BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Administrative Orders

Rules

INTRODUCTION AND SUMMARY

Alfalfa Solar I LLC ("Alfalfa"), Dayton Solar I LLC ("Dayton"), Fort Rock Solar I LLC ("Fort Rock I"), Fort Rock Solar II LLC ("Fort Rock II"), Fort Rock Solar IV LLC ("Fort Rock IV"), Harney Solar I LLC ("Harney"), Riley Solar I LLC ("Riley"), Starvation Solar I LLC ("Starvation"), Tygh Valley Solar I LLC ("Tygh Valley"), and Wasco Solar I LLC ("Wasco") (collectively, "Defendants" or the "NewSun Parties") hereby submit their Reply in Support of the NewSun Parties' Motion for Summary Judgement to the Public Utility Commission of Oregon ("OPUC" or "Commission").

As demonstrated in the NewSun Parties' Motion for Summary Judgment ("Motion"), the NewSun Parties' interpretation of the NewSun Parties' power purchase agreements (the "NewSun PPAs") is supported by: (1) the text and context of the 2015 Standard Renewable Contract Form;[1] (2) the expert testimony and related evidence of the common industry usage of the language regarding the fifteen-year fixed-price term in PGE's Schedule 201, appended to the NewSun PPAs; (3) the objectively reasonable understanding of the Commission's policy established in Order No. 05-584 to provide fifteen years of fixed prices after operations, which was recently reconfirmed by the Commission as a longstanding policy in effect both before and after execution of the NewSun PPAs; and (4) the fact that Portland General Electric Company ("PGE") has pointed to nothing in the 2015 Standard Renewable Contract Form, or in the

[1]This brief refers to PGE's standard contract approved for use in Order No. 15-289 and executed by the NewSun Parties as the "2015 Standard Renewable Contract Form." That form, as filed with the Commission, is contained in the record at PGE/107, Macfarlane/28-49. PGE Exhibit 101, containing Alfalfa's PPA and Schedule 201, may be relied on for references to the provisions of the executed NewSun PPAs and the applicable Schedule 201 in this brief, unless otherwise noted.

NewSun Parties' edits to that fill-in-the-blank form, stating that the fifteen-year fixed-price term ends fifteen years after the date the contract is executed.

The summary judgment evidence further establishes that PGE knew how to unambiguously state the fixed-price period ends fifteen years after execution, but PGE *voluntarily withdrew* a proposal to include such language in its standard contracts in order to avoid objections and ensure Commission approval of its contracts. After removing the fifteen-years-from-effective-date language in its draft contracts, PGE even agreed to language in Schedule 201 and Section 4.5 that was consistent with PacifiCorp's first generation of renewable standard contracts and stated unambiguously in Section 4.5 that the fifteen-year period ends only after completion of the first fifteen years after the Commercial Operation Date. The summary judgment record contains no material dispute on these facts, and PGE has identified no disputed facts necessitating a hearing to further prolong the outcome.

Therefore, the Commission should grant summary judgment in favor of the NewSun Parties by issuing an order finding that the NewSun PPAs require PGE to pay the applicable Qualifying Facility ("QF") the fixed-price On-Peak and Off-Peak rates in Tables 6a and 6b of Schedule 201 for fifteen years after the Commercial Operation Date.

ARGUMENT

I. When Read in Context, the NewSun PPAs Unambiguously Provide Fixed Prices for Fifteen Years After the Commercial Operation Date

PGE's Response to the NewSun Parties' Motion for Summary Judgment fails to refute that the only reasonable interpretation of the NewSun PPAs is that PGE must pay the fixed prices for fifteen years after the Commercial Operation Date. Under step one of the *Yogman*[2] test, the

[2]*Yogman v. Parrott,* 325 Or 358, 937 P2d 1019 (1997).

Commission should grant summary judgment to the NewSun Parties.

A. The Regulatory Context of the Agreements Supports Fifteen Years of Fixed Prices Commencing on the Commercial Operation Date

Despite PGE's arguments, there is no reasonable dispute that the Commission always intended—both before and after execution of the NewSun PPAs—that the fixed-price term would provide fifteen years of predictable revenue to the QF *after* operation and sales of power begin. *See NewSun Parties' Motion* at 6-11, 27-29 (providing detailed regulatory background). PGE misconstrues Commission orders to argue otherwise. Over PGE's strenuous objection in UM 1805, the Commission indeed confirmed that the fifteen-year term begins at operation, *not* at the time the PPA is executed.

Because Order No. 05-584 gave rise to the contractual provisions at issue, Oregon law requires the contracts to be interpreted consistent with the underlying intent of that order. *NewSun Parties' Motion* at 26-29 (discussing Oregon law and *Re Investigation Related to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 19-20 (May 13, 2005)); *see also PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, 151 FERC ¶ 61,223, PP 49-51 & n. 109 (June 18, 2015) (construing PGE's former standard contract "consistent with section 292.303(a) of the [Federal Energy Regulatory Commission]'s regulations that requires each electric utility to purchase '*any* energy and capacity which is made available from a [QF].'" (emphasis in original)). Therefore, the NewSun PPAs must be construed consistently with the recently reconfirmed intent of the policy established in Order No. 05-584 to provide QFs with fifteen years of fixed prices paid after delivery of power begins.

Yet PGE continues to argue this outcome was a *new* policy and is thus inapplicable to the NewSun PPAs, which were executed before UM 1805. *See PGE's Summary Judgment*

Response Brief at 7-8, 30-34 (Feb. 15, 2019) (*hereafter* "*PGE's SJ Response*"). In doing so, PGE defiantly makes arguments the Commission flatly rejected in UM 1805.

PGE argues that the Commission "has already ruled that PGE's 2005 to 2017 contract forms did not violate any Commission orders." *PGE's SJ Response* at 5. But that assertion overstates PGE's case. Instead, the Commission resolved the UM 1805 complaint on a very narrow ground—the "decision that PGE had not violated any Commission statute, rule, or order with regard to its prior contracts was *based solely on the fact that [the Commission] had approved PGE's standard contracts* under Order No. 05-584, and was not based on a review of any standard contract." *Northwest and Intermountain Power Producers Coalition v. Portland General Electric Co.* (*hereafter* "*NIPPC III*"), Docket No. UM 1805, Order No. 18-079, at 1-2 (Mar. 5, 2018) (emphasis added). The Commission never has found that limiting the fixed-price term to the fifteen years immediately following execution is consistent with Order No. 05-584. As the Commission determined in UM 1805, such treatment is inconsistent with the intent and purpose of the underlying policy established in 2005.

Next, the Commission directly rejected PGE's assertion that the Commission had adopted a new policy in UM 1805. After Order No. 17-465, PGE specifically argued in support of its rehearing request that "the Commission's requirement to offer fixed prices for 15 years measured from COD is a *new* policy not a *clarification* of an existing policy because the Commission acknowledged in Order No. 17-256 at page 3 that Order No. 05-584 did not specify the date on which the 15-year fixed price period begins." *See* Declaration of Gregory Adams in Support of Defendants' Motion for Summary Disposition, Ex. I, at 6-7 & n. 23 (filed July 2, 2018) (hereafter "Adams Declaration") (emphasis in PGE's Application for Rehearing).

But in a passage that PGE completely fails to address in its briefs in this case, the Commission declared:

> We also reject PGE's characterization that our decision constituted the adoption of a "new policy." Rather, as requested by complainants, our decision was simply to affirm the policy with respect to the commencement date for the 15-year period of fixed prices. This policy, which had been reflected explicitly in standard contract forms for PacifiCorp and Idaho Power Company, had been, up until the filing of PGE's most recent standard contracts, neither a source of controversy nor litigation by either a QF or a utility.
>
> * * * *
> Our order merely affirmed Commission policy, and did not require the interpretation or review of any standard contract form.

NIPPC III, Order No. 18-079 at 3.

The Commission already rejected PGE's arguments that UM 1805 created a *new* policy. The policy has always been that the fixed-price term necessarily runs for fifteen years after operation of the facility. That was the last and final word on the matter in UM 1805. Thus, PGE is wrong to rely on decisions where a whole "new statute" is enacted and thus not relevant to the interpretation of contracts executed before its enactment. *See PGE's SJ Response* at 32. The Commission did not amend or modify Order No. 05-584 in UM 1805; it merely confirmed that the UM 1805 complainants had correctly interpreted the intent of the order.

Ignoring the plain statements in the Commission's order, PGE next relies on out-of-context quotations from the Oregon Department of Justice's ("DOJ") legal brief filed in defense of PGE's appeal of the UM 1805 orders. *PGE's SJ Response* at 2 n. 3, 32-34. PGE's reliance on DOJ's appellate brief is unavailing. First of all, the DOJ's brief is not a Commission order. Oregon law allows the Commission to amend its orders in lieu of filing a response brief if it intends to alter the reasoning of the orders on appeal in response to the PGE's arguments. ORS

183.482(6). However, the Commission did not amend the statements in Order No. 18-079 rejecting PGE's "new policy" theory.

Additionally, PGE fails to provide the entire DOJ brief, which on the whole advocates that the Commission did *not* implement a new policy in UM 1805. In sections not supplied by PGE, the DOJ's brief states "that the ordered change to PGE's future QF contracts was consistent with the PUC's statewide policy concerning QF contracts that it adopted in 2005." *See* Second Supplemental Declaration of Gregory M. Adams, Ex N, at 13 (filed March 1, 2019) (containing DOJ's entire brief); *id.* at 19 ("[t]he PUC did not change its policy in this case . . . "); *id.* at 20 ("PGE disagrees with the PUC's characterization of its orders on review as clarifying or affirming the policy it established in Order No. 05-584 [but] PGE's arguments fails"); *id.* (the "PUC did not misinterpret its policy"); *id.* at 21 ("the prospective change to PGE's contracts represented at most a clarification, and not a misinterpretation, of PUC policy"). Accordingly, if the Commission were to rule in this case that UM 1805 created a new policy, as PGE argues, the Commission would contradict the DOJ's brief and undermine the lead arguments therein.

PGE latches onto arguments the DOJ made only in the alternative. The DOJ brief argues, only in the alternative, that even if the orders could be understood to change the policy, the orders did so properly. *Id.* at 19, 22, 25-29. That is hardly a concession that the orders created a new policy. Instead, it is an argument in the alternative—"*At most*, it was a change of policy applicable to PGE." *Id.* at 22 (emphasis added). And even that argument does not change the fact that the Commission has now clarified that the underlying *intent* of Order No. 05-584 was to provide fifteen years of fixed prices after operation. Therefore, to the extent any ambiguity exists in the NewSun PPAs, those contracts should be interpreted consistent with the intent and purpose of that statewide policy that has been in effect since 2005.

PGE also incorrectly asserts the UM 1805 orders are irrelevant because PGE appealed those orders. *PGE's SJ Response* at 33-34. But PGE cannot undermine state energy policy for years by merely filing an appeal. Under Oregon law, "any order made or entered upon any matter within the jurisdiction of the commission shall be in force and shall be prima facie lawful and reasonable, until found otherwise in" judicial review. ORS 756.565. The only exception to that rule is if the petitioner applies "to the Court of Appeals for a stay of the order until the final disposition of the appeal[,]" in which case the court will only grant such a stay for good cause and after posting of any necessary bond or other security "in favor of the commission for the benefit of interested persons . . . ." ORS 756.610(2). PGE's appeal has no relevance because PGE has not been granted, or even requested, a stay of the effect of the UM 1805 orders.

Finally, PGE again focuses on its own prior contract forms as reflective of the Commission's own policy and intent in Order No. 05-584. *PGE's SJ Response* at 35-37. The NewSun Parties thoroughly refuted any reliance on these old forms that the NewSun Parties did not sign and upon which PGE affirmatively disavowed reliance. *See NewSun Parties' Motion* at 57-58 (quoting Denise Saunders' assertion to NewSun Parties that PGE is not "required to conform to practices under prior contracts no longer in effect"); *NewSun Parties' SJ Response* at 18-25 (containing numerous reasons these forms are irrelevant and unhelpful to PGE). PGE offers nothing new in its response brief worthy of further discussion of these forms.

In sum, the regulatory context for the NewSun PPAs is the Commission's policy to provide QFs with fifteen years of fixed pricing after the start of operations of the facility. Under Oregon law, the NewSun PPAs must be interpreted consistent with that policy.

B. The Common Industry Understanding of the Words Used in PGE's Schedule 201 Further Supports the Conclusion that the Fifteen-Year Fixed-Price Term of the Power *Purchase* Agreement Begins When *Purchases* Begin

Industry context and understanding is material to the Commission's resolution of the summary judgment motions. PGE has made this evidence relevant by relying on out-of-context snippets of undefined words in Schedule 201, which necessarily requires consideration of context and industry usage to understand the objectively reasonable meaning of the words.

Schedule 201 is intended to contain only "*general information* about pricing options" and in fact uses the same generalized language with respect to the fixed-price term as that used in Order No. 05-584 itself. *Re Investigation Related to Electric Utility Purchases from Qualifying Facilities*, Order No. 05-584 at 59 (emphasis added). That order stated it was "[e]stablishing a *maximum standard contract term* of twenty years[,]" and it was "[a]llowing a QF to select fixed pricing for the *first fifteen years* of the standard contract[.]" *Id.* at 1-2 (emphasis added). Similar to the language in PGE's Schedule 201, the Commission also explained, "in the event a QF opts for a standard contract with a 20-year term, the QF must take one of the market pricing options that we address later in this order for the *final five years* of the contract." *Id.* at 20 (emphasis added). Given that the Commission has itself recently confirmed in UM 1805 that these words should be understood to describe periods after operation of the facility, expert testimony in the record merely provides additional evidence in support of the conclusion the Commission already reached regarding the objectively reasonable interpretation of the words in PGE's Schedule 201.

Nevertheless, the NewSun Parties and Intervenors submitted extensive testimony from industry experts on the use of generalized phrases regarding the term of a power purchase agreement and, more generally, the industry context of the transaction itself. The expert

testimony established that a normal industry participant would be "very surprise[ed]" by PGE's position that the fifteen-year fixed-price term and the twenty-year term are both measured from the date of execution of the PPA. NewSun Parties/200, Harnsberger/2. PGE presented no competing industry usage testimony supporting its interpretation. Instead, PGE spends much of its Response attempting to discredit and mischaracterize the testimony of these experts. But PGE's arguments fail.

PGE first misstates the testimony of the experts. *PGE's SJ Response* at 10 & n. 48, 14, 17. The Commission should read the testimony, which is summarized herein in response to the misstatements in PGE's brief.

Each of the three experts testified to the common industry understanding of the following phrases in Schedule 201 that PGE relies on in this case with respect to the fifteen-year period:

> This option is available for a *maximum term of 15 years*. Prices will be as established at the time the Standard PPA is executed and will be equal to the Renewable Avoided Costs in Tables 4a and 4b, 5a and 5b, or 6a and 6b, depending on the type of QF, effective at execution.
>
> * * * *
>
> Sellers with *PPAs exceeding 15 years* will receive pricing equal to the Mid-C Index Price and will retain all Environmental Attributes generated by the facility for *all years up to five in excess of the initial 15*.

CREA-NIPPC-REC/100, Lowe/5 (quoting Schedule 201 at 12); *see also* NewSun Parties/100, Stephens/15 (same); NewSun Parties/200, Harnsberger/4 (same). That is the language PGE points to in support of its argument that fixed prices cease fifteen years immediately after execution, which as noted above is essentially the same language the Commission itself used in Order No. 05-584.

Each expert explained that in the independent power industry, it is common to use "term", "contract length" and similar phrases to describe the period during which the facility is operating and expected to be delivering and *selling* power under the PPA even though the PPA itself would be effective before operation of the facility. *See* NewSun Parties/200, Harnsberger/4 (so stating); CREA-NIPPC-REC/100, Lowe/3, 6-7 (same); NewSun Parties/100, Stephens/8-12, 34-38 (same). Therefore, each expert explained, the above-quoted references to the fifteen-year period of years in Schedule 201 consist of typical language used in the industry to describe the period during which the facility is operating and expected to be delivering and selling power to the purchasing utility. NewSun Parties/200, Harnsberger/5; CREA-NIPPC-REC/100, Lowe/5-8; NewSun Parties/100, Stephens/8-12.

In particular, John Lowe commented specifically on the use of this type of language in other Oregon utilities' tariffs under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Mr. Lowe has decades of experience administering PURPA contracts for PacifiCorp. CREA-NIPPC-REC/100, Lowe/1. He demonstrated that the Idaho Power Company and PacifiCorp PURPA tariffs approved by the Commission subsequent to Order No. 05-584 through the present time have consistently used "term" and "contract length" or "years" in describing the fifteen-year fixed-price period and the twenty-year power purchase period, *not* the overall period from the execution of the contract to the termination date. *Id.* at 8-13. There could be no more directly relevant evidence of industry usage of these words, aside from the Commission's own recently reconfirmed intent of its own use of the same words in Order No. 05-584. It is meritless for PGE to suggest that Mr. Lowe's testimony has no relevance to the Oregon locality.

Further to this point, the summary judgment evidence also contains PacifiCorp's Oregon PURPA tariff that uses the same words "term" and "first 15 years" consistent with the NewSun Parties' understanding of these words. Specifically, PacifiCorp's PURPA tariff offered during Phase II of Docket No. UM 1610 provided as follows:

> Renewable Fixed Avoided Cost Prices are available for *a contract term of up to 15 years* and prices under *a longer term contract (up to 20 years)* will thereafter be under the Firm Market Indexed Avoided Cost Price…. A Renewable Qualifying Facility choosing the Renewable Fixed Avoided Cost pricing option must cede all Green Tags generated by the facility, as defined in the standard contract, to the Company during the Renewable Resource Deficiency Period identified on page 6, except that a *Renewable Qualifying Facility retains ownership of all Environmental Attributes* generated by the facility, as defined in the standard contract, during the Renewable Resource Sufficiency Period identified on page 6 and *during any period after the first 15 years of a longer term contract (up to 20 years).*

Adams Declaration, Ex. E, at 19. This is, in effect, the same terminology as PGE's Schedule 201.

PacifiCorp's contract also states that the contract is "effective after execution" in Section 2 of the contract, which is titled "TERM; COMMERCIAL OPERATION DATE." *Id.*, Ex. E at 39 (bold and underline removed). Thus, the "TERM" of PacifiCorp's contract technically begins upon execution but PacifiCorp still refers to the "term" and the "first 15 years" in its PURPA tariff as the time after expected operations, in the case of PacifiCorp's contract upon the "Scheduled Initial Delivery Date." *Id.*, Ex. E at 13 (Sections 2.4 and 5.3). This is consistent with industry practice of ensuring the PPA is legally effective when signed, which allows the parties to rely on a binding arrangement for planning and financing purposes. *See* NewSun Parties/200, Harnsberger/6 (so explaining). PacifiCorp's contract and tariff further confirm that there is nothing contradictory about a fifteen-year "term" of power sales described in a tariff and a "TERM" of effectiveness of the PPA that exceeds that period to allow for financing and

development. As Thomas Harnsberger explained, that is why an industry participant would not understand the definition of the "Term," in Section 1.38 of the NewSun PPAs, to establish that Schedule 201's "maximum term of 15 years" of fixed prices must end fifteen years after execution. *See id*. at 3-6 (explaining this point).

PacifiCorp's standard contract also used strikingly similar language to PGE's 2015 Standard Renewable Contract Form in describing the transition time to market-based prices and the QF's ownership of Environmental Attributes. It states, "PacifiCorp waives any claim to Seller's ownership of Environmental Attributes 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 Scheduled Initial Delivery Date." *Id.*, Ex. E at 45 (Section 5.5.2) (emphasis added). All of this is very compelling evidence that the normal use of the same words in PGE's Schedule 201 are objectively understood to mean that the fixed-price period does not end fifteen years immediately after execution.

Indeed, Mr. Lowe's position is further bolstered by the fact that PGE's Schedule 201 continues to state the fixed-price option "is available for a maximum *term* of 15 years" even after UM 1805. *See* PGE/108, Macfarlane/60 (containing PGE's UM 1805 compliance filing). In other words, the summary judgment record demonstrates that *all three* Oregon utilities, *including PGE*, use the language at issue in a manner consistent with the NewSun Parties' interpretation. PGE completely fails to rebut these points.

PGE misstates the law to suggest that industry usage only applies where the parties specifically agree to use words in the sense they are used in the industry and where such use is universal. *PGE's SJ Response* at 16-19. That may be the case where the parties are not industry participants or the words do not have a normal and expected use in the industry. But under

Oregon's objective theory of contracts, the Commission must determine "'the meaning that would be attached to the integration by *a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances* prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean.'" *Harty v. Bye*, 258 Or 398, 404, 483 P2d 458 (1971) (quoting *Restatement of Contracts*, § 230) (emphasis added). In Oregon, "[c]ourts infer that members of a vocation employ its trade terms in their technical sense whenever they use them." *Dorsey v. Oregon Motor Stages*, 183 Or 494, 513, 194 P2d 967 (1948); *accord Restatement (Second) of Contracts* § 202(3)(b) (similarly stating, "technical terms and words of art are given their technical meaning when used in a transaction within their technical field").

Even the authorities on which PGE relies do not stand for the proposition for which they are cited. For example, PGE cites *George v. School Dist. No. 8R of Umatilla County*, 7 Or App 183, 490 P2d 1009 (1971) (*see PGE's SJ Response* at 16 & n. 83), but in that decision the Court of Appeals explained that "parties are bound by custom and usage when they knew of it at the time of contracting *or had reason to know of its existence and nature.*" 7 Or App at 190 (emphasis added). "Custom and usage" need not be "universal." It only needs to be known of by the parties. PGE's attempt to rely on *Peace River Seed Co-Operative, Ltd. v. Proseeds Mktg., Inc.*, 355 Or 44, 322 P2d 531 (2014), is similarly unavailing. *See PGE's SJ Response* at 16 & n. 84 (citing that case). In *Peace River*, the plaintiff failed to present evidence of "custom and usage." 355 Or at 68-69. Here, there are three different experts who have provided such testimony. Similarly, in *Guinasso v. Pac. First Fed. Sav & Loan Ass'n*, 89 Or App 270, 277-278, 749 P2d 577 (1988) (citied by *PGE's SJ Response* at 16, n. 85), the Court of Appeals found that the defendant had failed to establish "custom and usage" because it could not show that the

parties were aware of such custom and usage. PGE makes no such similar argument here.

Industry usage is relevant at step one of *Yogman*, and PGE is incorrect to rely on its own alleged intent to use words in Schedule 201 in a drastically different manner than the Commission, its Staff, other Oregon utilities and QFs would understand those words. *PGE's SJ Response* at 20 & n. 107. Because all members of the transaction here are members of the same industry and unrebutted evidence establishes the normal use of the words in this context, the courts presume that meaning unless it is carefully negated. *Dorsey*, 183 Or at 512-13.[3]

Finally, PGE seeks to misapply *Hellbusch v. Reinholdt*, 275 Or 307, 550 P2d 1199 (1976), for the proposition that "the question of whether a trade usage exists is a question of fact." *PGE's SJ Response* at 20 & n. 107. It is a material *dispute* of fact, not the mere existence of a fact issue, that precludes summary judgment. No question of disputed fact arises on summary judgment when one party submits evidence and the opposing party presents no opposing evidence. *See* ORCP 47 D ("the adverse party's response, by affidavits, declarations, or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial"). Courts can and do rely on uncontradicted evidence of the existence of an industry usage at summary judgment. *See Lone Rock Timberland Co v. Nicholls*, No. 6:11-cv-6274-TC, 2012 WL 2836880, at *7 (D Or July 10, 2012) (relying at summary judgment on evidence of the meaning of the "phrases 'transporting logs' or 'transporting timber/forest products'" as used "within the context of the timber industry").

[3]PGE asserts this rule only applies in contracts subject to the Uniform Commercial Code, but *Dorsey* was not a decision arising from a transaction subject to the Uniform Commercial Code. *See id.*

Here, PGE has not presented any expert testimony to rebut the NewSun Parties' extensive evidence of "custom and usage." There is no competing evidence of anyone in the industry who would naturally understand the phrase "maximum term of 15 years" to mean the period after execution instead of the period after operation of the facility.

In sum, there is no dispute of fact in the record—"a reasonably intelligent person *acquainted with all operative usages and knowing all the circumstances* prior to and contemporaneous with the making of the integration[]" would understand PGE's Schedule 201 to describe a fifteen-year period of fixed-price payments *after* operation of the facility. *Harty*, 258 Or at 404 (internal quotation omitted). That is an undisputed and dispositive fact without even considering the language in Section 4.5 of the NewSun PPAs that unequivocally confirms that conclusion.

C. Construing the NewSun PPAs as a Whole and Within the Regulatory and Industry Context from Which They Arose, the NewSun PPAs Unambiguously Require PGE to Pay Fixed Prices for Fifteen Years After the Commercial Operation Date

The context and words of the NewSun PPAs allow for only one reasonable interpretation, which is that PGE must pay the fixed prices for fifteen years after the Commercial Operation Date. *See NewSun Parties' Motion* at 38-40 (so arguing at length). Nothing in the NewSun PPAs supports the result PGE urges.

PGE's main contractual argument continues to rely on an *incomplete* quotation of the sentence in Schedule 201 that establishes that at the end of the fifteen-year period, PGE will pay Mid-C Index Prices and the QF will own all Environmental Attributes. PGE's Response incompletely quotes this language five different times as follows: "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." *PGE's SJ Response* at 1, 6, 8-9, 10, 42 (quoting Schedule 201 at 12). As previously explained, PGE omits words linking the ownership of Environmental Attributes to the change in pricing from this sentence to make an argument that Section 4.5's express statement regarding the timing of the fifteen-year period has no relevance to the price paid. *NewSun Parties' SJ Response* at 17.

PGE also continues to infer definitions and meaning that does not exist in Schedule 201. PGE again argues that the "Standard Power Purchase Agreement" has a commencement date when executed and thus, according to PGE, the period of fifteen years of fixed prices discussed later in the Schedule in the above-referenced incomplete quotation must end fifteen years after the date of execution of the "PPA." *PGE's SJ Response* at 8-9. As explained in the NewSun Parties' response brief, there is no definition in Schedule 201 supporting PGE's position. *See NewSun Parties' SJ Response* at 17. Nothing in Schedule 201 limits the maximum term of fixed prices to the fifteen years immediately after execution.

PGE also again incorrectly argues that PGE will pay the NewSun Parties before any power is delivered, and it again relies on misplaced arguments with respect to test energy payments and calculation of Start-Up Lost Energy damages. *PGE's SJ Response* at 11-12. These arguments were already fully rebutted by the NewSun Parties. *See NewSun Parties' SJ Response* at 9-12, 16. These misplaced arguments do not warrant further discussion.

Finally, in the background section of PGE's Response, PGE attempts to rely on a statement in Schedule 201 that merely establishes the fixed prices will not change after execution. *See PGE's SJ Response* at 6 & n. 23 (citing Schedule 201 at 12). This sentence does not, as PGE asserts, "explicitly beg[i]n the fixed-price period at 'execution.'" *Id.* Instead, the applicable sentence states: "Prices will be as established at the time the Standard PPA is

executed and will be equal to the Renewable Avoided Costs in Tables 4a and 4b, 5a and 5b, or 6a and 6b, depending on the type of QF, effective at execution." NewSun PPAs, Schedule 201 at 12. That merely confirms the rates will not change after the contract is executed. As federal and state law require, the QF has the right "to commit to sell power in the future at prices which are determined at the time the qualifying facility makes its decision to provide power." *Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 600, 734 P2d 1366 (1987).[4]

D. PGE's Contention that the Fixed-Price Period in the NewSun PPAs Begins on the Execution Date Would Create an Irreconcilable Conflict with Section 4.5 of the PPAs

As demonstrated in NewSun Parties' Motion, the central bargain of the Commission-approved renewable-pricing PPAs offered by both PacifiCorp and PGE during Phase II of Docket No. UM 1610 was that the price paid to the QF was tied to whether the QF was selling brown power without RPS Attributes[5] or was selling green power with RPS Attributes to the utility. *NewSun Parties' Motion* at 29-31. The NewSun PPAs include this arrangement, and PGE's interpretation would require a reformation of Section 4.5's express statement that the QF owns all Environmental Attributes "after completion of the first fifteen (15) years after the Commercial Operation Date." *See id.* at 38-44 (quoting NewSun PPAs at § 4.5).

However, PGE tries to create confusion by citing a Commission order that changed the policy for contracts executed *after* the NewSun PPAs. *PGE's SJ Response* at 23-24. PGE argues "in Order No. 16-174, the Commission 'ties REC ownership to utilities sufficiency or deficiency position,' not the prices paid to the QF[,]" and therefore "the QF does not necessarily

[4]All three expert witnesses quoted this sentence in their testimony and expressed a contrary understanding to PGE's unique argument regarding this sentence. NewSun Parties/100, Stephens/19-20, NewSun Parties/200, Harnsberger/4-6; CREA-NIPPC-REC/100, Lowe/5-8.

[5]Also referred to by the parties as renewable energy certificates or "RECs."

retain the Environmental Attributes even when 'market prices replace avoided cost prices during the last five years of a 20-year standard contract.'" *PGE's SJ Response* at 23 (quoting Order No. 16-174). In Order No. 16-174, the Commission determined that the utilities would own the RECs during the last five years of the renewable standard contract where the QF was paid the market-based prices. *Re Investigation into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 16-174, at 4-5 (May 13, 2016).

But PGE's argument based on Order No. 16-174—where PGE apparently now suggests that the QF does not own the RPS Attributes during the portion of the NewSun PPA where PGE pays the Mid-C Index Price—is inconsistent with PGE's own proffered interpretation of the NewSun PPAs. PGE already argued in this case that, under the 2015 Standard Renewable Contract Form, the date on which PGE begins paying the Mid-C Index Price is the same date that the ownership of RPS Attributes will shift from PGE to the QF. *PGE's Motion* at 24. The only point of contention between the parties is whether that time begins fifteen years after execution or fifteen years after the Commercial Operation Date. PGE's attempt to rely on Order No. 16-174 therefore fails because it contradicts PGE's own interpretation of the contracts. In any event, Order No. 16-174 is totally irrelevant to the NewSun PPAs, which contain express language that contradicts the holding of that order and contracts executed in compliance with that order. *See NewSun Parties Motion* at 31-32 (explaining this point).

Next, PGE tries to confuse the issues by arguing that "defendants' reading of Section 4.5 would mean that the QF would not even retain the Environmental Attributes during the sufficiency period." *PGE's SJ Response* at 27-28. This argument mischaracterizes the NewSun Parties' argument—which is that under the plain terms of the NewSun PPAs, the QF owns the Environmental Attributes during the Renewable Resource Sufficiency Period, through 2019, and

then begins owning the Environmental Attributes again after completion of the first fifteen years after the Commercial Operation Date. *NewSun Parties' Motion* at 14-16, 38-44. The NewSun Parties' Motion even included a chart that visually demonstrated this reasonable interpretation of the PPAs. *Id.* at 40. PGE's attempt to create confusion is unavailing.

PGE also tries to override the plain meaning of Section 4.5 by relying on extrinsic evidence related to the development of the contract form in stakeholder processes. *PGE's SJ Response* at 25. According to PGE, this extrinsic evidence establishes that Section 4.5 cannot inform the transition date where PGE begins paying the Mid-C Index Price and the QF begins to again own all Environmental Attributes. *Id.* The extrinsic evidence is actually adverse to PGE's position, which is discussed further below. But there is no need to even consider the extrinsic evidence because the NewSun PPAs are unambiguous on this point—Section 4.5 confirms that the transition date occurs after completion of the first fifteen years after the Commercial Operation Date.

PGE also again argues that the standard contract form offered to non-renewable QFs from December 2014 to July 2016 did not contain the language establishing that the change to the Mid-C Index Price occurs at the same time as the change in ownership of Environmental Attributes. *PGE's SJ Response* at 28. As explained previously, however, the NewSun Parties are not bound by contract forms they did not sign. *NewSun Parties SJ Response* at 25-26. Moreover, based on a review of Docket No. RE 143, *no QF ever signed* these non-renewable contract forms offered during that timeframe. PGE seeks to bind the NewSun Parties to the terms of a contract form nobody ever signed.

Finally, PGE wrongly rejects as irrelevant the Commission Staff's conclusion, in its brief on reconsideration in Docket No. UM 1725, that Section 4.5 of the 2015 Standard Renewable Contract Form contradicts PGE's position. *PGE's SJ Response* at 28-29. Again, the Commission must ascertain "the meaning that would be attached to the integration by *a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances* prior to and contemporaneous with the making of the integration[.]" *Harty*, 258 Or at 404 (internal quotation omitted). Staff's PURPA counsel, who filed the brief, is precisely the type of intelligent person acquainted with all operative usages and whose views therefore inform the objective meaning of the contracts. Staff's brief supports the NewSun Parties' interpretation under Oregon law.

PGE further incorrectly asserts that the Commission rejected Staff's argument and "stated that PGE's PPAs did not start the fixed price period at commercial operations." *PGE's SJ Response* at 30. In fact, the Commission declined PGE's invitation to clarify that "the 15-year period is measured from the date the contract is executed[.]" *Re Idaho Power Company*, Docket No. UM 1725, Order No. 16-175, at 2-3 (May 16, 2016). The Commission never stated PGE's contract was consistent with Commission policy, and it did not reject Staff's objectively reasonable conclusion that Section 4.5 contradicts PGE's interpretation of the contracts at issue in this case.

E. PGE's Contention that Its Interpretation of the NewSun PPAs Is Supported by the Definition of "Term" Is Contrived and Unpersuasive

PGE's continued reliance on the definition of "Term" in Section 1.38 of the NewSun PPAs to resolve the meaning of the "maximum term of 15 years" in Schedule 201 is unconvincing. *PGE's SJ Response* at 13-22. That is the only phrase in Schedule 201 that uses

the word "term" to discuss the fifteen-year period. PGE's argument suffers from many flaws that PGE's briefs fail to overcome.

First of all, PGE *still uses* the same phrase stating that the fixed-price option is "available for a maximum term of 15 years" in its post-UM 1805 Schedule 201. PGE/108, Macfarlane/60. PGE argues that the NewSun Parties' interpretation of the NewSun PPAs would require a revision of Schedule 201 such that it would state: "the fixed price 'option is available for a maximum [period during which the facility is operating] of 15 years.'" *PGE's SJ Response* at 22 (quoting Schedule 201 at 12; alteration in PGE's brief). But PGE itself made no such revision after UM 1805. That confirms that the phrase does not require the fifteen-year period to end fifteen years immediately after execution.

Additionally, Schedule 201 contained this same statement—that the fixed-price option is "available for a maximum term of 15 years"—when the OPUC Staff informed PGE in 2013 that it would be a substantive change to this phrase if it were revised to state that the fifteen-year term ends fifteen years after execution. *See* CREA-NIPPC- REC/204, Sanger/6. PGE agreed not to make such a change to the language, effectively agreeing with OPUC Staff's position that the phrase does not mean the period of years immediately following the execution.

PGE also fails to refute that "term" was not among the many words specifically defined in Schedule 201 as having the same meaning as defined in the contract form, which the NewSun Parties demonstrated at length in their motion. *NewSun Parties' Motion* at 45-47.

In sum, if PGE wished to achieve the unexpected result for which it now advocates, PGE would have had to draft the contract and Schedule 201 such that it unambiguously explained that result. Because PGE failed to do so, the maximum term of 15 years is the period after completion of the first fifteen years after the Commercial Operation Date.

II. If the Commission Finds the NewSun PPAs Ambiguous, the Summary Judgment Record Still Requires a Conclusion that the PPAs Provide Fixed Prices for Fifteen Years After the Commercial Operation Date

As previously argued, it is not necessary to proceed to steps two and three of *Yogman* because any minor ambiguity PGE can try to create simply results in the inclusion of the Commission's underlying policy in the agreements by operation of law. *E.g., NewSun Parties' Motion* at 26-29. However, summary judgment is *still* required *even if* the Commission applies steps two and three of *Yogman*.

A. Extrinsic Evidence Under Step Two of *Yogman* Confirms that the 2015 Standard Renewable Contract Form Provides Fixed Renewable Prices for Fifteen Years After Commercial Operation

The extrinsic evidence regarding development of the underlying renewable contract forms offered during Phase II of Docket No. UM 1610 conclusively undermines PGE's position. Nothing in PGE's briefs overcomes this evidence.

It is undisputed that PGE proposed language to Schedule 201 that would have stated that the fixed-price option "is available for a maximum period of fifteen years immediately following the effective date[,]" as well as similar revisions to the contract forms themselves. *Defendants and Intervenors' Joint Statement of Undisputed Additional Facts* (*hereafter "Defendants' Undisputed Facts*") at ¶¶ 55, 57, 58, 61 (Jan. 25, 2019). But PGE *withdrew* its proposed language after Commission Staff objected to this proposal as a *substantive* change. *Id.* at ¶¶ 67-68 (citing CREA -NIPPC-REC /204).

PGE asserts that Staff employee Adam Bless failed to explain why PGE's proposed changes to modify Schedule 201 were a substantive change to the tariff and therefore was incorrect that PGE's proposed change was substantive. *PGE's SJ Response* at 38. This argument makes little sense. After Mr. Bless stated Staff's position, PGE *voluntarily withdrew*

the language stating the fixed price period ends fifteen years immediately after execution. *See* CREA-NIPPC-REC/200, Sanger/9-11 (discussing evidence on this point). If PGE believed that Schedule 201 already provided that outcome, PGE should not have agreed to remove the language it proposed that would have made that result unambiguously clear.

Then, during the ensuing workshops with stakeholders, PGE agreed to revisions to the renewable contract forms that expressly tied the ownership of RPS Attributes and pricing paid after the fifteen-year period consistent with PacifiCorp's renewable contract, as set forth above. *Defendants' Undisputed Facts* at ¶¶ 72-82. This included the edits to Section 4.5 of PGE's contract that state that the end of the fifteen-year period occurs after completion of the first fifteen years after the Commercial Operation Date.

PGE asserts all of the extrinsic evidence regarding development of the renewable contract form is irrelevant because the start and end dates of the fifteen-year fixed-price term were not in issue in the orders in Docket Nos. UM 1396 and UM 1610. *PGE's SJ Response* at 37-39. But PGE is incorrect. As the testimony of Irion Sanger explains, "[t]he date of the end of the 15-year fixed-price period had to be resolved in the renewable contracts due to the need to resolve ownership of renewable energy certificates sold with energy at the renewable fixed prices." CREA-NIPPC-REC/200, Sanger/11. "Even though the precise start and finish of the 15-year fixed price period had not been addressed in the 2014 order [with which] PGE's filing was required to comply, the end of the 15-year period was at issue because of the need to address ownership of renewable energy certificates." *Id.* In other words, "it was necessary to resolve the start and end date for the 15-year period because renewable energy certificates would not be transferred to PGE after the end of the 15-year period." *Id.* Accordingly, the clarification to Section 4.5 was needed, consistent with PacifiCorp's contract, with precise language in the

contract itself stating when the fifteen-year period ended. There is no need to hold a hearing on any of this because it is irrefutably the case.

Despite all of this evidence and the plain language of the PPAs, PGE asserts that Section 4.5 of the contract form regards only Environmental Attributes and has no impact on the price. *PGE's SJ Response* at 25. According to PGE, the "margin comment from CREA suggesting 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 they retain.'" *Id.* (quoting CREA-NIPPC-REC/209, Sanger/45). In fact, the margin comment also stated that the edit was intended to make PGE's contract consistent with PacifiCorp's contract. CREA-NIPPC-REC/209, Sanger/45. In any event, it had already been agreed that "the date of change in REC ownership would be the date PGE stops paying the fixed renewable prices." CREA-NIPPC-REC/200, Sanger/13-14 (discussing PGE's acceptance of the Oregon Department of Energy's proposal on that point). The fact that a subsequent comment bubble in the margin did not recite every development along the path to the final clarifying edit to make PGE's contracts consistent with PacifiCorp's contracts does not support PGE's position or warrant the need for a hearing.

PGE also again inappropriately points to the alleged financial impact of the NewSun Parties' interpretation to suggest PGE would not have agreed to these changes "by implication." *PGE's SJ Response* at 25-26 (citing PGE/300-301). As previously explained, PGE's submission of evidence of financial impact is highly inappropriate in a dispute over the meaning of a PURPA contract. *See NewSun Parties' SJ Response* at 31-32.[6] The other problem with PGE's

[6]The NewSun Parties moved to strike PGE's evidence on this point from the record and requested that Administrative Law Judge Allan Arlow certify his denial of that motion for resolution by the Commissioners. At the time of filing this brief, that matter remains unresolved.

specious argument related to this evidence is no PGE witness testifies that PGE was concerned with financial impact in 2014 or that PGE anticipated the large amount of PURPA contracts it would eventually sign when it negotiated this form in 2014. Even if there were such a link in the record, PGE's financial impact evidence is based on conditions four years later in 2018. PGE/300, Khandoker/4. It therefore has no relevance to PGE's reasonable expectations of financial impact in 2014, when market conditions were quite different. Furthermore, PGE's financial impact analysis assumes QFs will take up to three years to achieve Commercial Operation, thus putting three years of pricing in dispute. *Id.* at 2-3. But PGE did not agree to allow QFs to have a three-year period between execution and the scheduled Commercial Operation Date until Order No. 15-130, which was *after* development of Section 4.5 and page 12 of Schedule 201 in 2014. *See NewSun Parties Motion* at 31 (discussing this point). In other words, PGE's financial-impact analysis vastly expands the impact beyond what was known in 2014.

Moreover, nothing was changed in PGE's contract forms by implication in 2014. The parties to the workshop agreed to link the ownership of RPS Attributes to the price paid and agreed to specific contract language in Section 4.5 stating that the fifteen-year period would end after completion of the first fifteen years after the Commercial Operation Date.

Finally, PGE continues to argue that its statements to the NewSun Parties prior to execution of the contract forms somehow control the outcome here. These meritless arguments have been thoroughly refuted in prior briefing, and PGE's latest brief adds nothing that warrants any further discussion. *See NewSun Parties' Motion* at 58-60; *NewSun Parties' SJ Response* at 26-30. PGE cannot alter the meaning of contract forms or Commission policies through its incorrect legal conclusions made to deter QFs from entering into contracts.

B. Under Step Three of *Yogman*, Applicable Maxims of Construction Require that the NewSun PPAs Provide Fixed Prices for Fifteen Years After the Commercial Operation Date

If the case does not turn on material disputes of fact over competing extrinsic evidence that could be resolved in step two of *Yogman*, Oregon courts grant summary judgment by applying canons of construction under step three of *Yogman*. *Dial Temp. Help Serv., Inc. v. DLF Int'l Seeds, Inc*., 255 Or App 609, 612, 298 P3d 1234 (2013).[7] Here, the applicable canons support the NewSun Parties' interpretation.

1. Ambiguous Provisions Regarding the Fixed-Price Benefit Are Construed in Favor of the QFs for Whom the Fixed-Price Benefit Was Created

The NewSun Parties demonstrated that the provision of fifteen years of fixed prices was made to benefit QFs and thus under ORS 42.260 any ambiguities should be interpreted in the NewSun Parties' favor. *NewSun Parties' Motion* at 61-62.

Yet PGE argues that offering fifteen years of fixed prices is a benefit to PGE because the fixed prices do not apply for the full twenty-year term. In support of this argument, PGE asserts that "[p]rior to Order No. 05-584, the Commission's orders required that utilities offer fixed prices to the utilities [sic, QFs] for the *entirety* of the legally enforceable obligation." *PGE's SJ Response* at 43-44. However, PGE fails to mention that the status quo at the time of Order No.

[7] Despite itself moving for summary judgment, PGE incorrectly states that if the contracts are found ambiguous, the Commission must reopen discovery and then hold a hearing. *PGE's SJ Response* at 41. This argument misconceives summary judgment, which should be granted if there is no competing extrinsic evidence on material facts that require a trial. *See Dial Temp. Help Serv.*, 255 Or App at 612. The parties already engaged in months of discovery at PGE's insistence, even though this is supposed to be an expedited proceeding for the Commission to interpret the meaning of Commission-approved contract forms. PGE's argument appears to be a tactic to drag out resolution of this dispute, which has already run past the scheduled Commercial Operation Date in several of the NewSun PPAs.

05-584 was a five-year contract term. *Re Investigation Related to Electric Utility Purchases from Qualifying Facilities*, Order No. 05-584 at 10. Thus, extending the overall term to twenty years with fifteen years of fixed prices was a benefit conferred on QFs, and those periods should be interpreted to begin after operations under this canon.

2. Any Ambiguous Provisions in PGE's Standard Contract or Schedule 201 Regarding the Fixed-Price Term Must be Construed Against PGE As the Drafter of Its Unique Treatment of the Fifteen-Year Fixed-Price Term

It is a well-established maxim that ambiguous contracts are construed against their drafter. *Heinzel v. Backstrom*, 310 Or 89, 96, 794 P2d 775 (1990). Somewhat incredibly, PGE now argues that it did not draft its standard contract. *PGE's SJ Response* at 44-45. The Commission specifically directed PGE to draft a contract that was consistent with the Commission's policies. PGE then proceeded to draft a contract that it now asserts to treat the fixed-price period entirely differently from the other two utilities and how the Commission recently explained it intended the policy to work. If PGE failed to reach the result it desired with unambiguous language, construction against PGE under this maxim and consistent with the underlying policy is necessary.

3. The Other Canons PGE Cites Are Contrary to Its Interpretation

PGE incorrectly asserts two additional canons support its position: (i) that the specific controls the general, and (ii) that multiple instruments should be construed together. *PGE's SJ Response* at 42-44. Neither canon supports PGE's position.

First, as explained in the NewSun Parties' Motion, the specific language, using defined and capitalized terms, with respect to the fifteen-year period in Section 4.5 controls over the

more general language used in Schedule 201 on the same subject. *See NewSun Parties' Motion* at 43 n. 7 (citing ORS 42.240). PGE's argument to the contrary is misplaced.

Next, relying on the canon that multiple writings regarding the same transaction are construed together when concurrently signed by the same parties, PGE argues that the word "term" in Schedule 201 must be given the same meaning as the capitalized and defined word "Term" in the PPAs. *PGE's SJ Response* at 42. Yet, PGE's conclusion does not properly flow from its premise. The NewSun Parties do not dispute that Schedule 201 and the PPAs must be read together, given that PPAs incorporate Schedule 201 by reference. NewSun PPAs at § 1.33. Rather, under Oregon law, courts presume that "contracting parties intend that each word in a contract to carry independent significant meaning." *Hunters Ridge Condominium Association v. Sherwood Crossing, LLC*, 285 Or App 416, 440, 395 P3d 892 (2017). Here, PGE chose *not* to define or capitalize "term" in Schedule 201. Accordingly, giving that word the same meaning as the defined (and capitalized) "Term" in Section 1.38 of the contract form would disregard the canon of giving each word independent significant meaning. Had PGE wanted the uncapitalized "term" in Schedule 201 to mean "Term" as that word is defined (and capitalized) in the PPAs, PGE should have so indicated, either by capitalizing "term" or defining it in Schedule 201. PGE failed to do so and, for that reason among others the NewSun Parties have demonstrated, the only way to construe the two documents consistently and without contradiction is the NewSun Parties' interpretation.

CONCLUSION

For the reasons explained herein, the Commission should issue an order determining that the NewSun PPAs require PGE to pay the applicable QF the fixed-price On-Peak and Off-Peak rates in Tables 6a and 6b of Schedule 201 for fifteen years after the Commercial Operation Date.

DATED this 1st day of March 2019.

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	)	**SECOND SUPPLEMENTAL DECLARATION OF GREGORY M. ADAMS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

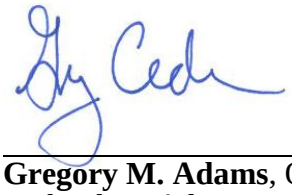
I, Gregory M. Adams, declare under the penalty of perjury as follows:

1. I am a partner at the law firm Richardson Adams, PLLC in Boise, Idaho, and am one of the attorneys of record for Defendants Alfalfa Solar I LLC ("Alfalfa"), Dayton Solar I LLC ("Dayton"), Fort Rock Solar I LLC ("Fort Rock I"), Fort Rock Solar II LLC (Fort Rock II"), Fort Rock Solar IV LLC ("Fort Rock IV"), Harney Solar I LLC ("Harney"), Riley Solar I LLC ("Riley"), Starvation Solar I LLC ("Starvation"), Tygh Valley Solar I LLC ("Tygh Valley"), and Wasco Solar I LLC ("Wasco") (collectively, the "NewSun Parties" or "Defendants") in the above-captioned proceeding before the Oregon Public Utility Commission ("OPUC" or "Commission"). This declaration is based on my personal knowledge and, if called to testify to the following facts, I could and would competently do so. I submit this declaration in support of Defendants' Motion for Summary Judgment.

2. Attached hereto as **Exhibit N**[1] is a true and correct copy of the Respondent's Answering Brief filed by Oregon Department of Justice on behalf of the Public Utility Commission of Oregon in *Northwest and Intermountain Power Producers Coalition et al. v. Portland General Elec. Co*, CA A167707, on February 14, 2019.

I hereby declare that the above statements are true to the best of my knowledge and belief, and that I understand they are made for use as evidence in the Oregon Public Utility Commission and are subject to penalty of perjury.

DATED this 1st day of March 2019.



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[1] The lettering sequence of exhibits in this Second Supplemental Declaration continues from the last-referenced exhibit, Exhibit M, to the Supplemental Declaration of Gregory M. Adams In Support of Summary Judgment (January 29, 2019).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

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

RESPONDENT'S ANSWERING BRIEF

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

Continued…

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

Other Authorities

RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE CASE

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

Summary of Argument

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

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

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

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

ANSWER TO ASSIGNMENT OF ERROR

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

A. Preservation of Error

PGE preserved its claim of error.

B. Standard of Review

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

2. Complainants challenged PGE's standard contract.

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

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

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

[5] ORS 756.500(1) provides:

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

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

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

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

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

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

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

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

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

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[6] ORS 756.568 provides, in pertinent part:

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

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

Footnote continued…

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

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

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

B. This judicial review proceeding is moot.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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