BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1894

Portland General Electric Company, Complainant, v. Pacific Northwest Solar, LLC, Defendant.	REPLY IN SUPPORT OF PACIFIC NORTHWEST SOLAR, LLC'S REQUEST FOR ALJ CERTIFICATION

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I. INTRODUCTION

Pacific Northwest Solar, LLC ("PNW Solar") respectfully submits this Reply in Support of its Request for Certification requesting that Administrative Law Judge ("ALJ") Allan Arlow certify the ruling issued October 27, 2017 ("Ruling") in the above-captioned contested case proceeding before the Oregon Public Utility Commission ("OPUC"). Good cause and undue prejudice exists to certify the Ruling because PNW Solar will be forced to participate in a case in which the OPUC does not have personal jurisdiction over it or primary subject matter jurisdiction. If the Ruling is not certified and it later becomes apparent that the OPUC did not have jurisdiction, then PNW Solar would have incurred undue expense in defending itself against this claim. In addition, PNW Solar is unduly prejudiced and there is good cause because the Ruling made a finding of primary subject matter jurisdiction when there was no pending motion to dismiss for lack of subject matter jurisdiction and that issue was not briefed. The ALJ should certify the Ruling to the OPUC, and the OPUC should vacate the Ruling and dismiss PGE's complaint because the OPUC lacks jurisdiction over PNW Solar and also does not have primary subject matter jurisdiction.

PNW Solar urges the OPUC to consider the practical implications of interpreting the law to conclude that the OPUC has primary jurisdiction over post-execution PURPA contracts, as well as jurisdiction over any complaint by a utility regarding any good or service that the utility purchases which could "affect" the retail rates charged to end use consumers. If PGE's arguments regarding PURPA are accepted, then the OPUC would be required to interpret a myriad of potential standard contract disputes between utilities and QFs, including but not limited to representations and warranties, creditworthiness requirements (senior liens, step-in rights, escrow and letters of credit), billing disputes, defaults, remedies, termination, the

interpretation of force majeure provisions, indemnification, liability, insurance requirements, joint and several obligations, choice of law, successors and assigns, notices, the meaning of a material breach, etc. Similarly, if PGE's arguments that it has the ability to sue any entity that sells a utility goods or services, then it could find itself resolving a nearly unlimited number of contract disputes. Outside the context of contracts for the sale of power from a utility to end use consumer, the OPUC has not and should not now exercise jurisdiction over contract disputes that are more properly adjudicated by the courts.

II. BACKGROUND

The background of this dispute is detailed in PNW Solar's Request for Certification and will not be repeated here. The OPUC simply needs to be aware that PNW Solar moved to dismiss for lack of personal jurisdiction, which the ALJ denied. PNW Solar did *not* move to dismiss for lack of subject matter jurisdiction, but the ALJ still decided that the OPUC has primary subject matter jurisdiction. Because PNW Solar and PGE have now briefed the primary jurisdiction issue, and the OPUC should address the issue, and conclude that it does not have primary jurisdiction over a post-contract-execution dispute between PGE and PNW Solar.

III. ARGUMENT

The OPUC must have both personal and subject matter jurisdiction. The OPUC is not a tribunal that has general jurisdiction (like state circuit courts) but is a creature of statute; its jurisdiction is determined by its statutory grant of authority.

A. The OPUC Does Not Have Personal Jurisdiction Over PNW Solar

The OPUC does not have personal jurisdiction over PNW Solar under any of the grounds advanced by PGE or relied upon by the ALJ. First, Section 17 of the PPAs is not a grant of personal jurisdiction and was never intended to be. Even if it was, PGE cites to no legal

authority for the proposition that a company can agree to give an agency personal jurisdiction over it. The OPUC is created by statute and can only act where it is granted authority by statute to act. Second, because the OPUC's authority is also limited to areas where it is not pre-empted by PURPA, it does not have jurisdiction to regulate a qualifying facility in the same way that it regulates utilities. Third, there is no personal jurisdiction because the cost PGE pays for energy from PNW Solar does not "affect" PGE's utility rates. Even if it did, PNW Solar, as a qualifying facility, is exempt from state laws or regulations respecting the rates of electric utilities so the OPUC would be pre-empted from regulating PNW Solar in that manner. Last, PNW Solar does not consent to the OPUC's jurisdiction in this case by filing other complaints against PGE on an interconnection dispute, and PGE cites to no authority for the proposition that a company can consent to personal jurisdiction in one matter by filing a separate matter in the same tribunal.

1. PNW Solar Did Not Subject Itself to the OPUC's Jurisdiction

Section 17 of the PPAs is not a consent to grant the OPUC personal jurisdiction over PNW Solar for resolution of contract disputes. That section provides:

> This agreement is subject to the jurisdiction of those governmental agencies and courts having control over either party or this agreement. The public utility's compliance with the terms of this contract is conditioned on the qualifying facility submitting to the public utility and to the Public Utility Commission of Oregon, before the date of initial operation, certified copies of all local, state, and federal licenses, permits, and other approvals required by law.

As described in the Request for Certification, this section does not specifically call out the OPUC as the forum to resolve any disputes. It does not expressly grant the OPUC personal jurisdiction or waive objections to personal jurisdiction. There are numerous "governmental agencies" that have some measure of control over the parties to the agreement, and the history of this provision explains that the OPUC wanted to make sure that the contract would be subject to

the authority of governmental agencies and courts other than itself when it promulgated this language.

The language in Section 17 is identical to OAR 860-029-0020(2)(a), which was adopted in AR 114, Order No. 85-099. There are two sentences in the rule and Section 17 which cannot be read in isolation. The first states that the contract is subject to the jurisdiction of all agencies and courts having jurisdiction over the parties, and the second states that the qualifying facility must obtain permits and other approvals from those same governmental agencies. Read in proper context, the rule was not meant to designate the OPUC, or any other administrative agency, as decider of any future contract disputes.

Instead, Order No. 85-099 explains that the rule is intended to clarify that the utility is not obligated to purchase power, if any governmental agency or court with jurisdiction over the qualifying facility or utility orders the qualifying facility to halt operations. Specifically, the order explains:

> . . . the rule states the contract is subject to the jurisdiction of all governmental agencies and courts having control over the parties to the proceeding. *The Commissioner includes this language with the understanding that if a governmental agency or a court orders the QF to halt generation, the utility is no longer obligated to purchase power under the contract.*[1]

The remainder of the order clarifies that the qualifying facility is required to obtain all permits prior to operation and that the utility bears no obligation to verify the permits or determine which permits are required.

The order provides no other reason for why the Commissioner included this language,

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[1] In the Matter of the Adoption of a Rule Relating to Approval of Utility Purchases from Qualifying Facilities, Docket No. AR 114, Order No. 85-099, 2 (Feb., 12, 1985) (attached as Exhibit 1) (emphasis added).

and does not mention or discuss any requirement that the qualifying facility must litigate any contractual disputes before the OPUC. If the rule was meant to be a broad expansion of the OPUC's jurisdiction over executed contracts, then the Commissioner should have included that in his "understanding" of the rule's meaning.

The fact that the agreement is "subject to" governmental agencies and courts having control over either party or this agreement simply means that the utility is no longer obligated to purchase power, if the qualifying facility fails to obtain all permits from the applicable governmental agencies or if those approvals are later revoked and the qualifying facility is ordered to cease operations. Given that PURPA legally obligates a utility to purchase the qualifying facility's net output under terms and conditions in the power purchase agreement, it makes sense to relieve the utility of that obligation, if another governmental agency concludes that the qualifying facility does not have the approval to generate electricity.

In the end, Order No. 85-099 demonstrates that neither OAR 860-029-0020(2)(a) nor Section 17 was intended to require that a qualifying facility agree to submit to the OPUC's jurisdiction. The rule and Section 17 are not dispute resolution provisions, they are intended to require a qualifying facility to submit to the OPUC's jurisdiction, and do not mean that the OPUC has jurisdiction to resolve contract disputes.

Additionally, even if the OPUC reads the language as a consent to personal jurisdiction, PGE cites to no legal precedent that supports the claim that a company can consent to grant an *agency* personal jurisdiction over it. The case PGE cites stands for the proposition that personal

jurisdiction can be conferred on a *court* by consent,[2] but it does not stand for the proposition that personal jurisdiction can be conferred on an *agency* by consent. PGE does not dispute that the OPUC is an administrative agency created by statute with limited rather than broad discretion, that the OPUC must have both personal and subject matter jurisdiction, and that the OPUC's subject matter jurisdiction must be conferred by statute.[3] It is unclear why PGE believes that the OPUC then can require by rule that a company agree to give the OPUC personal jurisdiction over it without the OPUC having a statutory basis for doing so. Therefore, even if this language is interpreted to be a grant of personal jurisdiction, the OPUC still needs to find a statutory basis for requiring it, and none has been identified.

PGE also cites *PáTu Wind Farm, LLC v. Portland General Electric Co.*, for the proposition that personal jurisdiction can be consented to.[4, 5] That complaint was brought by a qualifying facility against a public utility. The OPUC has jurisdiction to hear complaints brought against utilities under ORS 756.500(1), but in this case the utility is bringing the complaint against a qualifying facility. The jurisdictional hook in *PáTu Wind Farm* was not the Oregon or

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2 Aguirre v. Albertson's, 201 Or App 31, 41 (2005) ("subject matter jurisdiction--unlike personal jurisdiction--cannot be conferred on the *court* by consent or estoppel") (emphasis added).

3 See PGE's Response to PNW Solar's Request for ALJ Certification ("PGE's Response to Certification") at 8.

4 PGE's Response to Certification at 6 n.22; PGE also cited *PáTu Wind Farm* in its Complaint. Complaint at 6.

5 PGE also incorrectly asserts that counsel for PNW Solar in this case was also counsel for PáTu Wind Farm and did not object in the *PáTu Wind Farm* case on that basis. Complaint at 9. Sanger Law's attorneys did not and do not represent PáTu Wind Farm. While counsel for PNW Solar are flattered that PGE would confuse them with the counsel for PáTu Wind Farm, if PGE had checked the service list for UM 1566, then PGE would be aware that different attorneys represent PáTu Wind Farm.

federal PURPA statute, and it was proper for the OPUC to resolve the issues in *PáTu Wind Farm*.

Other than *PáTu Wind Farm*, PGE cites *no* cases or orders for its conclusion that it is "well established" that the OPUC's "ongoing regulation and oversight of PURPA implementation" includes adjudication of post-contract-execution disputes between qualifying facilities and utilities, let alone any cases or orders that stand for the proposition that a qualifying facility can be forced to litigate its contract before the OPUC rather than in court. One case does not make a well established precedent. In contrast, as explained in PNW Solar's Request for Certification and below, Oregon courts have addressed contract disputes since nearly the passage of PURPA and *nearly every* jurisdiction that has addressed the issue has concluded that post-execution disputes belong in court rather than the state administrative agency implementing PURPA.

2. The OPUC Does Not Have Personal Jurisdiction Simply Because the Contract Performance in Question Is a PURPA Power Sale

The OPUC's authority to implement PURPA and ORS 758.535 also does not grant it personal jurisdiction over PNW Solar. Under ORS 758.500(1), the OPUC can hear complaints against any person whose business or activities are regulated by a statute the OPUC has jurisdiction to enforce or regulate. The OPUC does not have authority to regulate all aspects of PURPA implementation. Its authority is first limited to the authority granted to it by statute and second, limited to the areas in which it is not pre-empted by PURPA. Here, the statutes do not grant the OPUC the authority to regulate a qualifying facility's performance of its contracts, and even if the statutes can be read to grant it that authority, the OPUC would be pre-empted from

doing so because such regulation is akin to the utility-type regulation from which qualifying facilities are exempt.

PGE frames the regulated "activity" at issue in this case as "a sale of energy to a utility" and appears to argue that because the OPUC has the authority to establish rules regarding the terms of that sale, it must also have authority to regulate the performance of the contract.[6] The terms of the sale are not at issue here as those have already been established. The "activity" that is at issue here is PNW Solar's performance under the contract. The OPUC does not have authority under the statute to regulate the performance under PURPA contracts.

Specifically, the OPUC's statutory authority under ORS 758.535 includes the authority to 1) "establish minimum criteria that a cogeneration facility or small power production facility must meet to qualify as a qualifying facility," 2) establish "by rule" the "terms and conditions for the purchase of energy or energy and capacity from a qualifying facility," and 3) the rules must also "[e]stablish safety and operating requirements necessary to adequately protect all systems, facilities and equipment of the electric utility and qualifying facility." That section also requires that any rules be consistent with PURPA.

First, an agency's authority to promulgate rules is distinct from its authority to issue orders in contested cases.[7] As detailed in the Request for Certification, this statute is a grant of rulemaking authority upon the OPUC. The case currently before the OPUC is a contested case.[8]

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6 PGE's Response to Certification at 8.

7 Compare ORS 183.325-410 (Adoption of Rules) with ORS 183.411-471 (Contested Cases).

8 See Notice of Contested Case Rights and Procedures (attached to beginning of Complaint and Request for Dispute Resolution, UM 1894, filed Aug. 31, 2017) (last updated Oct. 2013).

ORS 758.535 does not grant the OPUC authority to hear contested case matters brought against a qualifying facility.

Second, nothing in this Oregon law grants the OPUC the authority to regulate a qualifying facility's performance of its contracts, which is the issue presented by this case. The OPUC, however, has authority to hear contested cases against PGE regarding the performance of its contracts because the OPUC has the "power and jurisdiction to supervise and regulate every public utility . . . in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction." This utility-type regulation is exactly the type of regulation from which PNW Solar is exempted from under PURPA. Under 18 CFR 292.602(c)(1), "[a]ny qualifying facility . . . shall be exempted . . . from State laws or regulations respecting: . . . (ii) The financial and organizational regulation of electric utilities."[9] Therefore, an attempt to subject PNW Solar to this utility-type regulation over its business, would be pre-empted by PURPA.

This situation is comparable to the first grant of OPUC authority in ORS 758.535 to establish minimum criteria for qualifying facilities. It is well-settled law that the state commissions do not have authority to make qualifying facility status determinations.[10] Therefore, even where there is an Oregon statutory grant of authority to the OPUC, if the OPUC acts inconsistent with PURPA, then the OPUC is pre-empted. In fact, Oregon law even provides

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[9] See also 16 USC §824a-3(e)(1).

[10] Indep. Energy Prod. Ass'n, Inc. v. Cal. Pub. Util. Comm'n, 36 F.3d 848, 858 (9th Cir. 1994) ("What the state may not do, however, is to intrude into the [FERC]'s exclusive jurisdiction to make QF status determinations by denying to certified QFs the full avoided cost rates to which they are entitled").

that the rules promulgated by the OPUC shall be consistent with PURPA. The situation in this case is no different.

Even if ORS 758.535 can be read to provide personal jurisdiction over a qualifying facility, that statutory grant of authority must also not be pre-empted by PURPA (or must be consistent with PURPA). As just discussed above, PURPA exempts qualifying facilities, like PNW Solar, from utility-type regulation. Therefore, PNW Solar cannot be called before the OPUC as a defendant in a contested case proceeding (as the OPUC would do with a utility over which it has general supervisory authority). This is especially true where the only grant of statutory authority is the OPUC's authority to promulgate rules, not the authority to decide contested cases.

3. The OPUC Does Not Have Jurisdiction Simply Because Power Sales Can Be Recovered as Prudently Incurred Costs in Rates

The OPUC also does not have personal jurisdiction under ORS 756.500(5) on the grounds that the cost of PNW Solar's power will affect PGE's rates, and even if it did, PNW Solar is exempt from any statute or regulation respecting utility rates.

A review of the plain language of ORS 756.500(5) explains that it only applies to the rates paid to a utility by a customer for the utility's services. ORS 756.500(5) specifically provides that:

> Notwithstanding subsection (1) of this section, any public utility or telecommunications utility may make complaint as to any matter affecting *its own rates or service* with like effect as though made by any other person, by filing an application, petition or complaint with the commission.[11]

[11] ORS 756.500(5) (emphasis added).

As explained in PNW Solar's Request for Certification, the OPUC's interpretation of its authority must be made with common sense. PGE's argument and the ALJ's finding that the price paid for power affects rates would mean that PGE could drag before the OPUC any entity selling any product to PGE that could be included in the utility's rates.

No case cited by PGE or the ALJ cite ORS 756.500(5) as a grant of personal jurisdiction over a seller of electricity or any other product to a utility. The *Roats Water System* court applied ORS 756.500(5) to allow a utility to sue a retail customer over a contract dispute regarding certain aspects of its retail payments that incorporated the utility's retail tariff.[12] PGE cites to no other examples where the OPUC has jurisdiction under this statute to hear complaints brought against entities that sell power to the utility.

Under 18 CFR 292.602(c)(1), "[a]ny qualifying facility . . . shall be exempted . . . from State laws or regulations respecting: (i) The rates of electric utilities."[13] Therefore, even if 756.500(5) would permit a suit against a company that sells power to a utility, it would be pre-empted by PURPA. PGE argues that PNW Solar would be subject to personal jurisdiction under this section because it would be "difficult to conceive of any activity more closely and substantially affecting a utility's rates for electricity than the costs and terms of electricity purchases."[14] PGE appears to misunderstand the plain meaning of the term "respecting," which is *with reference or regard to*. ORS 756.500(5) *references* utility rates. Therefore, because the

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12 Roats Water System, 225 Or. App. at 620 ("Petitioner Golfside Investments, LLC, seeks judicial review of a final order of the [OPUC], which granted respondent [Roats] complaint in part, and ordered petitioner to pay certain residential development charges (RCDs) in accordance with PUC-approved water service tariffs").

13 See also 16 USC §824a-3(e)(1).

14 PGE's Response to Certification at 10.

Oregon statute references utility rates, PURPA exempts the qualifying facility from that law and any regulations promulgated therefrom.

The *Freehold* case illustrates an example where the court applied this jurisdictional bar. In *Freehold*, avoided cost became lower than the avoided costs listed in the contract and the state commission sought to impose new avoided cost rates on that existing contract.[15] The Third Circuit found that an attempt by a state commission "to either modify the PPA or revoke [state commission] approval is 'utility-type' regulation--exactly the type of regulation from which [the QF] is immune . . . ."[16] Therefore, the state commission did not have jurisdiction to impose new avoided cost rates on an existing contract.[17]

The *Independent Energy Producers Association, Inc.* case also illustrated an example where a state commission allowed utilities to pay lower avoided cost prices to qualifying facilities under already executed contracts.[18] The difference with that case, however, is that the program allowed a utility to pay the lower cost if the utility determined that the qualifying facility no longer met the requirements to be qualified.[19] The Ninth Circuit found pre-emption, not in the PURPA section exempting qualifying facilities from utility-type regulation, but instead relied on PURPA's grant of exclusive jurisdiction to FERC to make qualifying facility status

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15 Freehold Cogeneration Assocs., v. Bd. of Regulatory Comm'rs of the State of N.J., 44 F.3d 1178, 1183 (3d Cir. 1995).

16 Id. at 1192.

17 Id. at 1194.

18 Indep. Energy Prod. Ass'n, Inc. v. Cal. Pub. Utils. Comm'n, 36 F.3d 848, 852 (9th Cir. 1994).

19 Id. at 852-53.

determinations.[20] Therefore, the court similarly concluded that the state commission did not have jurisdiction to change the avoided costs.[21]

This case is similar to both *Freehold* and *Independent Energy Producers Association, Inc.* PGE's motivation for refusing to honor PNW Solar's contractual rights is because avoided cost prices have decreased since the contracts were executed.[22] PGE is requesting that Section 4.3 of the contract be revised and limited to "upgrades and efficiency improvements to an existing facility," or immaterial pre-construction changes to nameplate capacity.[23] The language of Section 4.3 is plainly not limited to post-construction upgrades and efficiency improvements or immaterial pre-construction changes to nameplate capacity. Therefore, similar to *Freehold* and *Indep. Energy Prod. Ass'n, Inc.*, such a reconsideration and amendment of PNW Solar's executed contracts would deprive PNW Solar of the full avoided costs to which it is entitled under PURPA, to which PNW Solar has detrimentally relied upon in obtaining its financing, and would subject PNW Solar to the same type of utility ratemaking regulation from which it is exempt under PURPA.

4. PNW Solar's Did Not Concede OPUC Jurisdiction Over a Post-Execution Breach of Contract Dispute by Separately Filing Interconnection Complaints Against PGE

Last, PNW Solar does not consent to the OPUC's jurisdiction in this case by filing other complaints against PGE on an interconnection dispute, and PGE cites to no authority for the

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20 Id. at 859.

21 Id. at 858.

22 PGE's Response to Certification at 3-4 ("Importantly, since the date PNW Solar executed its PPA's, PGE's avoided cost prices have been updated twice, on June 7, 2016 and again on June 1, 2017, resulting in substantially lower prices. Thus, PNW Solar is requesting to maintain the right to *out-of-date* avoided cost prices. . .").

23 Id. at 4.

proposition that a company consents to personal jurisdiction in one matter by filing a separate matter in the same tribunal. Additionally, the interconnections complaints can be distinguished in important respects.

First, as described above, the OPUC has jurisdiction to hear complaints against utilities. PNW Solar's interconnection complaints are against PGE and filed under to the OPUC's authority to hear complaints against utilities on interconnection matters. The present case was filed by PGE against PNW Solar, so the OPUC must separately have jurisdiction over PNW Solar in this matter.

Second, the parties' interconnection dispute is not the same as the dispute in this matter. In its interconnection complaints, PNW Solar argues that PGE delayed its interconnection. A number of factors contributed to PGE's delays. Without agreeing to PGE's characterization, even if some delays were caused by a "revised nameplate capacity,"[24] that does not mean that these cases implicate the same issues. In fact, two of the five interconnection complaints filed by PNW Solar allege delays for projects not at issue in this case and for which there was never any purported change to nameplate capacity.[25] Even if PGE wins this case, there are still other issues in the interconnection complaints that could proceed, and it would not render the interconnection claims "moot."

Additionally, the interconnection complaints do not involve contract interpretation, and if they did, the OPUC has clearly detailed the process by which either party can petition the OPUC

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24 Id. at 17.

25 PNW Solar filed five interconnection complaints, two of which are projects not at issue in this case (UM 1902 and UM 1904-1907). A sixth interconnection complaint was filed by Butler Solar, LLC, which is not a party to the present action (UM 1903).

for enforcement of an interconnection contract.[26] First, the interconnection dispute is pre-contractual, and here is also a rule permitting either party to request that the OPUC arbitrate interconnection disputes.[27] While there is no specific rule requiring that pre-contractual interconnection disputes be brought the OPUC, there is a stronger case that those disputes must be resolved by the OPUC. There is no comparable rule or statute in the present case that provides the Commission with the authority to enforce a PURPA contract. Therefore, just because PNW Solar has filed some interconnection complaints dealing with some of the same projects as this litigation, that does not mean that PNW Solar has consented to the OPUC's jurisdiction in this proceeding.

The comparison of the interconnection rules illustrates why the Commission does not have jurisdiction over the enforcement of a PURPA contract dispute. The OPUC's interconnection rules contemplate that the OPUC will be involved prior to contract execution and provide rules for litigating an interconnection agreement. The OPUC's PURPA rules specifically allow for a QF to file a complaint against a utility and provide a process to litigate a dispute prior to contract execution.[28] There are no similar rules for the OPUC to have jurisdiction to litigate PURPA post-contract execution disputes.

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26 See OAR 860-082-0085("Complaints for Enforcement. This rule specifies the procedure for a public utility, an interconnection customer, or an applicant to file a complaint for the enforcement of an interconnection agreement").

27 See 860-082-0080 ("Arbitration of Disputes. An interconnecting public utility or an interconnection applicant may petition the Commission for arbitration of disputes arising during review of an application to interconnect a small generator facility or during negotiation of an interconnection agreement").

28 OAR 860-029-0100 (Resolution of Disputes for Proposed Negotiated Power Purchase Agreements)

B. The ALJ Should Not Have Issued a Ruling on Primary Subject Matter Jurisdiction but Since the ALJ Ruled on the Issue, and the Parties Have Briefed it, the OPUC Should Rule on it Now

The ALJ should certify the Ruling to the OPUC because the Ruling finds that the OPUC has primary subject matter jurisdiction when there was no pending Motion to Dismiss on those grounds. That issue was not properly before the ALJ. PNW Solar specifically noted in its Motion to Dismiss and in its Reply that it was not moving to dismiss based on subject matter jurisdiction.[29] The Ruling, however, concluded that the OPUC has primary subject matter jurisdiction.

Contrary to PGE's assertion, it is immaterial whether the Complaint raised the issue of subject matter jurisdiction or whether PNW Solar briefly mentioned it in a footnote or in response to PGE raising it in its Response to the Motion to Dismiss.[30] What's relevant is whether a motion was made on that issue. The defense of lack of subject matter jurisdiction can be raised at any time, and the tribunal may dismiss *sua sponte* if it finds that it does not have subject matter jurisdiction.[31] However, to find that it does have subject matter jurisdiction without a motion and briefing on the issue, goes beyond the ALJ's authority.

Additionally, it is possible to separate personal and subject matter jurisdiction. The ORCP provides that there can be motions to dismiss for both (and they do not have to be raised at the same time).[32] PGE cites to no OPUC procedural rule contrary to the ORCP in this respect or any rule that requires a party to bring a motion to dismiss for lack of subject matter

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[29] See PNW Solar's Motion to Dismiss at 5 n.8; see also PNW Solar's Reply to PGE Response to Motion to Dismiss at 1 n.1.

[30] PGE's Response to Certification at 11.

[31] See ORCP 21.

[32] ORCP 21A(1) (lack of subject matter jurisdiction); ORCP 21A(2) (lack of jurisdiction over the person).

jurisdiction at the same time as a motion to dismiss for lack of personal jurisdiction. That PGE must rely on the OPUC's jurisdiction over the subject matter to impose personal jurisdiction upon PNW Solar highlights the fact that personal jurisdiction is not readily apparent. Therefore, because a motion was only made on the grounds of lack of personal jurisdiction, the Ruling should be certified to the OPUC.

PNW Solar, however, wants to make clear that it is asking the OPUC to resolve the issue of primary jurisdiction now. The fact that the ALJ issued a ruling on an issue that was not briefed provides justification for the OPUC reviewing the issue now, but now that PNW Solar and PGE have fully briefed the issues of primary jurisdiction, the OPUC should address the primary jurisdiction argument.

C. The OPUC Does Not Have Primary Jurisdiction

The OPUC does not have primary jurisdiction because this case presents a matter of common law contract interpretation not within the OPUC's expertise, but an issue which a court is better-suited to decide. The doctrine of primary jurisdiction is invoked by judges to disclaim jurisdiction where an agency's specialized expertise makes it a preferable forum for resolving the issue, there is a need for uniform resolution of the issue, and where a judicial resolution will have an adverse impact on the agency's performance of its regulatory responsibilities.[33] As detailed in the Request for Certification, numerous courts all across the U.S. have found that the state utility commission's in their jurisdictions do not have primary jurisdiction to hear PURPA contract

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[33] Boise Cascade Corp. v. Board of Forestry, 325 Or 185, 191 (1997). Notably, PGE's Response fails to address or dispute that absent a statute on point, the doctrine of primary jurisdiction is a judge made doctrine in which the court determines whether or not to defer to the administrative agency. Id. at 191-92. Primary jurisdiction is not a tool by which an administrative agency can affirmatively claim jurisdiction.

disputes.[34] PGE cites to *no* contrary examples, and remarkably simply ignores and does not even attempt to distinguish the overwhelming and near unanimous case law rejecting its position in this case.

Instead, PGE asserts that because a utility's obligation to purchase qualifying facility output is created by statutes, regulations, and rules (and not governed by contract law), this dispute must interpret those authorities and thus is within the OPUC's expertise, and the OPUC has primary jurisdiction.[35] This argument falls flat on a number of points.

First, it fails to acknowledge that once the parties execute a contract, the utility and qualifying facility are bound by the terms of that agreement.[36] To state that the interpretation of an executed contract would not be governed by contract law is absurd. The *Snow Mountain* case was simply illustrating that a utility cannot avoid its PURPA obligation (imposed by statutes, regulations, and rules) to purchase qualifying facility power by refusing to enter into a contract.[37] This is because, prior to PURPA imposing this obligation, there were very few utilities willing to contract with independent power producers. *Snow Mountain* is distinguishable from the present

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34 Request for Certification, 24-27.

35 PGE's Response to Certification at 13.

36 See Or. Trail Elec. Consumers Coop. v. Co-Gen Co., 168 Or App 466, 484 (2000) (interpreting a PURPA contract, "we hold OTECC to the bargain its predecessor made and to the risk it and its predecessor took"); PacifiCorp v. Lakeview Power Co., 131 Or App 301, 304-05 (1994) (enforcing a contractual provision that a qualifying facility obtain financing by a specified deadline to avoid automatic termination of the contract); Water Power Co. v. PacifiCorp, 99 Or App 125, 131-32 (1989) (upholding a PURPA contract condition that the qualifying facility obtain a transmission agreement by a specified deadline, "the parties may agree on terms or conditions in a power purchase agreement that vary from what is set forth in the regulations and rules").

37 Snow Mt. Pine Co. v. Mauldin, 84 Or App 590, 599-600 (1986) ("To permit a utility to delay the date to be used to calculate the purchase price simply by refusing to purchase energy would expose qualifying facilities to risks that we believe Congress and the Oregon Legislature intended to prevent").

case in at least one material respect: here PGE and PNW Solar have executed contracts. If no contracts had been executed yet, then the OPUC may have primary jurisdiction.[38]

Second, PGE's argument fails to acknowledge the real dispute in this matter: the interpretation of Section 4.3. PGE argues that this case would require the interpretation of the OPUC's "own orders and rules, as well as the application of its federal and state PURPA policies."[39] This is right after pointing out (in its section on personal jurisdiction) that the OPUC is not precluded from "*interpreting*" the meaning of a contract, which is what is required in this case.[40] PGE attempts to have it both ways. Is this an issue of contract interpretation or an interpretation of orders, rules, and statutes? The crux of this dispute is the meaning of Section 4.3, a provision of a contract, which should be properly resolved before a court.

In applying the *Boise Cascade* factors, the OPUC does not have primary jurisdiction because resolution of this common law contractual dispute is not within the OPUC's particularized expertise. The likely arguments the parties will make in this case center on the wording and phrasing of the language in Section 4.3, maxims of construction, and other common law contract interpretation mechanisms. While the OPUC Commissioners and ALJs have legal training, the OPUC does not typically engage in this type of deliberation. Therefore, the OPUC does not have any specialized expertise in this area. Regardless of the merits of uniform resolution of the issue, each contract between utilities and qualifying facilities are a little bit different, and the specific terms of this specific contract will govern. Only if the plain language is unclear will any other intrinsic evidence become relevant. Last, judicial resolution will not

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38 See Request for Certification, 22-23 (discussing how the OPUC may have primary jurisdiction over the utility's obligation to enter into PURPA contracts).

39 PGE's Response to Certification at 13.

40 Id. at 11.

have an adverse impact on the agency's performance of its regulatory responsibilities because the OPUC's primary regulatory responsibility as it pertains to PURPA is to establish by rule the "terms and conditions for the purchase of energy or energy and capacity from a qualifying facility."[41] The court will not infringe on the OPUC's rulemaking authority by deciding this case and will also not infringe on the OPUC's authority to require that utilities enter into contracts with qualifying facilities as it did in the *Snow Mountain* case. Therefore, the OPUC does not have primary jurisdiction.

Finally, PGE disputes that there is no basis for PNW Solar's claim that the OPUC is biased against qualifying facilities. PGE misconstrues PNW Solar's argument. PNW Solar is not arguing that any Commissioner or the OPUC's itself is personally biased against qualifying facilities. Instead, PNW Solar merely points out that the OPUC's enabling statutes and its responsibilities are biased against qualifying facilities, and the OPUC statutory and constitutional obligations to protect investor owned utilities supports resolving the contract dispute in a neutral adjudicatory forum. There can be no dispute that the OPUC is responsible for ensuring that utilities have an opportunity to obtain returns commensurate with other similarly situated businesses and that the overall economic health of a utility benefits customers by allowing them to receive adequate service at fair, just and reasonable rates. In other words, the OPUC is required to look out for the interests of the utility, but not the independent power producer. Therefore, it would make no sense to require the OPUC (over the objection of the power supplier) to adjudicate all PGE's disputes with power suppliers (qualifying facility or otherwise).

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41 ORS 758.535.

D. The OPUC Also Does Not Have Exclusive Jurisdiction

The OPUC does not have exclusive jurisdiction, and, like primary jurisdiction, this issue is also not property before the ALJ or the OPUC because there was no motion to dismiss for lack of subject matter jurisdiction. For an agency to have exclusive jurisdiction over an issue, it must jump a higher bar than if it had primary jurisdiction. Exclusive jurisdiction is defined as jurisdiction "to the exclusion of all other tribunals."[42] A court may not hear a case if a statute provides that an agency has exclusive jurisdiction over that particular type of action.[43]

In this case, the OPUC does not have exclusive jurisdiction because no statute gives it exclusive authority to hear the case, and this case does not require interpretation of any statute the OPUC must implement prior to a court adjudicating the contract provision in dispute. In support of its argument that that the OPUC has exclusive jurisdiction over this matter, PGE cites to no statutory provision that specifically confers authority on the OPUC to issue a declaratory ruling on a term in a PURPA contract, or to resolve disputes over executed contracts. Instead, PGE argues that there is a "comprehensive regulatory scheme" that provides exclusive jurisdiction to the OPUC, despite that PURPA confers jurisdiction upon state and federal courts as well as FERC, and that the OPUC does not have personal jurisdiction over PNW Solar.

There is no "comprehensive regulatory scheme" that provides the OPUC with exclusive jurisdiction over post-execution PURPA contract disputes. Instead, PGE's arguments rest upon an argument that the OPUC's partial PURPA jurisdiction not only provides the OPUC with

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42 Boise Cascade Corp. v Board of Forestry, 325 Or 185, at 191 (1997) (citing Black's Law Dictionary, 564 (6th ed 1990)).

43 See Oregon Elec. Sign Assoc. v. Beaverton, 60 Or App 518, 520 (1982) (finding that statute provided Oregon Land Use Board of Appeals exclusive jurisdiction over "land use decisions").

jurisdiction over post-execution contract disputes brought by a utility against a QF (which it does not), but that this jurisdiction excludes all other courts or administrative agencies (which it also does not). PGE argues that a "comprehensive regulatory scheme" related to PURPA "suggests" that both the federal and state legislatures intended to assign the agency exclusive jurisdiction to decide those issues.[44]

The *Ahern* case involved the Public Employee Collective Bargaining Act ("PECBA"), the only law (that PNW Solar can find and PGE cites no others) in Oregon that grants an agency exclusive jurisdiction based on the "comprehensive regulatory scheme" theory. In that case, the plaintiff filed a tort action against a public employee union for intentional interference with economic relations alleging an unfair labor practice as an element of a common law tort claim.[45] The court declared, without explanation of what constitutes a comprehensive regulatory scheme, that the Public PECBA is a comprehensive regulatory scheme for resolving public employee labor disputes.[46] The court did discuss, however, that the *statute* specifically provided a process by which anyone who has been injured by an unfair labor practice can file a complaint before the Employment Relations Board ("ERB") and provided for judicial review of final ERB orders.[47] Therefore, even though the court relied on the PECBA being a "comprehensive regulatory scheme," the court still relied on the *statutory* provisions that specifically gave the agency authority to determine whether an unfair labor practice has been committed.[48]

Here, there is no statutory provision granting exclusive jurisdiction to the OPUC over

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44 PGE's Response to Certification at 14 (citing *Ahern v. Oregon Public Employees Union*, 329 Or 428, 434 (1999).
45 Ahern at 433.
46 Id. at 434.
47 Id.
48 Id. at 434-35.

PURPA contract disputes, and OPUC's regulatory scheme is not *comprehensive*. In fact, as illustrated above in the sections on personal jurisdiction, the OPUC's PURPA authority is significantly limited by FERC[49] and federal law.[50] Additionally, if we look to the statute as the court did in *Ahern*, we note that there is not mechanism for the OPUC to resolve PURPA contractual disputes or for judicial review of those disputes. Therefore, the OPUC does not have exclusive jurisdiction under the comprehensive regulatory scheme theory.

Additionally, PGE's reference to the *Wah Chang* case does not provide a useful comparison, as that case concerned a regulated utility's *retail sale* of electricity to a customer subject to the OPUC's ratemaking authority.[51] Unlike a long-term PURPA sale, the OPUC has ongoing rate-making authority to change the rates or terms of a long-term retail service agreement between a customer and regulated electric utility in Oregon.[52] *Wah Chang* is inapplicable here because PNW Solar is exempt from utility-type rate regulations.[53] The rates or prices PNW Solar charges to PGE are only subject to regulation prior to contract execution, and cannot be altered by the OPUC after contract execution. This means that PNW Solar's PPA for the sale of electricity to PGE is not subject to the same ongoing OPUC oversight as a contract

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[49] Indep. Energy Prod. Ass'n, 36 F.3d at 853 (FERC has "exclusive jurisdiction over QF status determinations").

[50] Freehold, 44 F.3d at 1192-94 (state commissions are pre-empted from modifying avoided cost rates after contract execution as that would be a utility-type regulation from which qualifying facilities are exempt under PURPA).

[51] Wah Chang v. PacifiCorp, Docket No. UM 1002, Order No. 09-343 at 10 (Sept. 2, 2009) ("we clarify our existing jurisdiction to resolve this dispute over the rates charged by a regulated utility to a retail customer").

[52] See American Can Co. v. Davis, 28 Or App 207, 222 (1977) (holding the OPUC has duty to review and if necessary revise rates in special contract for *retail* electric services).

[53] See supra, note 51.

entered into by PGE to sell electricity to an end-use consumer. Therefore, the OPUC does not have exclusive jurisdiction over this issue.

E. The ALJ's Order Does Not Preserve PNW Solar's Right to a Jury

PGE argues that the ALJ's order preserves PNW Solar's right to prosecute its Multnomah County Circuit Court case and its right to a jury; however, that arguments ignores PGE's goal in filing and prosecuting the present action, which is to have this issue resolved by the OPUC. When PNW Solar indicated its intent to file a case in court, PGE acted expeditiously to file the present action, attempting to select the forum it wished to resolve the issue. A final order from the OPUC is appealable to the Oregon Court of Appeals, and PNW Solar would not be entitled to a jury in that forum either.

Further, this case does not represent a case of "statutory entitlements,"[54] but is a common law contract claim which existed at the time the Oregon Constitution was adopted. The case PGE cites to concerned the "resolution of a premium audit dispute under a statutory procedure that was established by the legislature in 1987."[55] That case can be distinguished from the present matter in that, here, there is no "statutory procedure" for resolution of a PURPA contract dispute. As discussed above and detailed in the Request for Certification, the Oregon courts have resolved PURPA contract disputes in the same manner as other contract disputes. If there were a statutory procedure, the courts would have deferred to that procedure. Therefore, PNW Solar does have a constitutional right to a jury trial here, and resolution before the OPUC would violate that right.

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[54] PGE Response to Certification Request at 16.

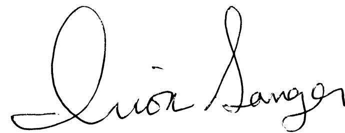
[55] Salem Decorating Center, Inc. v. Nat'l Council on Comp. Ins., 116 Or App 166, 170 (1992).

IV. CONCLUSION

Good cause exists to certify the Ruling to the OPUC because PNW Solar will experience undue prejudice by being required to participate in a case where the OPUC does not have personal jurisdiction over it and because the Ruling was issued on grounds not properly before the ALJ. In the end, the OPUC should vacate the Ruling and dismiss PGE's Complaint and Request for Dispute Resolution because the OPUC does not have personal jurisdiction over PNW Solar or primary subject matter jurisdiction.

Dated this 12th day of December, 2017.

Respectfully submitted,



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Of Attorneys for Pacific Northwest Solar, LLC

EXHIBIT 1

ORDER NO. 85-099

ENTERED FEBRUARY 12 1985

BEFORE THE PUBLIC UTILITY COMMISSIONER

OF OREGON

AR 114

In the Matter of the Adoption of a Rule Relating to Approval of Utility Purchases from Qualifying Facilities.	))))	ORDER

In this order, the Public Utility Commissioner of Oregon adopts an administrative rule relating to utility purchases of power from Qualifying Facilities (QF) under the Public Utility Regulatory Policies Act of 1978.

Public Participation

A hearing was held in this matter on October 24, 1984, in Salem, Oregon. In addition, public meetings on this rule were held in conjunction with hearings in AR 112 in Medford, Oregon, on September 11, 1984; in Bend, Oregon, on September 12, 1984; in Baker, Oregon, on September 13, 1984; in Portland, Oregon, on September 19, 1984; and in Salem, Oregon, on September 20, 1984.

The Commissioner received written statements from fourteen parties, including utilities, small power producers, industry associations, environmental groups, local government associations, state agencies, and local units of governments.

Purpose of the Rule

The purpose of the rule is to insure that prior to the date of commercial operation, a qualifying facility can demonstrate that it has complied with all applicable local, state and federal statutes, rules and regulations governing its operations. The Commissioner is concerned that all utility agreements for the purchase of power from a QF require that the initial deliveries are made after the QF submits approvals required by governmental agencies.

The rule, however, must not place undue and unwarranted burdens on the utility shareholders and ratepayers. The Commissioner does not intend to place on the utility entering into a contract with a QF the obligation to

"police" the terms of the certificate, permit or other approval required by governmental agencies.

Substantive Requirements

In this rule, the Commissioner requires all power purchase contracts between utilities and QFs to include a clause which makes the contract conditional on the QF submitting to the utility and the Commissioner, prior to the date of commercial operation of the facility, copies of all permits, certificates, and other approvals required by local, state, and federal law.

The rule makes clear, however, the utility bears no obligation to verify that the governmental approvals have been properly obtained, or that the project is maintained according to the terms of the approvals. In addition, the utility is under no obligation to determine which approvals a QF must obtain.

In addition, the rule states the contract is subject to the jurisdiction of all governmental agencies and courts having control over the parties to the proceeding. The Commissioner includes this language with the understanding that if a governmental agency or a court orders the QF to halt generation, the utility is no longer obligated to purchase power under the contract.

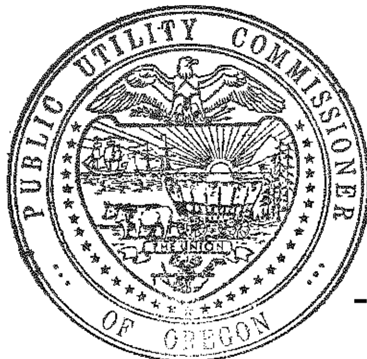
Adoption of this rule should not be construed to require QFs and utilities to reopen contracts now in effect. The rule shall only be applicable to contracts signed after the effective date of this order.

ORDER

1. Rule 860-29-020, as set forth in the Appendix, is adopted and shall be filed with the Secretary of State.

2. This rule shall be applicable to contracts signed after the effective date of this order.

Made, entered, and effective February 12, 1985.



GENE MAUDLIN
Public Utility Commissioner

0164A

APPENDIX

Rule 860-29-020 is amended to read:

Obligations of Qualifying Facilities to the Electric Utility

860-29-020 The conditions listed in this rule shall apply to all qualifying facilities that sell electricity to a public utility under this Division:

(1) The owner or operator of a qualifying facility purchasing or selling electricity pursuant to these rules shall execute a written agreement with the public utility. The utility shall file a true copy or summary of the terms of the executed agreement with the Commissioner within 30 days of the execution of the agreement. If a summary is filed, the summary shall identify the quantity and quality of the power and the price being paid. A true copy of the executed contract shall be available upon request for Commissioner staff review.

(2)(a) All contracts between a qualifying facility and a utility for energy, or energy and capacity shall include language which substantially conforms to the following:

This agreement is subject to the jurisdiction of those governmental agencies and courts having

control over either party or this agreement. The utility's compliance with the terms of this contract is conditioned on the qualifying facility submitting to the utility and to the Public Utility Commissioner of Oregon, prior to the date of initial operation, certified copies of all local, state and federal licenses, permits, and other approvals required by law.

(b) Under paragraph (a) of this subsection, the utility shall bear no obligation to identify which approvals are required by law, or to verify that the approvals were properly obtained or that the project is maintained pursuant to the terms of the approvals.

[(2)] (3) In order to ensure system safety and reliability of interconnected operations, all interconnected qualifying facilities shall be constructed and operated in accordance with all applicable federal, state, and local laws and regulations.

[(3)] (4) The qualifying facility shall furnish, install, operate, and maintain in good order and repair and without cost to the public utility switching equipment,

relays, locks and seals, breakers, automatic synchronizers, and other control and protective apparatus as shown by the utility to be reasonably necessary for the operation of the qualifying facility in parallel with the public utility's system, or may contract for the public utility to do so at the expense of the qualifying facility. Delivery shall be at a voltage, phase, power factor, and frequency as specified by the public utility.

[(4)] (5) Switching equipment capable of isolating the qualifying facility from the public utility's system shall be accessible to the utility at all times.

[(5)] (6) At its option, the public utility may choose to operate the switching equipment described in section (4) of this rule if, in the sole opinion of the utility, continued operation of the qualifying facility in connection with the utility's system may create or contribute to a system emergency. Such a decision by the utility is subject to the Commissioner's verification pursuant to OAR 860-29-070. The utility shall endeavor to minimize any adverse effects on the qualifying facility of the operation of the switching equipment.

[(6)] (7) Any agreement between a qualifying facility and a public utility shall provide for the degree to which the qualifying facility will assume responsibility for the safe operation of the interconnection facilities.

[(7)] (8) At its option, the public utility may require a qualifying facility to report periodically the amount of deliveries and scheduled deliveries to the utility, as shown to be reasonably necessary for the utility's system operations and reporting.

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