BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	INTERVENORS' APPLICATION FOR RECONSIDERATION

I. INTRODUCTION

Pursuant to ORS 756.561 and OAR 860-001-0720, Intervenors the Northwest and Intermountain Power Producers Coalition ("NIPPC"), the Community Renewable Energy Association ("CREA") and the Renewable Energy Coalition (the "Coalition," and together with NIPPC and CREA, the "Intervenors") request reconsideration of Order No. 19-255 (the "Order") on the grounds that the Order contains errors of law and fact. Intervenors have reviewed and fully concur in the arguments contained in the NewSun Parties' application for reconsideration. Intervenors separately move for reconsideration out of concern for the adverse precedent that the Order sets, which should be corrected by the Oregon Public Utility Commission ("Commission").

Simply put, a regulated utility should not be allowed to thwart Commission policy through any means or method – whether it be confusing and indirectly worded compliance filings (intentional or otherwise), mistakes in documents, statements to counter parties, or otherwise. The Order establishes a precedent where a utility may

thwart Commission policy with the effect of undermining the Commission's authority and stakeholders' confidence in Commission orders, rules, and tariffs, and therefore it should be reconsidered.

The Commission's Order No. 18-079 confirmed that its policy of offering each qualifying facility ("QF") fixed prices for 15 years after operations commence was not a "new" policy, and indeed that has always been the only logical treatment of the issue since 2005 because, in this Commission's words, "[p]rices paid to a QF *are only meaningful when a QF is operational and delivering power to the utility*."[1] That policy is a critical element of the Commission's implementation of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), which affirmatively requires the Commission to offer QFs fixed prices for sufficient time to allow financing of renewable energy facilities.

Yet the Order allows utilities, like Portland General Electric Company ("PGE"), to thwart such critically important policies for years through underhanded means. As detailed below, PGE did not specifically call out its 15-years-from-effective-date offer in its UM 1129 compliance filings to which the Order refers. Instead, PGE used the same type of language in its Schedule 201 as PacifiCorp and Idaho Power Company ("Idaho Power") used in their corresponding PURPA pricing tariffs, which industry participants understood to have a consistent meaning. PGE's atypical position could only be inferred from confusing and poorly drafted contract language buried within hundreds of pages of compliance filing documents. No Commission order, Staff comments, or any document

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[1] Northwest and Intermountain Power Producers Coalition v. Portland General Electric Co., Docket No. UM 1805, Order No. 17-256 at 4 (July 13, 2017) (emphasis added).

produced in UM 1129 specifically described PGE's atypical position, much less stated it was a reasonable implementation of the policy to offer QFs 15 years of fixed prices under PURPA. And when PGE later tried to make its 15-years-from-effective-date proposal explicit in 2012, stakeholders objected and PGE *withdrew* its proposed unambiguous language and *agreed* to include language regarding ownership of RPS Attributes in the renewable contract that directly contradicts a "15-years-from-effective-date" interpretation. The Order ignores all of this context around the NewSun PPAs and instead rewards PGE's actions by determining that the NewSun PPAs are unambiguous in PGE's favor on the 15-year fixed-price issue – and in direct contradiction to the policy that Oregon QFs should be provided fixed prices for 15 years after operations commence. At a minimum, this context at least raises some doubt about PGE's position, and certainly could not compel a finding that the PPA is *unambiguous* in PGE's favor.

Intervenors' requested changes to the Order would lead to the conclusion that the NewSun PPAs require PGE to pay fixed prices for 15 years after the Commercial Operation Date and accordingly that summary judgment should be granted to the NewSun Parties.

Finally, the Commission should explicitly clarify whether its analysis and conclusions about the regulatory history and prior PPA versions had any bearing on its decision in this matter. The Commission should also expressly state that executed PURPA contracts are to be interpreted under Oregon's laws for contract interpretation and reject PGE's arguments that PURPA PPAs are to be interpreted as statutes to end PGE's ongoing arguments on this point.

II. ARGUMENT

A. The Order Erroneously Recites the Regulatory History and Infers as a Matter of Fact That No Policy Was Established in UM 1129

The Commission should grant reconsideration to correct errors of fact in the recitation of the regulatory history. The Order failed to recite and account for critical facts that are material to its legal conclusion that the regulatory history supported its conclusion in this case.

The Order infers that the Commission, Staff, and/or other stakeholders had actual knowledge and understanding about PGE's different implementation of the 15-year fixed price period in its initial compliance filings and found that to be a reasonable implementation when there is no basis upon which to make such an inference, and evidence in the record directly contradicts such an inference. Specifically, the Order states that "[u]ntil we clarified our policy on a going-forward basis, the Commission had not established a specific requirement for when the 15-year period of fixed prices must commence,"[2] and that "[t]he Commission approved all three contracts, despite the material difference in the calculation of time periods—most significantly, when the 15-year period of fixed prices began."[3] These statements make an error of fact by implying that PGE's atypical position was understood and endorsed by the Commission as consistent with the Commission's intent for the 15-year fixed-price period.

There are several facts in the record that run counter to or directly contradict this inference. There is no evidence in the record that PGE specifically called out its atypical

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2 Order No. 19-255 at 16.

3 *Id.* at 5.

position in any of its UM 1129 compliance filings.[4] PGE's Compliance filings used the same type of language as the other two utilities. Specifically, where PGE's Schedule 201 says the fixed-price option is "available for a maximum *term* of 15 years,"[5] PacifiCorp's Schedule 37 says "Fixed Avoided Cost Prices are available for a contract *term* of up to 15 years."[6] Each refers to a maximum *term* of 15 years without using specifically defined terms and without any indication as to when the fixed-price period began because that is how members of the industry refer to a 15-year period of power sales under a PPA. Common industry understanding was consistent with what both PacifiCorp and Idaho Power included in their filings.[7] There is nothing obvious about the use of the word "term" in either of these schedules that implies any different meaning between the two uses. PacifiCorp and Idaho Power's template contracts further clarify that the referenced 15-year period of fixed-price power sales begins after the "Scheduled Initial Delivery Date,"[8] in the case of PacifiCorp, or is available for "15 Contract Years" that begin on the "Operation Date,"[9] in the case of Idaho Power. PGE's template agreement did not explicitly state when the 15-year fixed-price term begins and certainly did not spell out

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4 *See* PGE/102, Macfarlane (PGE Advice No. 05-10, UM 1129 Compliance Filing (July 12, 2005)); *See also* PGE/105, Macfarlane (PGE Advice No. 06-26, UM 1129 Compliance Filing (Oct. 20, 2006)).

5 PGE/102, Macfarlane/7 (PGE Advice No. 05-10, UM 1129 Compliance Filing at Schedule 201 Original Sheet No. 201-4) (emphasis added).

6 PGE/103, Macfarlane/38 (PacifiCorp UM 1129 Compliance filing at Schedule 37 Original Sheet No. 37-2 (July 12, 2005)) (emphasis added).

7 Defendants' and Intervenors' Joint Statement of Additional Undisputed Facts at ¶ 53 (Jan. 25, 2019).

8 *Id.* at 16 (PacifiCorp UM 1129 Compliance filing at Power Purchase Agreement at § 5.2).

9 PGE/104, Macfarlane/18 (Idaho Power UM 1129 Compliance filing at Energy Sales Agreement § 7.1 (July 12, 2005)).

the atypical, and contrary to industry understanding position that fixed prices would be paid only for 15 years immediately following the effective date.

Rather, in discussing these initial UM 1129 compliance filings, the Order infers that PGE's atypical position should have been well-understood by looking to the statement about when the *20-year term* of the agreement should end in PGE's initial UM 1129 standard contract template from over a decade ago. In that portion of PGE's initial UM 1129 contract template, the blank space for completion of the Termination Date contained language suggesting that PGE expected the agreement to terminate no more than 20 years after the Effective Date. It provided in Section 2.3:

> 2.3 This Agreement shall terminate on _____,____ [*date to be chosen by Seller*], up to 20 years from the Effective Date, or the date the Agreement is terminated in accordance with Section 10 or 12.2, whichever is earlier ("Termination Date").[10]

Although PGE now argues that it intended this section to limit the overall term of effectiveness of the agreement to 20 years after the effective date of the contract, by limiting the permissible Termination Dates, it is far from certain that the contract template would necessarily always be completed that way upon casual examination of the form itself. Additionally, the limiting language – "up to 20 years from the Effective Date" – is not contained anywhere in the contract templates or Schedule 201 executed by the NewSun Parties, calling into question the Order's reliance on it for any purpose.

In this litigation, PGE also tried to point to the language governing the 15-year period of fixed prices in Section 5 of this initial contract form, but that provision is even

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[10] PGE/105, Macfarlane/30.

more confusing.[11] The Order does not attempt to rely on that provision. The upshot of these undisputed facts is that nothing in PGE's initially approved Schedule 201 or standard contract expressly provided that PGE would only pay fixed prices for the 15 years immediately following the effective date.

Even if the Commission, Staff, and stakeholders at the time noticed this slight discrepancy in the wording and use of defined terms buried within hundreds of pages of PPA templates, they would need to infer that PGE's lack of clarity on the topic meant that its "term" as used in Schedule 201 meant something entirely different than what the other two utilities meant with nearly identical language in their PURPA pricing tariffs.

However, there is no evidence that anyone noticed the discrepancy in PGE's language. No Commission order, Staff comments, or any document produced by the Commission in UM 1129 specifically described PGE's atypical position, which was not clearly communicated until years later, much less stated it was a reasonable implementation of the policy.[12] The compliance filings in that docket consisted of hundreds of pages of complex tariffs and contract terms and conditions for all three utilities, each of which would have needed to be reviewed in extreme detail and with a fine tooth comb in order to discover a minor discrepancy in the language such as this.

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11 As was pointed out in this case, a literal reading of the provisions PGE cited in support of its interpretation of its initial UM 1129 standard contract would result in the QF only being paid fixed prices for less than 15 years, because the 15-year period would begin on January 1st of the year the agreement is executed rather than the effective date. *See NewSun Parties' Summary Judgment Response* at 23-24.

12 *See* Order No. 19-255 at 6 (noting that 2016 was the first time any direct reference had been made to the differences between the utilities' contracts with respect to the start date of the 15-year fixed price period.).

This is especially true, where the common industry understanding was consistent with what both PacifiCorp and Idaho Power included in their filings.[13] While, in an ideal world, discrepancies like PGE's atypical position would be noticed, called out, and addressed, the practical reality is that the Commission, Staff, or other stakeholders are busy and/or have limited resources to provide such a detailed review. Here, where PGE's language was so identical to common industry language also used by other Oregon utilities it is not reasonable to assume it would have been caught or reasonably presumed by Staff (or any other reader) to have an atypical or contrived meaning; indeed, quite the contrary. "A QF and the Commission—as the regulatory body charged with ensuring the utility's tariffs comply with applicable policies and laws—should be entitled to rely on substantively identical language in the three Oregon utilities' tariffs implementing the same Commission policy to have the same general meaning."[14]

Further evidence that no one noticed, understood, or found PGE's atypical position to be reasonable can be found in the record, in that years later once PGE specifically asked to change the language to make its intentions explicit in Schedule 201, parties objected and PGE withdrew the request. This occurred in 2012, when PGE tried to make it explicit in the standard contract and Schedule 201 that the 15 years of fixed prices ran only for 15 years "*immediately following the effective date*."[15] Stakeholders

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13 Defendants' and Intervenors' Joint Statement of Additional Undisputed Facts at ¶ 53 (Jan. 25, 2019).

14 Defendants' Motion for Summary Judgment at 48 (Jan. 29, 2019).

15 Defendants' and Intervenors' Joint Statement of Additional Undisputed Facts at ¶¶ 57-61.

objected to such treatment and PGE *withdrew* its proposed unambiguous language.[16] PGE then agreed to express contract language in its renewable PPA that explicitly tied the ownership of RPS Attributes to the fixed-price period and that directly contradicts a "15-years-from-effective-date" interpretation.[17] Not only is the RPS language about when renewable energy certificates are transferred, but it also is evidence that the 15-year fixed-price period ends at the same time as when ownership of the RPS Attributes changes.[18]

Finally, the Commission itself weighed in on its understanding of when the 15-year fixed-price period was supposed to commence in UM 1805. The orders in UM 1805 confirm that the Commission never consciously approved PGE's atypical 15-years-from-effective-date position. Specifically, in Order No. 17-256, the Commission recognized that the decision to require fifteen years of fixed pricing implicitly included a requirement that those prices commence on the Commercial Operation Date because "[p]rices paid to a QF *are only meaningful when a QF is operational and delivering power to the utility*."[19] Further, over PGE's strenuous objection (which it later appealed) the Commission expressly clarified that the decision to require PGE to use the Commercial Operation Date as the commencement date did not "constitute the adoption of a 'new

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16 *Id.* at ¶¶ 62-70.

17 *Id.* at ¶¶ 71-82 ("renewable PPAs. . . will include language assigning ownership of all Environmental Attributes to the QF during the last five years of a 20-year contract when prices are at market").

18 *Id.* at ¶¶ 80-82.

19 Order No. 17-256 at 4 (emphasis added).

policy,'" but "affirm[ed] the policy" initially adopted in 2005.[20] The only logical conclusion is that had PGE's atypical position been clearly articulated and therefore well-understood at the time of the initial compliance filings, it would not have been approved.

All of this evidence weighs against the inferences that the Commission did not set a specific policy as to when the 15-year fixed-price period commences and that the Commission specifically approved PGE's differential treatment. It was therefore an error for the Order to not consider this evidence and reconsideration should be granted in order to remedy these errors of fact.

B. The Order Erroneously Concludes That the Regulatory History Supports its Decision

The Commission should further grant reconsideration to correct errors of law in concluding that the regulatory history supports the Commission's conclusion. In light of the above-described factual irregularities in the Order, it was an error of law to conclude that the regulatory history supports the conclusion that "[n]othing in the regulatory history points to a different conclusion than we reach under *Yogman*."[21] Rather, the regulatory history supports the conclusion that the Commission established a policy requiring a fixed-price term commencing at the Commercial Operation Date, and that the NewSun Parties executed PGE-drafted contracts that did not clearly and explicitly specify anything different.

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20 *Northwest and Intermountain Power Producers Coalition v. Portland General Electric Co.*, Docket No. UM 1805, Order No. 18-079 at 3 (Mar 5, 2018).

21 Order No. 19-255 at 16.

The precedent that the Commission establishes with Order 19-255 is one that encourages utilities to thwart Commission policy by drafting confusing and indirectly worded compliance filings, making statements to counter parties, or otherwise. This is the case because as long as the utility does not thwart policy explicitly and no one catches such an action in the initial compliance filing, the utility will be permitted to impute new policy through its compliance filings. This effect undermines the Commission's authority and stakeholders' confidence in Commission orders, rules, and tariffs because they can be swept aside by a single utility's atypical implementation.[22] The Order attributes undue significance to since-abandoned language buried within PGE's initial UM 1129 compliance filing contract template to thwart the recently "affirm[ed]" policy that the fixed price period should be offered for 15 years after operations commence because, as every industry participant knows, prices are only meaningful to the QF after operation of the facility begins.

The situation is particularly egregious in the context of this case. PGE's initial compliance filings discussed in the regulatory history are not the same standard contracts negotiated and executed by the NewSun Parties, and the NewSun Parties expressed disagreement with PGE's purported understanding of the Commission's 15-year fixed-price policy.[23] Further, the QFs were facing a rate decrease that limited their ability to

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22 *See* Intervenors' Motion for Summary Judgment at 20-25 (Jan. 29, 2019).

23 The NewSun Parties did so in writing, prior to PGE's execution of these PPAs, and then PGE executed the PPAs anyway, having been so informed. Indeed, the NewSun Parties did so while having expressly calling out the inconsistency of PGE's position with Commission policy which has ultimately been repeatedly confirmed by the Commission to have been a correct understanding.

challenge PGE's interpretation. The Order tells QFs that they need to litigate these issues prior to executing a PPA to ensure that they are entitled to their rights. This upfront litigation would have risked the QF's entitlement to the prices because the QF would have also been required to litigate the issue of whether and when it had formed a legally enforceable obligation. The Order encourages PGE to continue constantly taking positions that are contrary to PUC policy, and QFs should not be required to litigate those when the policy is clear but the compliance filings or PPAs are confusing or indirectly worded. Therefore, the Order also sets a precedent that creates an even greater power imbalance between the QF and utility because should the QF dare to disagree with the utility's "interpretation" of Commission policy, the QF risks also being subject to years-long litigation which is not only burdensome on the QF, but on the Commission itself, Staff, and likely utility ratepayers which will pick up the utility's bill.

Therefore, reconsideration should be granted to correct the error of law that would allow a utility to frustrate Commission policy with an confusing compliance filings.

C. The Commission Should Clarify the Role of the Regulatory History in its Decision and that Oregon Contract Interpretative Framework Applies to PURPA PPAs

The Commission should also expressly state that executed PURPA contracts are interpreted under Oregon's laws for contract interpretation and reject PGE's arguments that PURPA PPAs should be interpreted as statutes to end PGE's ongoing arguments on this point.

The potential for ambiguity on this point arises from the Commission's prior orders in this docket and PGE's arguments. The Order cites to the Commission's earlier Order No. 18-174 denying the NewSun Parties' motion to dismiss stating that "[t]he

terms and conditions of these contracts were litigated before the Commission, adopted by the Commission, and *have the force of regulation* under our implementation of PURPA."[24] In response to this, PGE argued that the:

> terms should be interpreted in the manner that statutes are, which includes looking at the legislative history and examining prior versions of the statute. Here, analogous to legislative history, that means examining the prior Commission orders and prior versions of the standard PPAs that led to the standard PPAs at issue.[25]

Thus, PGE took the position in this case, as it has in other cases, that PURPA PPAs are analogous to statutes and statutory interpretive methods apply, including that "prior versions of the PPA forms are relevant at the first step of interpretation."[26] PGE appears to make this odd argument in order to elevate the significance of PGE's version of "regulatory history," which relies heavily on the hidden meaning in PGE's own prior compliance filings and contract templates (rather than the Commission's own statements), even where the QF counter party did not execute those contract templates and may not have even been aware of PGE's intended meaning in such previously offered templates.

While the Order states that "the parties agree that we must apply the analysis in *Yogman*,"[27] and that "we reach this conclusion under *Yogman*'s first step,"[28] the fact is that PGE argued that a statutory interpretation should apply to PURPA PPAs including its "version" of the regulatory history and prior versions of the PPA. Under the contract

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24 Order No. 19-255 at 2 (emphasis added).
25 PGE's Motion for Summary Judgment at 11.
26 *Id.* at 19.
27 Order No. 19-255 at 13.
28 *Id.* at 15.

law interpretative framework, it would be an unusual result for a contract to be interpreted in a particular manner simply because it was consistent with prior versions of that contract developed over a decade prior, that had gone through multiple revisions in the intervening years, none of which would have been reviewed by the contracting party.[29]

Given that the Order recites this regulatory history, including prior versions of the PPA and concludes that the regulatory history supports its decision, it is unclear what role the regulatory history played in reaching the final decision, i.e. whether it was in fact considered at the first step of interpretation and PGE asserted. Therefore, although it appears that the Order rejects PGE's ongoing arguments that Oregon PURPA PPAs are analogous to statutes, the Order does not directly reject PGE's argument on this point and could therefore allow for continued uncertainty and additional future litigation on the question. The Commission should reject PGE's approach and rule that PURPA PPAs are interpreted under the contract interpretative framework under Oregon law and clarify whether regulatory history plays any role under the first step of interpretation. That should be an easy determination for the Commission to make because the United States District Court has already addressed the question – stating that the Commission may "interpret terms in executed PPAs using traditional common law interpretive methods . . . "[30]

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[29] *See* Intervenor's Response to Cross-Motions for Summary Judgment at 13-15 (Feb. 5, 2019)

[30] *Alfalfa Solar I LLC v. Portland Gen. Elec. Co.*, 2018 LEXIS 92771, at *20, 2018 WL 2452947(D Or May 31, 2018).

Therefore, reconsideration should be granted so the Commission can clarify that:

- the discussion of the regulatory history is simply dicta or whether the Commission relied upon it in is decision-making, and
- the *Yogman* framework applies to interpretation of PURPA PPAs.

III. CONCLUSION

Should the Order stand as written, it risks setting a precedent that not only creates and endorses a set of means and methods for the utilities regulated by the Commission to thwart and evade their regulator, but also ultimately undermines confidence in, and the authority of, the Commission itself. It also creates a burdensome process for resolving QF-utility disputes by essentially requiring a litigated case prior to contract execution whenever the utility takes a position contrary to Commission policy. Finally, it sets an unclear analytical framework for resolving contract disputes by not explicitly rejecting PGE's argument that standard PPAs be interpreted as statutes including prior contract versions. For the above stated reasons, the Commission should grant reconsideration of and/or clarify Order No. 19-255.

Dated this 1st day of October 2019.

Respectfully submitted,

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