BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1894

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. PACIFIC NORTHWEST SOLAR, LLC, Defendant.	PACIFIC NORTHWEST SOLAR, LLC'S CROSS-MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Pursuant to ORCP 47 and OAR 860-001-0420 Pacific Northwest Solar, LLC ("PNW Solar") moves the Oregon Public Utility Commission ("Commission") for summary judgment in its favor as detailed herein. PNW Solar seeks summary judgment, finding that: 1) the Butler Solar ("Butler") project is allowed to increase its Nameplate Capacity Rating[1] from 4 MW as originally designated in the executed Power Purchase Agreement ("PPA") to 10 MW; and 2) that the Starlight Solar ("Starlight") and Stringtown Solar ("Stringtown") projects are not prohibited from decreasing their Nameplate Capacity Ratings from 4 MW, as originally designated in the executed PPAs, to 2.2 MW and 2.3 MW respectively.

The relevant facts are not in dispute and PNW Solar is entitled to judgment as a matter of law because the unambiguous language of the PPAs provides that increases to the Nameplate Capacity Rating are permitted through any means upon written notice to Portland General Electric Company ("PGE") and there is nothing that prohibits a decrease to the Nameplate Capacity Rating (with or without notice to PGE). The PPAs' language unambiguously provides that PGE will pay the Contract Price for any additional output due to increases in the Nameplate Capacity Rating, through any means, up to 10 MW. The PPAs also require that the qualifying facility ("QF") provide prior written notice to PGE of any increases and an "As-built Supplement" to specify changes in the Nameplate Capacity Rating occurring after contract execution, which recognizes there is no limitation in the change to a project's actual Nameplate Capacity Rating up to 10 MW. There is also no prohibition in the PPAs limiting a QF's ability to decrease the Nameplate Capacity Rating. The only substantive limitation is that increases in project size above 10 MW are paid a different price. Therefore, the changes in this case are

[1] Capitalized terms in this Motion are given their meanings as defined in the PPAs.

permitted and PNW Solar is entitled to the Contract Price because PNW Solar provided proper notice and has not increased the Nameplate Capacity Rating of any QFs over the 10 MW threshold.

II. BACKGROUND

PGE filed its Complaint and Request for Dispute Resolution initiating this matter on August 31, 2017. On March 6, 2018, Administrative Law Judge ("ALJ") Allan Arlow held a pre-hearing conference, during which the parties agreed to a shortened procedural schedule that was adopted by the ALJ. The schedule provided for the filing of a Stipulated Fact Statement, which was filed on March 16, 2018, and cross-motions for summary judgment on March 23, 2018. This is PNW Solar's Cross-Motion for Summary Judgment.

III. FACTS

The relevant facts are detailed in full in the Stipulated Facts for Cross Motions for Summary Judgment. In the first half of 2016, PNW Solar executed PPAs with PGE for six solar QFs under the Public Utility Regulatory Policies Act ("PURPA").[2] During negotiations, the parties had no discussions about whether or not the PPAs allowed PNW Solar to increase or decrease the Nameplate Capacity Rating for any of its solar facilities.[3]

Section 4.3 of each of the PPAs provides as follows:

> Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built. Seller shall not increase the Nameplate Capacity Rating above that specified in Exhibit A or increase the ability of the Facility to deliver Net Output in quantities in excess of the Net Dependable Capacity, or the Maximum Net Output as described in Section 3.1.11 above, through any means including, but not limited to, replacement, modification, or addition of existing equipment, except with prior written notice to PGE. In the event Seller increases the Nameplate Capacity Rating of the Facility to no more than 10,000 kW pursuant to this section, PGE shall pay the Contract Price for the

[2] Stipulated Facts for Cross Motions for Summary Judgment at ¶ 1.
[3] Id. at ¶ 3.

> additional delivered Net Output. In the event Seller increases the Nameplate Capacity Rating to greater than 10,000 kW, then Seller shall be required to enter into a new power purchase agreement for all delivered Net Output proportionally related to the increase of Nameplate Capacity above 10,000 kW.[4]

PNW Solar and PGE currently dispute whether Section 4.3 authorizes PNW Solar to increase the Nameplate Capacity Rating of Butler from 4 MW to 10 MW or decrease the Nameplate Capacity Rating of Starlight and Stringtown from 4 MW to 2.2 MW and 2.3 MW prior to construction and retain the right to the Contract Price in the executed Standard PPA.

IV. MOTIONS

PNW Solar hereby Moves this Commission for an order granting Summary Judgment in its favor finding:

1. That, as a matter of law, Section 4.3 of its PPA permits the Butler facility to increase its Nameplate Capacity Rating from 4 MW to 10 MW and still receive the Contract Price for the entire net output,
2. That, as a matter of law, the Starlight and Stringtown facilities are permitted to decrease their Nameplate Capacity Ratings from 4 MW to 2.2 MW and 2.3 MW respectively and still receive the Contract Price for the entire net output, and
3. In the alternative, if the Commission finds that the increased net output of the Butler facility is not entitled to the Contract Price, or that Starlight and Stringtown are not entitled to the Contract Price set forth in their PPAs, then any increased Net Output of Butler and all Net Output of Starlight and Stringtown are at least entitled to the avoided cost price in effect on the date PNW Solar notified PGE of the Nameplate Capacity Rating change.

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[4] Id. at ¶ 4.

V. LEGAL STANDARD

The Commission should grant a motion for summary judgment if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law.[5] No genuine issue as to a material fact exists if, based on the record and viewed in a manner most favorable to the non-moving party, no objectively reasonable person could return a verdict for the non-moving party on the matter that is the subject matter of the motion for summary judgment.[6]

VI. ARGUMENT

A. The PPAs Permit PNW Solar's Nameplate Capacity Rating Changes

When interpreting a contract provision there are three stages of analysis. The first step is to examine the text of the disputed provision, in the context of the document as a whole.[7] If the provision is clear, the trier of fact simply "construes the words of a contract as a matter of law."[8] If an ambiguity exists, then (and only then) the second step is to resolve the ambiguity through extrinsic evidence of the parties' intent.[9] If the ambiguity still cannot be resolved, then the third step is to resort to the appropriate maxims of construction.[10]

In this case, the plain language of Section 4.3 unambiguously allows Butler to increase its Nameplate Capacity Rating above that originally specified in the PPA and still receive the Contract Price because PNW Solar/Butler provided prior written notice to PGE. Even if the Commission finds that Section 4.3 is ambiguous, there is extrinsic evidence showing that PGE and the Commission intended to allow this type of increase to the Nameplate Capacity Rating.

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5 ORCP 47C.
6 Id.
7 Yogman v. Parrott, 325 Or 358, 361 (1997).
8 Id. (quoting Eagle Industries, Inc. v. Thompson, 321 Or 398, 405 (1995)).
9 Id. at 363.
10 Id. at 364.

Last, if the extrinsic evidence still does not resolve the ambiguity, the appropriate maxims of construction show that the ambiguity be resolved in favor of PNW Solar (the party for whose benefit the provision was included) and against PGE (the drafter). Therefore, as a matter of law, the Butler facility may increase its Nameplate Capacity Rating to 10 MW and PGE has no basis in law to deny Butler the Contract Price for any additional net output up to 10 MW.

Additionally, there is nothing in the PPAs or Oregon law that prohibits the Nameplate Capacity Rating decreases for Starlight and Stringtown, and in its Complaint and Request for Dispute Resolution, PGE cites to none. Section 4.3 does not place any restrictions on decreases to the Nameplate Capacity Rating as it does for increases, so decreases are permitted even without prior notice to PGE. PNW Solar is aware of no extrinsic evidence that PGE intended to disallow decreases in its drafting of Section 4.3. Also, the appropriate maxims of construction similarly mandate that any ambiguity be resolved in favor of PNW Solar (and against PGE). PGE has no basis in law to refuse to honor the Starlight and Stringtown Nameplate Capacity Rating decreases, and therefore PNW Solar is entitled to judgment as a matter of law.

1. The Plain Meaning of Section 4.3 Permits and Even Assumes Changes to the Nameplate Capacity Rating

Section 4.3 is plain and unambiguous; its express terms permit and even assume changes to the Nameplate Capacity Rating. The first step in contractual interpretation is to determine what the words of the provision say in the context of the document as a whole.[11] Whether the provision is ambiguous is a question of law, and if there is no ambiguity the trier construes the contract as a matter of law.[12] An ambiguity exists only if the disputed terms lend themselves to more than one reasonable interpretation.[13] However, a term is "unambiguous if its meaning is

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11 Id. at 361 (quoting Eagle Industries, 321 Or at 405).

12 Id.

13 Id. at 363-64.

clear enough to preclude doubt by a reasonable person."[14] Additionally, the trier of fact does not construe a contract in a manner that will render a portion of it meaningless.[15]

The language in Section 4.3 plainly not only permits, but assumes, changes to the facility at any time after contract execution, including before commercial operations. The first sentence of Section 4.3 requires that, "[u]pon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built." The "As-built Supplement" is further defined in Section 1.1 to mean "the Supplement to Exhibit A provided by Seller in accordance with Section 4.3 following completion of construction of the Facility, describing the Facility as actually built."

PGE's argument that Section 4.3 does not permit changes before the QF becomes operational is not supported by the plain language.[16] The fact that an "As-Built Supplement" is required by the PPA assumes that changes will occur before operations and that the facility as "actually built" can and likely will differ from the facility specifications at the time of contract execution. If changes were only permitted after commercial operations, then the an "As-Built Supplement" would be completely unnecessary and this sentence would be rendered meaningless. Therefore, as required by Oregon law, to give effect to the unambiguous language of the "As-built Supplement," pre-operational but post-execution changes must be permitted.

Next, Section 4.3 uses exact language to set a process by which some specific types of changes, namely an increase to the Nameplate Capacity Rating, may be made with prior written notice to PGE. The second sentence of Section 4.3 states that "Seller shall not increase the

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14 Quality Contractors v. Jacobsen, 139 Or App 366, 370-71 (1996).

15 Thomas Creek Lumber & Log Co. v. State Forester, 157 Or App 204, 213 (1998).

16 See PGE's Complaint and Request for Dispute Resolution at 6-7 ("Section 4.3. . . must apply only to upgrades that occur after a project is operational") (emphasis removed).

Nameplate Capacity Rating . . . except with prior written notice to PGE." This language plainly means that increases are allowed upon written notice to PGE. There is no minimum time requirement by which the seller is required to give that notice and no requirement that PGE actually approve the size change. The straight-forward and unambiguous process required by this section is simply "prior written notice."

The language in Section 4.3 identifies what the rate will be for certain types of increases in the Nameplate Capacity Rating. Section 4.3 articulates that, so long as the Nameplate Capacity Rating stays at or below 10,000 kW (or 10 MW), PGE will pay the Seller the Contract Price for any increases. To this end, the third sentence of Section 4.3 states in its entirety: "In the event Seller increases the Nameplate Capacity Rating of the Facility to no more than 10,000 kW pursuant to this section, PGE shall pay the Contract Price for the additional delivered Net Output."[17]

In addition, Section 4.3 provides no limitation on the reason a QF can increase its nameplate capacity up to 10 MW and still be paid the Contract Price. PGE's argument that upgrades and efficiency improvements are permitted but "material" changes are not permitted is not supported by this plain language. First, the plain language of Section 4.3 speaks only to a maximum 10,000 kW size. It does not use any language that could be read to limit the permissible increases by what is "material." Instead, the language in the PPA simply sets a clear and unambiguous bright line at 10,000 kW. Second, Section 4.3 also permits increases "through *any* means," and lists some illustrative examples of the ways in which the increases may occur

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17 The last sentence describes the price to be paid if the Nameplate Capacity Rating is increased above 10,000 kW, but since PNW Solar is not proposing to increase the nameplate capacity of any projects above that threshold, that provision is not relevant to this discussion.

"including, but not limited to, replacement, modification, or addition…"[18] If anything, PGE's position acknowledges that changes are permitted under Section 4.3 of the PPAs, though PGE attempts to introduce new terms to limit the same (which is impermissible). Accordingly, Section 4.3 unambiguously permits any amount of change (whether or not the utility considers it to be "material"), through any means (whether it's a replacement or additional equipment), and if that change results in a Nameplate Capacity Rating below 10,000 kW, the Seller is entitled to the Contract Price.

Additionally, decreases to the Nameplate Capacity Rating are unambiguously permitted without notice. As a reminder, Section 4.3 requires the Seller to provide an As-built Supplement to identify the actual size constructed, and only places certain limitations on increases. It places a maximum 10 MW size for eligibility for contracted prices, but no minimum size on the difference between the original size and the As-built Supplement. There is a notice requirement for increases, but nothing for decreases. Further, in the context of the contract as a whole there is nothing in the PPAs that prohibit a Nameplate Capacity Rating decrease. There is no minimum required deliveries or penalties for operating at a lower output. Instead, everything is discussed in terms of maximums.[19] Therefore, decreases are unambiguously permitted as a matter of law.

Finally, the terms of these Standard PPAs are unambiguous because PGE has already taken the position in a prior proceeding that the terms of its Standard PPA are not ambiguous and PGE is precluded by judicial estoppel from changing that position now. If a party made an inconsistent statement in a prior proceeding and benefited from that statement, that party is barred by judicial estoppel from changing its position in a later proceeding.[20] Docket No. UM

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18 Butler, Starlight, and Stringtown PPAs, Section 4.3 (emphasis added).

19 E.g., Butler, Starlight, and Stringtown PPAs, Section 1.19, 1.20, 3.1.11 and 4.3.

20 Hampton Tree Farms v. Jewett, 320 Or 599, 611 (1995).

1805 raised the issue regarding whether PGE's Standard PPA provided for 15 years of fixed prices from the commercial operation date.[21] In that docket, PGE "denied that its contract forms are ambiguous."[22] PGE benefited from that statement because the Commission found that PGE was not in violation of any Commission orders, granted summary judgment in favor of PGE, and dismissed the complaint.[23] Therefore, because PGE made and benefited from that statement, PGE is now barred by judicial estoppel from changing its position to argue that its contract terms are now ambiguous; as a result, the Commission should interpret the plain meaning of PGE's unambiguous contract terms as set forth herein.

In sum, Section 4.3 is unambiguous because its meaning is clear enough to preclude doubt by a reasonable person and because PGE has admitted that its contract terms are unambiguous. Giving meaning to each provision individually and reading the section as a whole, Section 4.3 simply provides: 1) that the Seller can change the Nameplate Capacity Rating at any time after contract execution; 2) that increases are allowed upon prior written notice to PGE; and 3) that increases may be made in any amount or manner with the limitation that the Seller is only entitled to the Contract Price for amounts increased to 10,000 kW.

In this case, the changes to the Nameplate Capacity Ratings of the Butler, Starlight, and Stringtown projects are permitted by the express and unambiguous terms of the PPAs. The

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21 See Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition v. Portland General Electric Company, Docket No. UM 1805, Complaint at 2 (Dec. 6, 2016).

22 Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition v. Portland General Electric Company, Docket No. UM 1805, PGE's Response in Opposition to Complainant's Motion for Summary Judgment at 4 (May 8, 2017).

23 See Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition v. Portland General Electric Company, Docket No. UM 1805, Order No. 17-256 (Jul. 13, 2017).

changes were requested after contract execution. That they were requested before construction or operation is irrelevant because the plain terms do not limit changes to after the commercial operation date and assume that the facility "as-built" will differ from that originally stated in the PPA. PNW Solar provided prior written notice to PGE (for both the increase and decrease in sizing, even though such a notice is not required for the decreases).[24] Last, because the increase for Butler is at the 10,000 kW (10 MW) threshold, PGE is required to compensate it for the additional Net Output at the Contract Price. The express terms do not limit changes to only those that are not "material" or only those that are for "efficiency improvements." Instead, the express terms permit a QF to retain Contract Prices for *any* change up to that bright-line 10,000 kW threshold. Butler's increase is under that threshold, and nothing else in the contract prohibits the decreases to Starlight and Stringtown, and therefore PNW Solar is entitled to judgment as a matter of law.

2. External Evidence Also Shows that the Commission and PGE Intended to Permit These Types of Changes to the Nameplate Capacity Rating

External evidence shows that the Commission and PGE intended to permit increases to the Nameplate Capacity Rating of QFs that were pre-operational, in any magnitude relative to original size, and through any means (so long as it stayed below 10 MW to receive the Contract Price). If the Commission finds that Section 4.3 is ambiguous, the next stage of analysis looks to external evidence of the parties' intent. "If a contract is ambiguous, the trier of fact will

[24] As indicated in the Stipulated Fact Statement, prior written notice of the increase on the Butler project was provided on May 8, 2017 and again on June 23, 2017 and notice for the Starlight and Stringtown decreases was provided in January and February 2017 to PGE's interconnection department and in June 2017 to PGE's PPA department. PGE's Complaint and Request for Dispute Resolution does not appear to dispute the fact of the notices or the sufficiency of the notices.

ascertain the intent of the parties and construe the contract consistent with the intent of the parties."[25]

In this case, the situation is different than a traditional contract because the terms of the contracts in question were not individually negotiated by the parties, but drafted solely by PGE as a Standard PPA and approved by the Commission. PGE's and the Commission's intent can be evidenced in the administrative record in the Commission proceedings where the terms were adopted. In contrast, and unless it wanted to engage in a longer and more difficult negotiation process,[26] PNW Solar had no opportunity to add, remove, or alter any provisions. So other than PNW's reading of the plain language prior to signing and general understanding of the industry and process, there is no external evidence of PNW Solar's intent. There is also no external evidence indicating that, prior to signing the contracts, PNW Solar should have been aware that PGE would oppose the requested changes.

The administrative record in UM 1129 regarding Section 4.3 is helpful to determine the Commission's and PGE's intent. There, the Commission intended to adopt a general policy that allowed for changes in nameplate capacity, and did not impose any limitations on actual size changes. However, the Commission was concerned about what the QF would be paid for increases in nameplate capacity above 10 MW. The Commission's order did not impose *any* restrictions on the ability of a QF to increase or decrease its nameplate capacity but adopted a

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25 Pacific First Bank by Wash. Mut. V. New Morgan Park Co., 319 Or 342, 347-48 (1994).

26 As of this date, only two qualifying facilities above the standard contract size threshold have been able to negotiate and execute PPAs with PGE, one of which is an existing and operating QF that is litigating its replacement contract with PGE. See Re PGE Qualifying Facility Contracts, Docket No. RE 143, OAR Compliance Filing Informational Filing – Covanta Marion, Inc. (Sept. 19, 2014) (Covanta Marion); see also Re PGE Qualifying Facility Contracts, Docket No. RE 143, Supplemental Application PGE's Summary of Qualifying Facility Agreements (Jun. 21, 2017) (Airport Solar); see also PGE v. Covanta Marion, Inc., Docket No. UM 1887.

requirement that increases up to 10 MW would retain their contract price and increases above 10 MW would be subject to a different price.

The discussions regarding changes in the Nameplate Capacity Rating appear to have started with Issue No. 8 in UM 1129. Issue 8 asked a number of related questions:

> Should increased Qualifying Facility output resulting from changes in operation of generating equipment—for example, improving its efficiency or operating at a higher power factor—qualify for the full avoided cost prices in the tariff as of the effective date of the agreement? Should increased generation resulting from efficiency improvements that increase the project's output above the nameplate rating specified in the contract be entitled to full avoided cost prices, so long as the project's nameplate rating remains at or below 10 MW? If so, should the increased generation be priced at the full avoided cost in the tariff as of the effective date of the agreement or as of the date of the improvement? Can Seller change the generator nameplate rating if equipment replacement is necessary?[27]

As drafted, Issue 8 did not have any discussion about changes occurring before or after commercial operations, but there is significant evidence regarding the magnitude and means by which the Nameplate Capacity Rating may be increased and the price that would be paid resulting from any increases. Apparently, nobody in that docket was concerned about decreases to the Nameplate Capacity Rating because PNW Solar cannot find any discussion of decreases. Issue 8 was the starting point for discussion around increases to the Nameplate Capacity Rating; the parties submitted testimony and evidence—not all of which was constrained to the specific questions asked in Issue 8. The evidence that exists around Issue 8 indicates that PGE intended to pay the Contract Price for any Net Output resulting from increases to the Nameplate Capacity Rating at any time after contract execution and through any means so long as it remained below 10 MW.

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[27] Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. 1129, Corrected Ruling, at Appendix A at 4-5 (Nov. 29, 2005).

First, the Commission intended to permit increases in any magnitude and pay the Contract Price so long as the Nameplate Capacity Rating remained below 10 MW. Staff recommended that if an increase was above the original capacity but still at or below 10 MW, the "QF should be subject to updated avoided cost pricing for the increase in installed capacity."[28] PGE suggested that "if the QF increases the nameplate capacity by 10%, any output from the QF will be split 10% to the new pricing and 90% to the existing pricing."[29] Ultimately, the Commission determined that it was not its "intent to discourage QF operators from upgrading their facilities" and that "a QF may upgrade operations and continue to receive its existing contract price for all power delivered up to 10 MW."[30] The Commission's decision does not support PGE's argument that "material changes" are not permitted because the Commission rejected the parties' suggestions to provide a different rate based upon the magnitude of the increase above the original capacity and instead adopted the 10 MW bright line rule. The mere fact that a limit was placed only on the upper bounds of sizing in order to maintain the Contract Price demonstrates an intent to allow for any changes within a specified range (otherwise if no such changes were permitted, there would be no need to include a limit of such change or the Commission would have placed a different type of limit on the change). There is no evidence that PGE did not intend to comply with the Commission's mandate when it drafted Section 4.3 or that PGE had its currently restrictive interpretation at that time. Therefore, PGE's intent in

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28 Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. 1129, Staff/1000, Schwartz/66 (Dec. 9, 2005).

29 Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. 1129, PGE/300, Drennan/Kuns/14 (Jan. 20, 2006).

30 Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. 1129, Order No. 06-538 at 39 (Sept. 20, 2006).

drafting Section 4.3 was to comply with the Commission's policy and to permit any change up to 10 MW, not just "immaterial" changes.

Second, it also appears that the Commission intended that an increase was eligible for the Contract Price regardless of whether it occurred before or after commercial operations. Staff discussed Issue 8 in the context of "any additional capacity installed after the *effective date*."[31] The "effective date" in PGE's Standard PPA is defined as the date "upon execution by both parties."[32] Therefore, Staff's testimony confirms that a QF could add capacity any time after execution. If the Commission intended to limit increases to only post-operational changes as PGE now argues, then the Commission would have clarified that increases are only permissible after commercial operations. PGE could have clarified this issue as well, submitted a compliance filing that did not provide for an "As-built Supplement," or otherwise limited changes to after commercial operations (it did not). However, PGE's rebuttal testimony simply agreed with Staff and only pointed out the administrative complications to administering a pricing mechanism,[33] and in turn PGE's contract explicitly anticipates that the facility as-built will differ from the design at execution. PGE's contract with the "As-built Supplement" language was approved by the Commission, further evidence that the Commission's intended to allow increases prior to construction. Therefore, PGE's intent in drafting Section 4.3 was to comply with the Commission's policy and to permit any change after execution (subject only to the 10 MW upper limit to receive the Contract Price).

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31 Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. 1129, Staff/1000, Schwartz/64 (Dec. 9, 2005) (emphasis added).

32 PGE's Standard PPA Section 2.1

33 Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. 1129, PGE/300, Drennan/Kuns/14 (Jan. 20, 2006).

It may be that this external evidence is insufficient to determine PGE's or the Commission's intent on this issue; however, there is no practical distinction between permitting a change to the Nameplate Capacity Rating after commercial operations but not before. If that were the case, a QF could simply wait to notify PGE of its increase until after it had commenced operations for a single day. This would result in sub-optimal economic changes in Nameplate Capacity Ratings (presumably the advanced notice required gives PGE time to plan for the increase in power to be delivered – here, PNW Solar gave what amounts to years of advanced notice to allow PGE to properly plan for such change in anticipated operations). Therefore, PGE and the Commission must have intended that Nameplate Capacity Changes could and likely would occur before commercial operations.

Further, there is no external evidence that PNW Solar should have expected prior to signing the PPAs that PGE would oppose the increases and decreases at issue in this case. First, PGE never told PNW Solar prior to executing the PPA that it would not be permitted to increase or decrease its Nameplate Capacity Rating. Second, practical considerations also weigh in favor of generally allowing changes to the Nameplate Capacity Rating before operation. For example, any electric generator may face obstacles during the planning and construction process regarding land use, permitting, interconnection, and other issues or may need to change the equipment for the project due to the unavailability of those materials from a supplier or a change in equipment design after the contract was executed. These practical circumstances, in light of the plain language of the PPAs, show that changes are generally permissible and anticipated after execution (with only those limitations spelled out in the PPA). These considerations in light of the plain meaning show that there is no external evidence that PNW Solar should have anticipated this issue before signing the PPAs.

In this case, the external evidence shows that PGE intended to permit an increase from 4 to 10 MW, as is requested for Butler. First, because the Commission explicitly stated that a QF may receive the Contract Price for all power delivered up to 10 MW and PGE intended to comply with that direction, Butler is entitled to the Contract Price for all generation up to its new 10 MW Nameplate Capacity Rating. Second, it does not matter whether Butler is installing additional generation units or merely replacing portions of its original design with more efficient models because the Commission and PGE intended to allow changes through any means. Third, it also does not matter that the change in this case was announced before commercial operations because there is no practical distinction between changes occurring before or after commercial operations and no explicit external evidence indicating that the Commission or PGE intended otherwise. Therefore, even if the Commission finds that Section 4.3 is ambiguous, that ambiguity is resolved by the Commission's and PGE's clear intent to allow an increase, such as the one for Butler from 4 to 10 MW.

There is no external evidence showing that PGE intended to disallow any decreases to the Nameplate Capacity Rating; therefore, the decreases for Starlight and Stringtown from 4 MW to 2.2 MW and 2.3 MW respectively, are also permitted as a matter of law.

3. If the Commission is Still Not Able to Resolve Any Ambiguity, the Ambiguity Should be Resolved in Favor of PNW Solar

Since Section 4.3 was drafted in favor of allowing a QF to change its Nameplate Capacity Rating, the ambiguity should be resolved in favor of PNW Solar. If external evidence of intent still does not resolve an ambiguity, then the final stage of contract interpretation is to resort to the appropriate maxims of construction.[34]

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[34] Yogman v. Parrott, 325 Or 358, 364 (1997).

An ambiguity is resolved in favor of the party for whose benefit the provision was included.[35] The Commission stated that in adopting the 10 MW threshold for standard contracts "[i]t was not [their] intent to discourage QF operators from upgrading their facilities."[36] This resolution of Issue No. 8 in UM 1129 favors of QFs, therefore, Section 4.3, as the direct result of Issue No. 8, should be construed in favor of PNW Solar.

Additionally, since PGE drafted this contract, the ambiguity should be resolved against PGE. An ambiguous provision should be construed against the party responsible for drafting its language.[37] This maxim should apply, in this case, where the express terms of the contract are clear, external evidence weighs against PGE's asserted interpretation, and especially where the purpose of the contract provision is to benefit the QF. It would be inappropriate to allow PGE to benefit from a poorly drafted provision that was explicitly intended to benefit a QF. The whole purpose of a standard PPA is to "eliminate negotiations and to thereby remove transaction costs."[38] That purpose would be frustrated if a QF, like PNW Solar, is not able to rely on the plain language of the contract and required to conduct extensive background research regarding PGE's intended meaning behind a provision that on its face appears clear and meant to benefit the QF. Therefore, in this situation, if the Commission finds that the provision is still ambiguous after looking at the plain language and the external evidence of PGE's intent, the Commission

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35 ORS 42.260; See, e.g., Crossroads Plaza, LLC v. Oren, 176 Or App 306 (2001).

36 Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. 1129, Order No. 06-538 at 39 (Sept. 20, 2006).

37 Hoffman Construction Co. v. Fred S. James & Co., 313 Or 464, 470–471, (1992) ("when two or more competing, plausible interpretations prove to be reasonable after all other methods for resolving the dispute over the meaning of particular words fail, then the rule of interpretation against the drafter of the language becomes applicable, because the ambiguity cannot be permitted to survive. It must be resolved").

38 Re Investigation Related to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129, Order No. 05-584 at 16.

should apply the above two maxims and construe Section 4.3 in favor of PNW Solar and against PGE to allow the increases and decreases requested.

B. Preventing Changes in Nameplate Capacity Would Be Inconsistent with PURPA's and this Commission's Policies to Encourage the Development of QFs

There are legitimate and potentially necessary business reasons for a QF to increase or decrease its Nameplate Capacity Rating, and the Commission should not adopt a policy that limits such changes because it would discourage the development of QFs. As explained by the U.S. Supreme Court, PURPA "seeks to encourage the development of cogeneration and small power production facilities."[39] PGE also admits that "[c]ongress enacted PURPA to encourage distributed and renewable power development."[40] PGE's proposed interpretation and limitation to only "immaterial" changes could result in QFs being discouraged from developing projects or required to shut down their operations. Oregon's mini-PURPA also seeks to promote the development of renewable energy by increasing "the marketability of electric energy produced by qualifying facilities located throughout the state for the benefit of Oregon's citizens" and creating "a settled and uniform institutional climate for the qualifying facilities in Oregon."[41]

The Commission's and FERC's policies established a two-stage process that allows a QF to first execute a power purchase agreement, and then enter into an interconnection agreement. The PPA process is intended to be streamlined, and, if there are no disputes or additional required information, the maximum amount of time for a QF to obtain an executable contract is about 32 business days.[42] In addition, FERC has found that a legally enforceable obligation may

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39 FERC v. Miss., 456 U.S. 742, 750 (1982).

40 PGE v. Covanta Marion, Inc., Docket No. UM 1887, PGE's Cross-Motion for Summary Judgment at 1 (Jan. 4, 2018).

41 ORS 758.515(2)(a)&(3)(a-b).

42 The utilities have no more than 15 business days to provide a draft standard contract, and when the QF indicates that it agrees to all the terms in the draft contract, "the utility has 15 days to forward a final executable contract to the QF." Re Commission Investigation

be formed in as little as a month and a half.[43] The PPA negotiation process in and of itself (absent disputes that require litigation) should be expedited and does not require the QF to provide significant deposits or construct any facilities.

Once the legally enforceable obligation is formed, the QF needs to be interconnected to the utility's system and is obligated to pay all costs of interconnection to the utility's infrastructure,[44] and then be constructed. The Commission recognizes that this can be a long process, and QFs are allowed to select a commercial operation date up to three years from contract execution.[45] The interconnection process can take far longer, come after the power purchase agreement is executed, and require the expenditure and payment of significant amounts of money to the utility. For example, the Tier 4 interconnection process may take months to years as multiple studies are involved and it is dependent on factors outside of the control of the QF.[46] PacifiCorp estimates that the interconnection process can take 18 months from the date of application to completion.[47] While an interconnection agreement can be negotiated before the PPA is finalized, FERC found that it was inconsistent with PURPA and FERC's regulations for a

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into QF Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 24 (May 13, 2016); see also Portland General Electric Company, Schedule 201, 201-2 regarding the calculation of days required.

43 Grouse Creek Wind Park, LLC, 142 FERC ¶ 61,187 at P.37 (2013) (QFs had negotiated starting in November to December 14).

44 18 CFR 292.306(a); OAR 860-029-0060(1).

45 Re Commission Investigation into QF Contracting and Pricing, Docket No. UM 1610, Order No. 15-130 at 2-4 (April 16, 2015). The QF also has an opportunity to establish a longer time if reasonable and necessary, and has a one year cure period if this miss their commercial operation date. Id.

46 OAR 860-082-0060. For Tier 4 interconnections, a QF has three studies (Feasibility, System Impact and Facilities Studies).

47 Re PacifiCorp dba Pacific Power Application to Update Schedule 37 Qualifying Facility Information, Docket No. UM 1729, Compliance Filing, Standard Avoided Cost Rates at 9 (Aug. 26, 2016).

state commission to require that an interconnection agreement be tendered to the utility in order to form a LEO.[48]

The interconnection process can potentially identify significant costs for an interconnection at different sizes, or could even theoretically conclude that an interconnection at a specific size is essentially not possible. For example, in theory, a QF could be able to economically build an interconnection at 2 MW, but the overall costs could become infeasible at 4 MW. Similarly, a QF may need to increase the size of its project to economically cover minimum interconnection costs identified by the utility regardless of sizing (for instance, from a 4 MW facility to a 10 MW facility). This process necessarily envisions that a QF may need to revise its nameplate capacity depending upon the costs or feasibility of interconnection. Therefore, it would be inappropriate to prevent a QF from reducing its Nameplate Capacity Rating because of unforeseen costs or difficulties in the interconnection process.

There are other reasonable business reasons why a QF may want to change its nameplate capacity, and it would discourage the development of cost effective QFs to impose such restrictions. As explained above, the basis for the Commission concluding that a QF can be eligible for contract prices up to 10 MW was because "[i]t was not our intent to discourage QF operators from upgrading their facilities."[49] Some of the economic reasons the Commission was explicitly aware of included modified operations or equipment.[50] While the record in this proceeding does not include any specific examples, it does not take much imagination to consider that there could be a myriad of economic reasons why any business, including a QF,

48 FLS Energy, Inc., 157 FERC ¶ 61,211 at P.23 (2016).
49 Docket No. 1129, Order No. 06-538 at 39.
50 Id. at 38.

might need or have a basis to change its operations or output of goods or services (financing, land use restrictions, costs of generating equipment, etc.).

C. PNW Has a PURPA Right to Provide Energy or Capacity Over a Specified Term at the Avoided Costs Calculated at the Time the Obligation is Incurred

Finally, the Commission must not violate PNW Solar's rights to provide energy and capacity under PURPA and to receive the avoided costs calculated at the time the obligation is incurred. PGE's interpretation implies that the Commission's policy requires a QF to choose between exercising its statutory rights to increase its Nameplate Capacity Rating under all circumstances or give up its right to a long-term contract. The Commission cannot force this Hobson's choice upon QFs.

Under PURPA, a QF has the right to provide energy or capacity over a specified term at the avoided costs calculated at the time the obligation is incurred.[51] The only limitation under PURPA regarding the amount of energy a QF is permitted to provide or obligated to provide is that a renewable project cannot be larger than 80 MW.[52] If PNW Solar is not permitted to make its requested Nameplate Capacity Changes, then its right to provide power under PURPA is violated. Therefore, the Commission cannot approve a contract provision which explicitly prevents a QF from increasing its Nameplate Capacity Rating.

Further, if PNW Solar is permitted to make its requested Nameplate Capacity Rating changes but at a rate not specified in its contract, then its right to avoided costs calculated at the time the obligation is incurred is violated. A QF has the right to enter into a long-term contract at fixed avoided cost prices.[53] The Commission cannot issue an order that requires a QF to give

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51 18 CFR 292.304(d).

52 18 CFR 292.204(a)(1)

53 Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980); Hydrodynamics Inc., 146 FERC ¶ 61,193 at PP. 33, 34 (2014); New York Gas and Elec. Corp., 71 FERC ¶ 61,027, 14-15 (1995).

up its fixed contracted prices.[54] Therefore, preventing the changes requested in this case would violate PURPA by requiring PNW Solar to give up its statutory rights to long-term fixed prices, if it elects to exercise its statutory rights to increase its nameplate capacity.

D. In the Alternative, if the Commission Finds that these Projects are Not Entitled to the Contract Price, then it Should Receive the Avoided Cost Prices in Effect on the Day it Notified PGE of the Change

If the Commission concludes that PNW Solar cannot change its Nameplate Capacity Rating in an amount that PGE considers "material" and remain eligible for the contracted prices, then the Commission should adopt that limitation to only the prices related to the increased Nameplate Capacity Rating. As explained above, PNW Solar has the right to a long-term fixed price and cannot be required to give up that right to increase its nameplate capacity. However,

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54 Idaho Wind Partners 1, LLC, 140 FERC ¶ 61,219 at P.41 (2012) (prohibiting a state commission or utility from unilaterally adjusting rates in fixed price contract, or otherwise adjusting the compensation paid to the QF under the contract); N.Y. State Elec. & Gas Corp., 7l FERC ¶ 61,027 at 61,118*, reconsid. denied*, 72 FERC ¶ 61,067 (1995), appeal dismissed sub nom. N.Y. State Elec. & Gas Corp. v. FERC, 117 F.3d 1473 (D.C. Cir. 1997) ("If we were to ... allow the reopening of QF contracts that had not been challenged at the time of their execution, financeability of such projects would be severely hampered"); Oregon Trail Electric Consumers Co-op, Inc. v. Co-Gen Co., 168 Or App 466, 482 (2000) (PURPA prohibits regulators from exercising any kind "of post-contractual, utility-type price modification authority"); Freehold Cogeneration v. Bd. Reg. Comm'rs of N.J., 44 F.3d 1178, 1192 (3d Cir), cert den 516 U.S. 815, (1995) ("Congress intended to exempt [QFs] from state and federal utility rate regulations); Smith Cogeneration Mgt. v. Corp. Comm'n, 863 P.2d 1227, 1240 (Okla. 1993) ("[r]econsideration of long-term contracts established estimated avoided costs imposes utility-type regulation over QFs. PURPA and FERC regulations seek to preventreconsideration of such contracts); American Paper Inst. v. American Elec. Power, 461 U.S. 402, 414 (1981) ("legislative history [of PURPA] confirms . . . that Congress did not intend to impose traditional ratemaking concepts on sales by [QFs] to utilities); Afton Energy, Inc. v. Idaho Power Co., 107 Idaho 781, 693 P.2d 427, 433 (1984) (subjecting PPA prices to later modification based on regulatory determination that they are contrary to the public interest results in utility-type regulation, which Congress rejected in enacting PURPA); see also Indep. Energy Producers Ass'n v. Cal. Pub. Util. Comm'n, 36 F.3d 848, 855 (FERC exclusive authority to determine or revoke QF status).

the Commission has the discretion to determine what the avoided cost price will be for any increases in nameplate capacity to PGE.[55]

Under the terms of Section 4.3, if PNW Solar increased its operations above 10 MW, then they would be required to "enter into a new [PPA] for all delivered Net Output proportionally related to the increase of Nameplate Capacity above 10,000 kW." If PNW Solar is required to enter into a new PPA for the portion of its capacity above the original but still below 10 MW, then PNW Solar should be no worse off than if it increased above 10 MW. Therefore, the additional Net Output that results from Butler's increase from 4 to 10 MW should, at the very least, be under the terms of a Standard PPA and Schedule 201 avoided cost rates in effect on the date PNW Solar provided its notice.

Similarly, in the event the Commission finds that PNW Solar cannot reduce the Nameplate Capacity Rating of Starlight and Stringtown, PNW Solar should nonetheless be entitled to the terms of a Standard PPA and Schedule 201 avoided cost rates in effect on the date PNW Solar provided its notice to PGE.

Finally, if the Commission agrees with PGE, then it should provide clarity regarding what a material change is. PGE apparently believes that a material change is at least 1.7 MW change but has provided no indication regarding what size would be an immaterial change.[56]

VII. CONCLUSION

PNW Solar is entitled to judgment as a matter of law because the unambiguous language of the PPAs provide that increases to the Nameplate Capacity Rating are permitted through any

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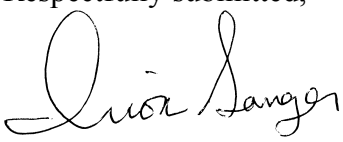
55 Docket No. 1129, Order No. 06-538 at 39.

56 See PGE's Complaint and Request for Dispute Resolution at 7 ("material changes in output . . . are not permitted"). PGE only objects to "material" changes but appears agree that it PNW Solar can make non-material changes. Id. at 3; Stipulated Facts at ¶ 11. PGE has not provided any definition of what it means by "material."

means upon written notice to PGE and there is nothing that prohibits a decrease to the Nameplate Capacity Rating.

Dated this 23rd day of March 2018.

Respectfully submitted,



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