 1610 demonstrates that the fixed-price period should begin at the Commercial Operation Date.[189] But this administrative history says nothing because the fixed-price period was not at issue in Docket Nos. UM 1396 and UM 1610.

The Commission can open a policy docket to address particular issues pertaining to QF standard contracts. The issues to be decided in a policy docket are then typically limited at the outset. In Docket No. UM 1396, Administrative Law Judge Power issued a ruling in March 2009, setting forth the eight issues to be decided in that docket.[190] The list of issues in Judge Power's ruling did not include the start date of the fixed-price period. In Phase II of Docket No. UM 1396, the Commission addressed an additional six issues, again none of which included the start date for the fixed-price period.[191] When PGE submitted a compliance filing in Docket No. UM 1396 in response to Order No. 11-505, its compliance filing included additional text in Schedule 201 confirming that the start date for the fixed-price period began at execution. To be clear, as discussed in PGE's motion for summary judgment, [192] PGE's then operative PPA forms explicitly began the fixed-price period at contract execution, because they stated that the fixed-price period began with the "Term," which began at execution. In a workshop regarding PGE's compliance

[189] *See* Defs.' Mot. for Summ. J. at 29.
[190] *In the Matter of Public Utility Commission of Oregon, Investigation into Determination of Resource Sufficiency, Pursuant to Order No. 06-538*, Docket No. UM 1396, ALJ Ruling at 1-2 (Mar. 3, 2009).
[191] Docket No. UM 1396, Order No. 11-505 at 1-2 (Dec. 13, 2011).
[192] PGE's Mot. for Summ. J. at 18.

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filings in response to Order No. 11-505, Staff's representative in the workshops marked the revisions to the fixed-price period as stated in the revised Schedule 201 as a "substantive" alteration to the Schedule 201 language, as opposed to mere "housekeeping." Staff's representative explained that, "The topic of contract term and when the 15 year period starts is a UM 1610 issue, and was not part of Order 11-505 or the July settlement meeting."[193] When the Commission opened Docket No. UM 1610, it defined the scope of that proceeding in Order No. 14-058, which also did not include the start date of the fixed-price period.[194] Thus, PGE's representative withdrew the edits from the compliance filings in Docket No. UM 1396[195] and did not re-raise them in Docket No. UM 1610. PGE's representatives understood that the edits were beyond the scope of both proceedings, and withdrew them.[196] To the extent this administrative history suggests anything about the NewSun PPAs, it confirms that neither Docket No. UM 1396 nor Docket No. UM 1610 was meant to alter the pre-existing contract language that explicitly began PGE's fixed-price period at execution.

Defendants appear to contend that the Staff representative's unexplained conclusion that PGE's proposed revisions in Docket No. UM 1396 were "substantive" and not "housekeeping" is binding on the Commission in this proceeding.[197] But the Staff representative's (Mr. Bless's) unexplained legal conclusion is not admissible as a "fact" at summary judgment (or at all), because it is both hearsay and a legal conclusion. Further, Mr. Bless's conclusion that PGE's proposed revisions were a "substantive" change[198] is not even persuasive authority because it is the mere

[193] CREA-NIPPC-REC/204, Sanger/1-2 (Adam Bless Email on Jan. 31, 2013).
[194] Docket No. UM 1610, Order No. 14-058 at 1-2 (Feb. 24, 2014).
[195] PGE/400, Macfarlane/3-5.
[196] *Id.*
[197] Defs.' Mot. for Summ. J. at 54.
[198] *Id.*

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conclusion that the change is "substantive" with no explanation. Defendants also attempt to read import into PGE's withdrawal of the revisions in Docket No. UM 1396 and failure to re-assert them in Docket No. UM 1610. But the undisputed evidence demonstrates that PGE withdrew and did not re-assert the proposed revisions because it correctly perceived them as beyond the scope of either proceeding.[199] Defendants' focus on that administrative history is an irrelevant distraction.

E. The parties' discussions before signing the PPAs are relevant to interpreting the PPAs because they are admissible parol evidence to explain the circumstances of the parties at the time the contracts were formed.

Intervenors contend that the Commission cannot rely on the parties' discussions prior to execution as extrinsic evidence of intent.[200] Intervenors do not support that purported rule with any citation, and it is not the law.

To interpret a contract under Oregon law, the first step is to determine if the contract is ambiguous. To do that, the court looks at the text, context, *and the circumstances of the parties at the time of contract execution*.[201] The Oregon Supreme Court explicitly stated that "in contract interpretation . . . in 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."[202] *Oregon Trail Elec. Consumers Co-op, Inc. v. Co-Gen, Co.* is an example of that rule being applied.[203] There,

[199] *See* PGE/400, Macfarlane/4-5.

[200] Intervenors' Mot. for Summ. J. at 20-21.

[201] 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.").

[202] *State v. Gaines*, 346 Or 160, 173 n 8 (2009) (citing *Abercrombie v. Hayden Corp.*, 320 Or 279, 292 (1994), and stating that *Abercrombie* "articulat[ed] that principle."); *see, e.g. Hawkins v. 1000 Ltd. P'ship*, 282 Or App 735, 754 (2016) ("[t]o determine whether a provision of a contract is ambiguous, we examine the text of the provision in the context of the document as a whole; *we also look to extrinsic evidence of the circumstances underlying the contract's formation*.") (citation omitted; emphasis added).

[203] *Oregon Trail Elec. Consumers Co-op, Inc. v. Co-Gen, Co.*, 168 Or App 466 (2000).

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the Court of Appeals relied on the parties' discussions during negotiations when construing provisions of a PPA executed between a QF and a utility to determine if the provisions were ambiguous and, if so, what they meant.[204] The Court of Appeals ultimately accepted the testimony regarding the meaning of the PPA.[205]

Defendants and intervenors ignore that black-letter rule of contract interpretation because they ask the Commission to ignore the extrinsic evidence of the parties' discussions immediately before executing the contracts. That evidence undisputedly shows that there is no ambiguity: PGE, in letters and emails, stated that its intention in its offer was that the 15-years begins to run at execution. The NewSun Parties proposed a counteroffer when they requested, in writing, to change the words in the PPA to provide for 15 years of fixed prices starting from the COD.[206] PGE said "no" and re-offered 15-years from execution.[207] Defendants signed that offer.

To avoid that undisputed evidence, defendants and intervenors take the contradictory positions that (A) the PPAs should be interpreted under Oregon law used to interpret common law contracts (where the goal, as required by statute, is to "pursue[]" "the intention of the parties")[208] and (B) the Commission should ignore PGE's explicit written intentions when it made the offer and explained, repeatedly, to defendants that the intention was that the 15-year fixed-price period commences at execution. Defendants and intervenors cannot have it both ways: they can't insist that the Commission follow Oregon law for interpreting common law contracts and then also insist that the Commission *not* follow the primary goal of contract interpretation—discerning the intent

[204] *Id.* at 476-80.
[205] *Id.* at 479-81.
[206] PGE/210, True/1, 2 (Nov. 20, 2015, Email from Bruce True to Jake Stephens, including several prior emails between them); PGE/212, True/2 (Dec. 3, 2015, Letter from Greg Adams to Denise Saunders).
[207] PGE/214, True/2 (Dec. 14, 2015, Letter from Denise Saunders to Greg Adams); PGE/210, True/1 (Nov. 20, 2015, Email from Bruce True to Jake Stephens, including several prior emails between them).
[208] ORS 42.240 ("In the construction of an instrument the intention of the parties is to be pursued if possible[.]")

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of the parties—and ignore the intent of the offeror (PGE). That was the offer that defendants, although they did not like it, accepted when they executed the PPAs. Under the objective theory of contracts, defendants' overt objective act—signing the PPAs—controls the interpretation of the contract. Because they accepted PGE's offer (albeit grudgingly), defendants' disagreements with PGE about what Order No. 05-584 required and what two prior executed PPAs provided does not change the meaning of the NewSun PPAs.

The parties' discussions prior to executing the PPAs are admissible and relevant extrinsic evidence of intent under Oregon case law and statutes[209] for interpreting contracts, and that evidence shows that there was no ambiguity: PGE offered, and defendants signed, PPAs that provided that the 15-year period commenced at execution. The Commission should reject defendants' and intervenors' motions.

F. The canons of construction favor PGE.

If the Commission concludes, based on the text, context and circumstances under which the NewSun PPAs were formed, that the NewSun PPAs are ambiguous, and if the Commission attempts, but is not able, to resolve that ambiguity by resolving the disputed issues of fact in this summary judgment motion (which the Commission should not do; if the PPAs are ambiguous, the parties should be allowed to complete discovery and present a full factual record for the Commission to review before deciding disputed factual issues), then at the third level of interpretation, canons of construction can apply.

[209] 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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1. The canon that when provisions are inconsistent, the specific controls the general applies to PGE's benefit because Schedule 201 is specifically about price while Section 4.5 refers to price only indirectly.

ORS 42.240 provides that "[i]n the construction of an instrument the intention of the parties is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control a general one that is inconsistent with it."[210] Here, the NewSun PPAs specifically provide that the Contract Price is to be found in Schedule 201.[211] Section 4.5 concerns ownership of Environmental Attributes and refers to Contract Price only as part of text about transfer of ownership of those attributes.[212] Thus, the text in Schedule 201 that "PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price . . . for all years in excess of the initial 15" is the specific provision in favor of PGE's argument that controls over the general reference to Contract Price in Section 4.5.

2. The canon that multiple instruments should be construed together eliminates the NewSun Parties' proposed distinction between "Term" and "term."

Oregon follows the canon that multiple writings are construed together where "(1) the documents are made by the same parties; (2) the documents are executed at or about the same time; and (3) the documents are part of the same transaction."[213] Under this canon similar words and phrases in two separate writings are to be construed consistently.[214]

Here, there is no question that PGE and each of the NewSun Parties entered into the PPAs and Schedule 201 at the same time as part of the same transaction: the Schedule is attached as

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[210] ORS 42.240.

[211] Compl., Ex. 1 at 2 (Alfalfa Solar I LLC PPA at Section 1.6).

[212] *Id.* at 10-11 (Alfalfa Solar I LLC PPA at Section 4.5).

[213] *In re Colen*, 516 BR 618, 625 (Bankr D Or 2014) (citation omitted).

[214] *See id.* (construing consistently "nonrefundable move in fee" in one writing and "nonrefundable fee" in another); *see also Weber v. Anspach*, 256 Or 479, 483 (1970) (writing referring to separate document incorporates that document); *Hays v. Hug*, 243 Or 175, 177 (1966) (land sale contract and escrow instructions construed together).

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Exhibit D to each PPA.[215] The NewSun Parties attempt to create a difference between the PPA's defined word "Term" and Schedule 201's use of the word "term." But, under clear and consistent Oregon case law, the Commission should interpret the definition of "Term" in the PPA consistently with Schedule 201's use of the word "term." Thus, as defined in the PPA, the "term" begins on execution.

3. The canon that an ambiguity should be construed in favor of the party meant to benefit from the provision supports PGE's interpretation because limiting fixed prices to the first 15 years of the standard contract was meant to benefit PGE's customers.

Another maxim is that an ambiguity is resolved in favor of the party for whose benefit the provision was written.[216] The Commission should construe the start date of the fixed-price period in PGE's favor, because limiting the fixed-price period to the first 15 years of the standard contract was meant to protect utility customers from price divergence between fixed prices and actual avoided cost rates in the later years of the PPA.[217]

Prior to Order No. 05-584, the Commission's orders required that utilities offer fixed prices to the utilities for the *entirety* of the legally enforceable obligation. In Order No. 05-584, the Commission expanded the overall contract term of standard contracts to 20 years. But the Commission altered the pre-existing rule that provided for fixed prices during the entirety of the contract term. The Commission ruled that "standard contract prices should be fixed for only the first 15 years of the 20-year term."[218] This limitation on fixed pricing was meant to limit

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[215] Compl. Ex. 1 at 24-36 (Alfalfa Solar I LLC PPA, Schedule 201 attached as Exhibit D).

[216] ORS 42.260 ("When different constructions of a provision are otherwise equally proper, that construction is to be taken which is most favorable to the party in whose favor the provision was made."); *see also Crossroads Plaza, LLC v. Oren*, 176 Or App 306, 310 (2001) (applying ORS 42.260).

[217] Docket No. UM 1129, Order No. 05-584 at 19 ("A primary goal in this proceeding is to accurately price QF power."); *id.* at 20 (deciding to restrict fixed prices to just 15 years, not 20, to reduce divergence between actual avoided costs and fixed prices).

[218] *Id.*

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forecasting error because "divergence between forecasted and actual avoided costs must be expected over a period of 20 years."[219] Thus, the Commission intended to limit the economic cost to the utilities' customers of fixed pricing over the full 20-year term. Because this provision was meant to benefit utilities' customers, any ambiguity should be construed in favor of the utility and its customers.

4. The canon that an ambiguity should be construed against the drafter does not apply and is inconclusive.

The canon that a contract should be construed against the drafter does not apply to interpret the NewSun PPAs for several reasons. First, the canon to construe ambiguities against the drafter is a canon of last resort, and the Commission need not reach it if other canons apply, as they do here.[220] Second, the underlying reason for this canon is that the drafter (normally) controls the document and had the ability cure ambiguities at will.[221] In this case, PGE in fact proposed revisions to the fixed-price period that would have made explicit the intent that fixed prices begin at execution, and Commission Staff rejected these revisions as beyond the limited scope of the then-pending policy docket.[222] Thus, the underlying rationale for forcing the drafter to bear the burden of ambiguity does not exist in this context, because PGE did not have unfettered opportunity to cure any ambiguity.

Third, any ambiguity in Section 4.5 should be construed against the QFs, not PGE. The NewSun Parties contend that Section 4.5's assignment of Environmental Attribute ownership is

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[219] *Id.*

[220] *Hoffman Const. Co. of Ala. v. Fred S. James & Co. of Or.*, 313 Or 464, 470–71 (1992) ("[A]fter all other methods for resolving the dispute over the meaning of particular words fail, then the rule of interpretation against the drafter of the language becomes applicable.").

[221] *Heinzel v. Backstrom*, 310 Or 89, 96-97 (1990) ("As the drafter of the document, Mr. Heinzel had the opportunity to include language which would have clearly shown the parties' intentions.").

[222] CREA-NIPPC-REC/204, Sanger/1-2 (Adam Bless Email on Jan. 31, 2013).

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what supports their proposed interpretation.[223] CREA, an association of independent power producers, drafted Section 4.5, not PGE.[224] Thus, even applying the canon, any ambiguity created by Section 4.5 should not be construed against PGE, but against CREA, an intervenor in this docket. Put another way, if CREA intended Section 4.5 to set the start date of the fixed-price period, it could have done so explicitly.

IV. CONCLUSION

The Commission should deny defendants' and intervenors' motions for summary judgment for the reasons stated above.

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Respectfully submitted,

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[223] Defs. Mot. for Summ. J. at 10 (citing intervenors' complaint in UM 1805 concerning Section 4.5).
[224] *Id.* at 55 (describing history of drafting of section 4.5).

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