BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

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

Gregory M. Adams, OSB No. 101779
Richardson Adams, PLLC
515 North 27th Street
Boise, ID 83702
Telephone: (208) 938-2236
Facsimile: (208) 939-7904
Email: greg@richardsonadams.com

-and-

Robert A. Shlachter, OSB No. 911718
Keil M. Mueller, OSB No. 085535
Steven C. Berman, OSB No. 951769
Stoll Stoll Berne Lokting & Shlachter P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: rshlachter@stollberne.com
kmueller@stollberne.com
sberman@stollberne.com

Attorneys for Defendants

TABLE OF CONTENTS

APPLICATION FOR RECONSIDERATION 1

INTRODUCTION 2

ARGUMENT 4

I. The Order Erroneously Assumes that Section 2.3 of the Standard Contract Templates on Which the PPAs Are Based Limits the Contractual Term to 20 Years From Execution 4

II. The Order Erroneously Concludes that the Definition of the Word "Term" in the PPAs Applies to the Period of Fixed Pricing Described in Schedule 201 8

III. The Order Erroneously Fails to Read Schedule 201 in Light of Established Industry Trade Usage 12

IV. The Order Erroneously Interprets the Period of Fixed Pricing Provided for in the PPAs in a Manner that Creates an Unnecessary and Avoidable Inconsistency between Schedule 201 and Section 4.5 16

V. The Commission's Recitation of the Regulatory History Ignores Crucial Aspects of Its Own Prior Orders in UM 1805 20

VI. If Necessary to Reach the Issue, the NewSun Parties Are Entitled to Summary Judgment Under Steps Two and Three of the *Yogman* Test 22

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Dorsey v. Oregon Motor Stages,
183 Or 494, 194 P2d 967 (1948) 13

Hoffman Constr. Co. v. Fred S. James & Co.,
313 Or 464, 836 P2d 703 (1992) 17

New Zealand Ins. Co. v. Griffith Rubber Mills,
270 Or 71, 526 P2d 567 (1974) 17

Ocean Accident & Guarantee Corp. v. Albina Marine Iron Works,
122 Or 615, 260 P 229 (1927) 21

Peace River Seed Coop. Ltd. v. Proseeds Mktg.,
355 Or 44, 322 P3d 531 (2014) 13

Savage v. Grange Mut. Ins. Co.,
158 Or App 86, 970 P2d 695 (1999) 22

Yogman v. Parrot,
325 Or 358, 937 P2d 1019 (1997) 2, 4, 13, 17, 20, 22, 23

Statutes

ORS 756.561 1

Regulations

OAR 860-001-0720 1

Other Authorities

11 *Williston on Contracts* § 30:19 (4th ed 2018) 21

Wigmore on Evidence § 2464 (2d ed) 13

Administrative Orders

Northwest and Intermountain Power Producers Coalition v. Portland General Electric Co.,
OPUC Docket No. UM 1805, Order No. 17-256 (July 13, 2017) 4, 20, 21

Northwest and Intermountain Power Producers Coalition v. Portland General Electric Co.,
OPUC Docket No. UM 1805, Order No. 18-079 (Mar 5, 2018). 4, 21, 22

Re Investigation Related to Electric Utility Purchases from Qualifying Facilities,
OPUC Docket No UM 1129, Order No. 05-584 (May 13, 2005).................................... 6, 20, 21

APPLICATION FOR RECONSIDERATION

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 apply to the Public Utility Commission of Oregon ("OPUC" or "Commission") for reconsideration of Commission Order No. 19-255, entered August 2, 2019 (the "Order").

Pursuant to ORS 756.561 and OAR 860-001-0720, Defendants request reconsideration on the grounds that the Order contains errors of law and fact that are essential to the Commission's decision as set forth below. The portions of the Order subject to this application are the sections titled "III. Resolution" and "IV. Order" on pages 13-18, as more specifically quoted and identified in this application.

Defendants request the Commission revise the Order to grant Defendants' motion for summary judgment and to deny PGE's motion for summary judgment.

Defendants' requested changes will alter the outcome by reversing the Commission's decision to grant PGE's motion for summary judgment and to deny Defendants' motion for summary judgment.

In support of this request, Defendants rely on the points and authorities set forth in the following sections of this application for reconsideration. In so moving for reconsideration, Defendants expressly reserve the right to raise any additional issues should reconsideration be denied and judicial review become necessary and do not waive any arguments by not raising them as a basis for reconsideration.

INTRODUCTION

As the Order correctly holds, the power purchase agreements between PGE and the NewSun Parties (the "PPAs") must be interpreted according to the three-step analysis set out by the Oregon Supreme Court in *Yogman v. Parrot*, 325 Or 358, 937 P2d 1019 (1997). *Yogman* requires, at the first step, an "examin[ation] [of] the text of the disputed provision, in the context of the document as a whole." *Id.* at 361.

Applying step one of the *Yogman* analysis, the Order adopts PGE's proffered interpretation of the PPAs, concluding that the PPAs unambiguously provide that the period of fixed prices ends fifteen years immediately following execution of the PPAs. This conclusion, however, rests on a number of errors of law and fact.

First, the Order includes an error of fact in that it concludes that the standard contract template's Section 2.3 necessarily limits the overall term of effectiveness of the PPA to twenty years immediately following the effective date. This error is apparently based on an assumption that the typed-in specification of after "the sixteenth (16th) Contract Year" in the blank space for the termination date in Section 2.3 of the NewSun PPAs is language that appears in the blank template form, and can therefore inform the meaning of the critical phrases of Schedule 201 discussing the fifteen-year fixed-price period. However, that conclusion is incorrect. Instead, the standard contract templates at issue contain no language limiting the twenty-year term of power sales under the agreement to the twenty-year period immediately following the effective date, and thus this aspect of the Order provides no support for the conclusion that the fixed-price period ends fifteen years immediately following the effective date.

Second, the Order contains an error of law in that it concludes the use of the uncapitalized word "term" in Schedule 201 possesses the same meaning as the defined and capitalized word

"Term" in Section 1.38 of the PPA. The definition of the "Term" in Section 1.38 does not work in the critical location of Schedule 201, Sheet No. 201-12, that explains that the Renewable Fixed Price Option "is available for a maximum *term* of 15 years" because the overall "Term" of effectiveness of the PPA will be more than 15 years. Thus, the Order's atypical use of the concept of a PPA's term of power sales that begins upon operation of the facility is contrary to the words and definitions that the Order itself relies upon.

Third, the Order contains an error of law in that it concludes that undisputed evidence of prevailing industry usage of the words and phrases in dispute – i.e., a "maximum term of 15 years" of fixed prices available for an "initial 15" years of a PPA – can be completely ignored when interpreting the reasonably understood meaning of those words and phrases in the PPAs at issue. The undisputed evidence of industry usage supports the NewSun Parties' interpretation that the only reasonable understanding of the use of those words and phrases within the context of the agreements at issue is that they provide for fifteen years of fixed prices after the Commercial Operation Date.

Fourth, the Order contains an error of law in that it casually ignores the irreconcilable inconsistency regarding ownership of RPS Attributes created by the interpretation of the PPAs adopted by the Order. Oregon law does not allow for adoption of an interpretation of a contract that results in such an inconsistency if avoiding the inconsistency is at all possible, as it clearly is in this case by adopting the NewSun Parties' interpretation.

Fifth, the Order contains an error of law in that it adopts an interpretation of the NewSun PPAs that is directly contrary to the underlying regulatory policy giving rise to the contracts. The Order is only able to do so by failing to even acknowledge the Commission's conclusion in Order No. 17-256 that a term of fixed prices must begin on the Commercial Operation Date

because "prices paid to a QF *are only meaningful when a QF is operational and delivering power to the utility*." *Northwest and Intermountain Power Producers Coalition v. Portland General Electric Co.* (*hereafter* "*NIPPC I*"), Docket No. UM 1805, Order No. 17-256, at 4 (July 13, 2017) (emphasis added). The Order also ignores the Commission's conclusion in Order No. 18-079 that the decision in UM 1805 did not "constitute[] the adoption of a 'new policy.' Rather, … [the] decision was simply to affirm the policy with respect to the commencement date for the 15-year period of fixed prices." *Northwest and Intermountain Power Producers Coalition v. Portland General Electric Co.* (*hereafter* "*NIPPC III*"), Docket No. UM 1805, Order No. 18-079, at 3 (Mar 5, 2018). Because that recently "affirm[ed]" policy existed at the time of the NewSun PPAs and indeed gave rise to the very language being interpreted by the Order, the Order errs as a matter of law to construe the PPAs in a manner inconsistent with that policy.

These errors individually and collectively lead to the incorrect conclusion that PGE's proffered interpretation of the NewSun PPAs is unambiguously correct. But for these errors, the Order should conclude that the NewSun Parties' interpretation of the NewSun PPAs is the only reasonable interpretation under step one of *Yogman*. Therefore, as explained in further detail below, the Commission should grant reconsideration of the Order, and enter a new Order granting the NewSun Parties' motion for summary judgment and denying PGE's motion for summary judgment.

ARGUMENT

I. The Order Erroneously Assumes that Section 2.3 of the Standard Contract Templates on Which the PPAs Are Based Limits the Contractual Term to 20 Years From Execution

The first basis on which the Commission should grant reconsideration of the Order is to correct the false assumption that certain language contained in Section 2.3 of the PPAs comes from the Commission-approved standard contract templates on which the contracts are based,

when in fact that language was added by the NewSun Parties. This error of fact is essential to the decision in that, based on this false assumption, the Order concludes that Section 2.3 (along with Sections 1.38 and 2.1) "provides the source for understanding the 15-year term defined in Schedule 201." Order No. 19-255 at 14.

The Order recites the language of Section 2.3 as follows:

> 2.3. This Agreement shall terminate on the completion of the last day of the sixteenth (16th) Contract Year, or the date the Agreement is terminated in accordance with Section 8 or 11, whichever is earlier ("Termination Date").

Order No. 19-255 at 10.

While this is a correct recitation of the language of Section 2.3 as completed by the NewSun Parties, the specific termination date (*i.e.*, "the completion of the last day of the sixteenth (16th) Contract Year") was supplied by the NewSun Parties, not by the Commission-approved standard contract templates on which the PPAs are based. *See Defendants and Intervenors' Joint Statement of Undisputed Additional Facts* (*hereafter* "*Defendants' Undisputed Facts*") at ¶¶ 27-31 (Jan. 25, 2019). This is because PGE's standard contract templates allowed the seller to specify the termination date, stating as follows:

> 2.3. This Agreement shall terminate on ____ , __ [*date to be chosen by Seller*], or the date the Agreement is terminated in accordance with Section 8 or 11, whichever is earlier ("Termination Date").

PGE/107, Macfarlane/34.

The Commission may have mistaken the language specifying the sixteenth contract year as the termination date as being part of the template itself because the underlines originally appearing on the template's blank space were removed during PPA drafting of the NewSun PPA that was interpreted by the Commission. But for the typographical appearance and word

processing prior to execution of the agreements, the language of Section 2.3 should read as follows, showing the Seller-specified termination date language *underlined* as follows:

> 2.3. This Agreement shall terminate on <u>the completion of the last day of the sixteenth (16th) Contract Year</u>, or the date the Agreement is terminated in accordance with Section 8 or 11, whichever is earlier ("Termination Date").

The Order notes that, in its first compliance filing after the Commission issued Order No. 05-584, PGE included a standard contract template which provided the termination date would be the earlier of a date chosen by the seller, "the date the Agreement is terminated in accordance with Section 10 or 12.2," or "20 years from the Effective Date," where the effective date was defined as the execution date. Order No. 19-255 at 4. But this is irrelevant to the PPAs at issue that the NewSun Parties actually executed. Unlike the earlier version of PGE's standard contract template offered years ago, Section 2.3 in the relevant versions of the executed PPAs here neither limits the termination date to no more than twenty years from the effective date nor places any limitation on the date the seller may select. Further, while Section 1.38 of the standard contract templates define the "Term" as the period starting on the effective date and ending on the termination date, the templates do not state anywhere that this defined-concept "Term" cannot be more than twenty years. Indeed, the form PPA specifies that the termination date shall be "chosen by Seller," which is what occurred here.

As such, the NewSun Parties selected "the completion of the last day of the sixteenth (16th) Contract Year" as the termination date of the PPAs because – despite the fact that PGE's standard contract templates did not restrict the defined-concept Term to a maximum of twenty years – PGE refused to execute any contract with a termination date more than twenty years after

the execution date. *Defendants' Undisputed Facts* at ¶¶ 7-10, 27-31, 33-36, 42-44.[1] Defendants could have just as easily completed the template's Section 2.3 to state the PPA would terminate "15 years after the Commercial Operation Date" or some shorter period of time, such as "one year after the Commercial Operation Date," without PGE objecting. The words populated in the blank space are purely a function of how the template was completed before execution, and solely regarded the overall term of effectiveness of the agreement.

Even though the language in Section 2.3 was provided by the NewSun Parties and is not contained in the relevant standard contract templates, the Commission relied heavily on this language in concluding that "the PPA itself provides the source for understanding the 15-year term defined in Schedule 201." Order No. 19-255 at 14. While the Order states that "Section 2.3 defines the Termination Date in a manner that makes clear that the agreement may not extend more than 20 years past the Effective Date," the language on which the Order relies to conclude that the contract template does not "in normal circumstances" allow for a term of effectiveness in excess of 20 years is not part of the standard contract templates. *Id.* at 14 & n 18. Therefore, that Seller-specified language cannot be understood as limiting the potential length of a contract based on those templates, much less having any bearing on the meaning of the fixed-price period described in Schedule 201.

Under the Order's logic, the "understanding of the 15-year term defined in Schedule 201," *id.*, turns entirely on how the seller completes Section 2.3 of the standard contract template. This reasoning would allow for the meaning of the critical fifteen-year fixed-price

---

[1] Although the parties' discussion are not relevant to step one of *Yogman*, the NewSun Parties expressed their disagreement with PGE's purported interpretation of the fifteen-year fixed-price policy to PGE. *Id.* at ¶¶ 13-20, 32, 35-41. Ultimately, the NewSun Parties' position that the fifteen-year fixed-price period must commence upon operation of the facility was confirmed to be the correct interpretation of the policy by the Commission itself in UM 1805.

language in the Commission-approved Schedule 201 to change from one executed agreement to another. For example, had the NewSun Parties completed the template's Section 2.3 to state that the PPA terminates "15 years after the Commercial Operation Date," the internal logic of the Order would not apply because that overall term is not twenty years and the words used express no intent for an agreement longer than the fifteen-year period of fixed prices. Schedule 201 would have a different meaning from one executed contract template to another based solely on how Section 2.3 was completed. This result defies logic and the very premise for which the Commission asserted jurisdiction to ensure uniformity of application.

At best, Section 2.3, as completed by the NewSun Parties in the PPAs, is not inconsistent with PGE's proffered interpretation, but it certainly does not establish that PGE's interpretation is unambiguously correct. Indeed, Schedule 201 contemplates that not all sellers will select a termination date that would entitle them to a full twenty years of energy sales. Rather, it provides that the fixed price "option is available for a *maximum* term of 15 years" (Schedule 201, Sheet No. 201-12), and that sellers with longer contracts will receive market rate pricing for any years beyond the fifteen years of fixed pricing.

The Order should be reconsidered because it relies on an error of fact regarding the source of the language contained in Section 2.3 of the NewSun PPAs. When the source of that language is properly understood, it is clear that Section 2.3 does not support PGE's interpretation of the period of fixed pricing described in Schedule 201.

II. The Order Erroneously Concludes that the Definition of the Word "Term" in the PPAs Applies to the Period of Fixed Pricing Described in Schedule 201

The Commission should also grant reconsideration of the Order because the conclusion that the use of the uncapitalized word "term" in Schedule 201 possesses the same meaning as the

defined and capitalized word "Term" in the PPA, which is essential to the decision, is based on errors of law.

The Order adopts PGE's arguments with respect to the use of the word "term" in Schedule 201 and rejects the NewSun Parties' arguments that Schedule 201 uses the word "term" to refer in a general sense to a period of power sales, *not* to the overall period of effectiveness of the power purchase agreement. Its central reasoning is as follows:

> The provisions most directly related to the 15-year period of fixed prices appear in sheet 201-12 of PGE's Schedule 201. Schedule 201 defines the fixed prices "available for a maximum term of 15 years" and identifies the index by which market-based prices will be established for PPAs whose terms extend beyond 15 years.

Order No. 19-255 at 14.

While the Order acknowledges that "Schedule 201 does not explicitly define the 'term' during which fixed prices are available[,]" it relies on Section 1.38 of the PPA itself to interpret the phrase "maximum term of 15 years" – explaining that "Section 1.38 defines the 'Term' as 'the period beginning on the Effective Date and ending on the Termination Date.'" *Id.* The Order imports this definition from Section 1.38 of the PPA into Schedule 201 and applies it to the use of the uncapitalized word "term."

The Order then reads the word "term" into the sentence of Schedule 201 that uses the phrase "in excess of the initial 15" years, even though the word "term" does not appear anywhere in that sentence. *Id* (referring to the sentence at Schedule 201, Sheet No. 201-12 that states: "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."). According to the Order, that sentence "implicitly refers to the PPA *term,*" and that "implicit" understanding somehow results in an unambiguously clear interpretation that

the fifteen-year period must end fifteen years immediately after the effective date. Order No. 19-255 at 14 (emphasis added).

Finally, the Order rejects the NewSun Parties' argument, explaining: "In order to reach a different conclusion, we would need to find that the word 'term' in Schedule 201 had a different meaning than the word 'term' in the contract." *Id.* at 15.

The above-quoted sections of the Order contain errors of law that should be reconsidered to find in favor of the NewSun Parties. As the Order acknowledges, the only sentences of Schedule 201 that directly address the period of fixed prices are the statements that the Renewable Fixed Price Option "is available for a maximum *term* of 15 years" and that "[s]ellers 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." Schedule 201, Sheet No. 201-12 (emphasis added). With respect to the 15-year period, the word "term" itself only appears in the phrase "maximum *term* of 15 years." *Id.* However, the defined phrase "Term" from section 1.38 of the PPA does not fit within Schedule 201's use of the uncapitalized word "term."

Specifically, importing the definition of "Term" from Section 1.38 into the critical provision of Schedule 201 addressing the 15-year period leads to the following result:

> This option is available for a maximum [period beginning on the Effective Date *and ending on the Termination Date*] of 15 years.

Schedule 201, Sheet No. 201-12 & NewSun PPAs at § 1.38 (emphasis added). Because the period from the effective date to the termination date will be in excess of 15 years, insertion of the definition of "Term" from Section 1.38 of the PPA does not work in Schedule 201's discussion of the 15-year fixed-price term. Indeed, all parties, including the Order, agree that the overall "Term" of effectiveness of the PPAs at issue here will be up to twenty years. *See* Order

No. 19-255 at 14 & n 18. A "maximum" 20-year period "of 15 years" makes no sense, but that is the result of the Order's reasoning that the definition from Section 1.38 of the PPA should be plugged into the uncapitalized use of the word "term" in Schedule 201.

In effect, PGE has attempted to avail itself of the first half of the definition of the word "Term" in Section 1.38 of the PPA without accounting for the fact that the second half of that definition invalidates the use of that definition in Schedule 201's explanation that the fixed-price option is "available for a maximum term of 15 years." Thus, the Order must actually rely on the conclusion that the first half of the definition of the word "Term" in Section 1.38 is imported into Schedule 201's phrase "maximum term of 15 years" but the last half of the definition, *i.e.*, that the "Term" ends on the termination date, is somehow not imported into that phrase. There is no explanation or reasoning supplied by PGE or the Order to reach that implausible result. In any event, the conclusion that the definition of "Term" from Section 1.38 of the PPAs can simply be imported into the use of the uncapitalized word "term" in Schedule 201 is demonstrably wrong.

As the NewSun Parties pointed out repeatedly, PGE's arguments on the use of the word "term" in Schedule 201 are further undermined by the fact that PGE still uses this exact same phrasing to describe a 15-year period after scheduled operations. PGE's own UM 1805 compliance filing that was intended to explicitly clarify that the fifteen-year fixed-price period commences on the scheduled Commercial Operation Date also states in its Schedule 201 that the Renewable Fixed Price Option "is available for a maximum *term* of 15 years." PGE/108, Macfarlane/60 (emphasis added). The Order overlooks this fact entirely, even though it is directly relevant evidence to the common use of words like "term" in a utility's PURPA pricing tariffs.

Moreover, the Order's conclusion that the phrase "in excess of the initial 15" years "implicitly refers to the PPA term" proves nothing. Order No. 19-255 at 14. This reasoning simply assumes the conclusion. The cited language could just as easily refer to the initial fifteen years of actual energy sales, just as Oregon's other utilities use similar language to describe the fifteen-year period of power sales at fixed prices. *See Defendants' Undisputed Facts* at ¶¶ 49, 53 (citing to unrebutted evidence regarding use of this type of language in PacifiCorp and Idaho Power's PURPA tariffs). Indeed, when read holistically, this is the only reasonable meaning that can be ascribed to that language in PGE's Schedule 201 at issue.

Thus, in addition to all of the other reasons argued by the NewSun Parties in support of their interpretation, the Order should be reconsidered because it relies on a clear error of law by importing a definition into Schedule 201 when that definition does not fit within that location.

The NewSun Parties highlighted this problem with PGE's reasoning in their written oral argument presentation materials. *See NewSun Parties' Oral Argument Slide Presentation* at Slide 19 (citing PGE's Summary Judgment Reply at 30-32, which conflates the fifteen-year and twenty-year periods into the single word "term" in Schedule 201). Having now adopted the erroneous legal reasoning, the Commission should grant reconsideration and conclude that the definition of "Term" in Section 1.38 of the PPA cannot be the meaning of the word "term" as used in Schedule 201, and instead that the NewSun Parties' interpretation is correct.

III. The Order Erroneously Fails to Read Schedule 201 in Light of Established Industry Trade Usage

The Order contains a further error of law essential to the decision by failing to interpret the critical words and phrases of the standard contract template and Schedule 201 consistent with the undisputed evidence of how those words and phrases would be understood in the relevant

industry. The Order errs as a matter of law by concluding that such undisputed evidence has no relevance to the interpretation of the NewSun PPAs.

The NewSun Parties' position is not, as the Order states, that the Commission "should favor industry trade usage over a holistic reading of the entire agreement." Order No. 19-255 at 15. Rather, because an industry participant is presumed to understand the objective meaning of customary industry terms in its agreements with other industry participants, "it is appropriate to consider any applicable trade usage at the first level of analysis under *Yogman*." *Peace River Seed Coop. Ltd. v. Proseeds Mktg.*, 355 Or 44, 67, 322 P3d 531 (2014). Accordingly, the industry trade usage should inform a holistic reading of the entire agreement, which is precisely what the Oregon Supreme Court has long required. *See Dorsey v. Oregon Motor Stages*, 183 Or 494, 512-13, 194 P2d 967 (1948) ("Where all parties are members of the same trade . . . the only requirement is that the special use alleged should be in fact a usage, or settled habit of expression, and not merely the expression of a few persons or casual occasions." (quoting *Wigmore on Evidence* § 2464 (2d ed))).

The NewSun Parties do not suggest that industry trade usage overrides the contractual "Term" defined in Section 1.38. The question is whether that defined word "Term" controls the meaning of the uncapitalized word "term" as used in Schedule 201. The undisputed evidence of industry trade usage compels a conclusion that it should not. As detailed in the NewSun Parties' motion for summary judgment, the understanding in the industry is that, when – as provided for in Schedule 201 – fixed pricing is available "for a maximum term of 15 years," that fifteen-year period begins only when the power plant is constructed and begins delivering and selling energy, irrespective of the fact that the contractual "Term" may begin, and the contract may be

enforceable, upon execution. *NewSun Parties' Motion for Summary Judgment* at 33-37 (citing record evidence).

The Order ignores the undisputed evidence of industry trade usage submitted by the NewSun Parties, referring only to the Commission's approval of "other utilities' standard QF contracts with terms that begin at COD." Order No. 19-255 at 15. The record contains extensive additional undisputed evidence regarding industry usage as summarized at paragraphs 50 through 54 of *Defendants' Undisputed Facts*. Among other things, the NewSun Parties submitted testimony from an experienced industry participant that power purchase agreements typically include a pre-operation period, during which the project developer is designing the project, finalizing necessary permits, obtaining interconnection and transmission rights, and financing and constructing the facility, and an operation period when the facility is operational and selling electricity delivered to the power grid. *See* NewSun Parties/200, Harnsberger/3. The "term" of the contract is commonly understood to be a specified period of operation during which electrical production is delivered in exchange for payment. *See* NewSun Parties/200, Harnsberger/4. In other words, the "term" of a time period of payments (such as the 15-year period of fixed pricing at issue here) is commonly understood not to include the initial, per-operation period.

The NewSun Parties and Intervenors also submitted extensive evidence that Oregon's utilities have used the same type of words and phrases in PGE's Schedule 201 at issue here – including "term" and "maximum term of 15 years" and "initial 15" – to refer to a period of power sales. *See Defendants' Undisputed Facts* at ¶¶ 49, 53. Specifically, John Lowe, who has decades of experience in Oregon's PURPA market and formerly worked for PacifiCorp implementing Oregon's PURPA program, demonstrated that the language in PGE's Schedule

201 has no meaningful differences from that in the Idaho Power's Schedule 85 and PacifiCorp's Schedule 37. CREA-NIPPC-REC/200, Lowe/5-13. The record even included evidence that *PGE itself* uses the word "term" in reference to the period of power sales in its requests for proposals. *See Portland General Elec. Request for Proposals: Renewable Energy Resources*, Docket No. UM 1613, at 11, 16, 30 (Sept 10, 2012), [Adams Declaration ISO Defs' Motion Summ. Disp., Ex. G, at 18, 23, 37]; *Portland General Elec. Request for Proposals: Final - Renewable Energy Resources*, at 8, 13 (May 22, 2018), [*Id.*, Ex. H, at 8, 13]. Indeed, as noted earlier, PGE still uses the phrase "maximum term of 15 years" in a manner consistent with the NewSun Parties' position in its post-UM 1805 Schedule 201. PGE/108, Macfarlane/60. The record contains overwhelming and unrebutted evidence that the result reached by the Commission is directly opposite of what a normal industry participant would expect.

The Order's failure to consider this evidence and to read the PPAs holistically in light of established industry trade usage is an error of law. In particular, the Order errs by failing to consider that Schedule 201's reference to fixed pricing being available for a "maximum term of 15 years" would commonly be understood to mean a maximum period of years *during the operation period* of the PPAs when the facilities to be constructed are operational and the NewSun Parties are in fact selling electricity to PGE. As discussed below, applying the common industry understanding to the period of fixed pricing described in Schedule 201 aligns Schedule 201 with Section 4.5, avoiding an unnecessary internal inconsistency in the PPAs. Moreover, as discussed above PGE's relevant standard contract templates did not limit the contractual "Term" – *i.e.*, the period during which the contract is enforceable – to twenty years from the effective date, much less state PGE will only pay fixed prices for a period of fifteen years after the

effective date. Therefore, there is no basis in the text of the contract template or Schedule 201 to conclude that normal industry usage of the phrases at issue should be ignored.

The Commission should reconsider the Order and find that established industry usage supports the NewSun Parties' interpretation of the period of fixed pricing described in Schedule 201. In sum, reading the PPAs holistically in light of established industry trade usage forecloses any possibility that the fixed-price period described in Schedule 201 unambiguously must begin on the effective date.

IV. The Order Erroneously Interprets the Period of Fixed Pricing Provided for in the PPAs in a Manner that Creates an Unnecessary and Avoidable Inconsistency between Schedule 201 and Section 4.5

The Commission should grant reconsideration of the Order because it contains an error of law essential to the decision in that it adopts an interpretation of the period of fixed pricing described in Schedule 201 that creates an unnecessary and avoidable inconsistency between Schedule 201 and Section 4.5. The Order improperly discounts this inconsistency on the basis that Section 4.5 was not added to PGE's standard contract templates until 2014, and that "Section 4.5 does not speak to fixed price availability and does not indicate when fixed prices are available." Order No. 19-255 at 15. In so ruling, the Order fails to address controlling authority instructing that contractual inconsistencies must be avoided if at all possible.

While, as the Order states, "the terms governing the availability of fixed prices … were initially set in 2005," whereas the provisions regarding environmental attributes were "drafted separately" at a later date, Order No. 19-255 at 15, n19, the conclusion that "the later-added contract provisions relating to environmental attributes" do "not create ambiguity with respect to the availability of fixed prices starting at contract execution," *id.* at 15, misses the point and calls into question the nature of the inquiry in which the Commission engaged. When certain provisions of the PPAs first appeared in PGE's standard contract templates is plainly outside the

four corners of the PPAs and accordingly irrelevant under step one of *Yogman*. The Order itself states that its analysis is confined to the "four corners" of the NewSun PPAs, *id.*, and therefore its reasoning is not even internally consistent on this point.

The Order errs as a matter of law by ruling, in effect, that there is no need to reconcile inconsistent provisions in interpreting the NewSun PPAs. To the contrary, Oregon law requires that the Commission "must reconcile inconsistent provisions if it is at all possible." *New Zealand Ins. Co. v. Griffith Rubber Mills*, 270 Or 71, 75, 526 P2d 567 (1974); *see also Hoffman Constr. Co. v. Fred S. James & Co.*, 313 Or 464, 472, 836 P2d 703 (1992) (rejecting plaintiffs' interpretation of a contract where that interpretation would create a conflict between two parts of the contract). The fact that an inconsistency arises only with respect to a topic in the contract that is not directly related to the narrow topic in dispute does not obviate the need to avoid an interpretation that creates unnecessary inconsistencies elsewhere in the contract. The Order cites no authority for the illogical proposition that the creation of an inconsistency anywhere in a contract may ever be casually overlooked.

Indeed, the Oregon Supreme Court has explained that "[i]t is *a fundamental rule* in the construction of contracts that it is the duty of a court to construe a contract as a whole employing any reasonable method of interpretation *so that no part of it is ignored* and *effect can be given to every word and phrase*." *New Zealand Ins.*, 270 Or at 75 (emphasis added). By definition, this fundamental rule seeks to discourage use of an interpretation that creates an inconsistency *anywhere* in the contract and thus requires one of the inconsistent provisions to be rendered meaningless. The Order sweeps this fundamental rule under the rug.

Accordingly, the Order errs by concluding that "[t]he fact that the date of contract execution and commercial operation date may or may not align as it relates to Schedule 201 and

Section 4.5 with respect to the availability of environmental attributes does not create ambiguity with respect to the availability of fixed prices starting at contract execution." Order No. 19-255 at 15. In this sentence, the Order acknowledges that the interpretation it adopts creates an inconsistency with respect to the ownership of the RPS Attributes, but concludes it is acceptable to overlook that inconsistency on the ground that it is unrelated to the question of the fifteen-year fixed-price period. Setting aside the question of whether the topic of RPS Attribute ownership is unrelated to the prices paid for energy and RPS Attributes, the reasoning here is a plain misapplication of the law. Under Oregon law, the issue is not whether one provision "create[s] an ambiguity," *id.*, but rather whether one interpretation reconciles the various provisions of a contract, while the other creates an unnecessary and avoidable conflict.

Under PGE's interpretation, which the Order adopts, Schedule 201 would mean that the seller retains all Environmental Attributes starting fifteen years after execution. Specifically, Schedule 201 provides that "Sellers with PPAs exceeding 15 years . . . will retain all Environmental Attributes generated by the facility for all years up to five in excess of the initial 15." Schedule 201, Sheet No. 201-12. Under the interpretation adopted by the Commission, this fifteen-year period of fixed pricing would commence on the effective date. Accordingly, it would appear that the Order results in the seller owning all Environmental Attributes beginning fifteen years after the effective date. However, the Order does not even attempt to clarify this point or demonstrate how it reconciles all of the provisions of the contracts at issue.

In any event, the result adopted by the Order creates an unnecessary and avoidable conflict between Schedule 201 and Section 4.5, which expressly provides that the seller retains all Environmental Attributes starting "fifteen (15) years after the Commercial Operation Date." It would appear that the Order now results in a reformation of Section 4.5 as follows:

> [A]fter completion of the first fifteen (15) years after the ~~Commercial Operation Date~~ Effective Date, Seller shall retain all Environmental Attributes in accordance with the Schedule.

NewSun PPAs, § 4.5. That is, of course, just the type of inconsistency that Oregon law requires the Order to avoid in its interpretation of the agreements if at all possible.

On the other hand, adopting the NewSun Parties' interpretation that the term of fixed prices referred to in Schedule 201 begins when the seller begins selling power to PGE – *i.e.*, on the Commercial Operation Date – not only is consistent with industry usage, it also avoids the unnecessary inconsistency between Schedule 201 and Section 4.5. Both would mean that the seller retains all Environmental Attributes starting fifteen years after the Commercial Operation Date.

Furthermore, the Order errs as a matter of law by concluding that the topic of the prices paid for energy and RPS Attributes is wholly unrelated to the ownership of RPS Attributes. As noted above, the factual premise of the Order's reasoning is that: "Section 4.5 does not speak to fixed price availability and does not indicate when fixed prices are available." Order No. 19-255 at 15. Instead, according to the Order, "[t]he controlling fixed price terms are found in Schedule 201." *Id.* However, in so stating, the Order overlooks that the fifteen-year period of fixed pricing and the ownership of RPS Attributes are inextricably tied to each other in the sentence of Schedule 201 upon which the Order relies for its finding of unambiguity in PGE's favor, which states:

> 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.

Schedule 201, Sheet No. 201-12 (emphasis added). The subjects are inextricably linked in Schedule 201, and it is therefore an error of law to pretend as though the direct language on the

subject in Section 4.5 has no relevance. In other words, even if Oregon law allowed for the Order to overlook inconsistencies created in an unrelated and far-removed contract provision, such a rule would have no applicability here because the price paid for energy and RPS Attributes is directly related to the ownership of RPS Attributes in the very sentence the Order interprets.

The Commission should reconsider the Order and find that, because the inconsistency between Schedule 201 and Section 4.5 which PGE's interpretation creates should be avoided if at all possible, the NewSun Parties' interpretation avoids this unnecessary inconsistency and should prevail.

V. The Commission's Recitation of the Regulatory History Ignores Crucial Aspects of Its Own Prior Orders in UM 1805

Finally, the Commission should grant reconsideration to address an error of law essential to the decision with respect to the Order's recitation of relevant regulatory history. Specifically, the Order ignores crucial language from the Commission's recent orders in UM 1805 that belie the conclusion that the regulatory history supports the interpretation of the PPAs the Commission adopted based on its analysis under *Yogman*.

In analyzing the regulatory history, the Order states that Order No. 05-584 "did not address the potential start date for that 15 years of fixed price availability." Order No. 19-255 at 16. While it is true that Order No. 05-584 does not contain express language identifying precise contract language that PGE was required to adopt with respect to the trigger date of the fifteen-year period or the twenty-year period, the normal understanding of that order to industry participants is that the Commission intended to provide QFs with a fifteen-year period of power sales at fixed prices. The Commission recognized in Order No. 17-256 that it is implicit in the decision to require fifteen years of fixed pricing that the term of fixed prices must begin on the

Commercial Operation Date because "prices paid to a QF *are only meaningful when a QF is operational and delivering power to the utility*." *NIPPC I*, Order No. 17-256, at 4 (emphasis added). Indeed, the Commission subsequently confirmed that the decision in UM 1805 did not "constitute[] the adoption of a 'new policy.' Rather, … [the] decision was simply to affirm the policy with respect to the commencement date for the 15-year period of fixed prices." *NIPPC III*, Order No. 18-079, at 3.

The discussion of UM 1805 in the Order omits these key passages of Order No. 17-256 and Order No. 18-079. Instead, the Order states only that, with respect to when the fifteen years of fixed pricing begins, the Commission's "silence on th[e] issue prior to 2018 is not altered by our conclusion in docket UM 1805 … that 15 years of fixed prices must be available from COD …." Order No. 19-255 at 17. It would be one thing if the PPAs anywhere stated that the fifteen years of fixed pricing ends fifteen years immediately following the effective date, but they do not. It is remarkable that the Commission would adopt an interpretation contrary to its own recently affirmed policy, which policy was implicit in the decision in Order No. 05-584 to require fifteen years of fixed pricing, when the PPAs are not expressly contrary to the Commission's longstanding policy.

As the NewSun Parties argued in their motion for summary judgment, if a contract does not contain language contrary to a Commission policy (even if that policy only is implicit), industry participants should be able to rely on that policy to guide their understanding of the contract. The NewSun PPAs must be interpreted consistently with the intent and purpose of the underlying regulatory policy that gave rise to the PPAs. *E.g.,* 11 *Williston on Contracts* § 30:19 (4th ed 2018); *Ocean Accident & Guarantee Corp. v. Albina Marine Iron Works*, 122 Or 615, 617, 260 P 229 (1927); *Savage v. Grange Mut. Ins. Co.*, 158 Or App 86, 94-95, 970 P2d 695

(1999). Put differently, the Commission's policy should prevail unless a contract contains express language carefully negating the policy, which the PPAs do not.

The Order's conclusion that the regulatory history supports PGE's interpretation of the contracts is an error of law. The Commission should grant reconsideration to address this error and should find that PGE's proffered interpretation of the period of fixed pricing described in Schedule 201 is inconsistent with longstanding Commission policy, as expressly "affirm[ed]" by Order No. 18-079. The Commission should rule that, absent express agreement by the QF to a different outcome, the Commission's policy controls the meaning of standard contracts on the fifteen-year term issue. Because the express language of the NewSun PPAs and Schedule 201 do not compel an interpretation contrary to Commission policy, the inconsistency between PGE's interpretation and Commission policy supports the adoption of the NewSun Parties' interpretation.

VI. If Necessary to Reach the Issue, the NewSun Parties Are Entitled to Summary Judgment Under Steps Two and Three of the *Yogman* Test

The Order does not address steps two and three of the *Yogman* test, and the NewSun Parties maintain that the NewSun Parties should prevail under step one of the *Yogman* test. Therefore, this application for reconsideration will not restate the NewSun Parties' arguments under *Yogman* test's step two, regarding extrinsic evidence, and step three, regarding maxims of construction. *Yogman*, 325 Or at 363-65 (describing steps two and three). However, the Commission should conclude that the issues discussed above preclude a finding that PGE's interpretation is the *only* reasonable interpretation, and the Commission should therefore, at the absolute minimum, find that the PPAs are ambiguous.

If after considering the arguments in this application the Commission determines that there is more than one reasonable interpretation of the NewSun PPAs, the Commission should

still reverse the Order to grant summary judgment to the NewSun Parties after proceeding beyond step one of the *Yogman* test for the reasons previously briefed by the NewSun Parties. *See NewSun Parties' Motion for Summary Judgment* at 51-63; *NewSun Parties' Reply ISO Summary Judgment* at 22-28.

CONCLUSION

For the reasons stated above, the NewSun Parties respectfully request that the Commission reconsider Order No. 19-255 and enter a new order finding that the fifteen-year period of fixed pricing provided for in the PPAs and Schedule 201 begins on the Commercial Operation Date.

DATED: October 1, 2019.

By: /s/ *Gregory M. Adams*

Gregory M. Adams, OSB No. 101779
Richardson Adams, PLLC
515 North 27th Street
Boise, ID 83702
Telephone: (208) 938-2236
Facsimile: (208) 939-7904
Email: greg@richardsonadams.com

-and-

Robert A. Shlachter, OSB No. 911718
Keil M. Mueller, OSB No. 085535
Steven C. Berman, OSB No. 951769
Stoll Berne Lokting & Shlachter P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: rshlachter@stollberne.com
kmueller@stollberne.com
sberman@stollberne.com

Attorneys for Defendants