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December 5, 2017

VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
P.O. Box 1088
Salem, Oregon 97308-1088

Re: Docket UM 1894: Portland General Electric Company's Response to Pacific Northwest Solar LLC's Request for ALJ Certification

Dear Filing Center:

Attached for filing in the above-captioned docket is a copy of Portland General Electric Company's Response to Pacific Northwest Solar, LLC's Request for ALJ Certification.

Please contact this office with any questions.

Very truly yours,

A handwritten signature in blue ink that reads "Wendy McIndoo". The signature is written in a cursive, flowing style.

Wendy McIndoo
Office Manager

Attachment

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

Portland General Electric Company,
Complainant,

v.

Pacific Northwest Solar, LLC,
Respondent.

UM 1894

**PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE TO PACIFIC
NORTHWEST SOLAR, LLC'S REQUEST FOR ALJ CERTIFICATION**

December 5, 2017

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	3
III.	DISCUSSION.....	6
	A. The ALJ Properly Concluded That the Commission Has Personal Jurisdiction Over PNW Solar.....	6
	1. PNW Solar has explicitly subjected itself to the Commission’s jurisdiction under the terms of the PPAs.	6
	2. The Commission has personal jurisdiction because PNW Solar’s sale of energy as a QF is regulated by the Commission.....	8
	3. The Commission also has personal jurisdiction because PNW Solar’s price for selling electricity will affect PGE’s rates.	9
	B. The Commission Has Subject Matter Jurisdiction Over This Dispute.....	11
	1. The ALJ properly concluded that the Commission has primary jurisdiction to resolve this dispute.	13
	2. The Commission also has exclusive jurisdiction to resolve this dispute.....	14
	C. The ALJ’s Order Preserves the Parties’ Right to a Jury Trial	15
	D. PNW Solar Separately Conceded Commission Jurisdiction Over This Dispute by Filing Six Complaints Against PGE Regarding the Same Projects.....	17
IV.	CONCLUSION.....	18

I. INTRODUCTION

1 On August 31, 2017, Portland General Electric Company (PGE) filed a Complaint and
2 Request for Dispute Resolution (Complaint), asking the Public Utility Commission of Oregon
3 (Commission) to resolve a disagreement that has arisen between itself and Pacific Northwest
4 Solar (PNW Solar). PNW Solar is a developer of several qualifying facilities (QFs) with whom
5 PGE has executed standard power purchase agreements (Standard PPAs) pursuant to the Public
6 Utilities Regulatory Policies Act (PURPA).¹ Specifically, PGE has asked the Commission
7 whether PGE must accommodate PNW Solar’s request to make material changes to its projects’
8 nameplate capacities reflected in its executed PPAs, while retaining the right to now out-of-date
9 avoided cost prices. This is a straightforward legal issue requiring the Commission to interpret
10 and apply its own rules and orders, as well as state and federal PURPA policies that are
11 implemented through utilities’ Standard PPAs.

12 PNW Solar initially moved to dismiss PGE’s Complaint, arguing that the Commission
13 does not have jurisdiction over the dispute because it lacks personal jurisdiction over PNW
14 Solar.² The presiding Administrative Law Judge (ALJ) denied PNW Solar’s Motion, concluding
15 that the Commission “has both the authority and the primary jurisdiction over the parties and
16 subject matter to resolve this dispute.”³

17 PNW Solar now seeks review of this decision from the Commission.⁴ PNW Solar argues
18 that the ALJ’s clear and fully-reasoned decision is inadequate because “it does not specifically
19 address PNW Solar’s main argument . . . that the [Commission] lacks personal jurisdiction over
20 PNW Solar,” and because it reaches conclusions regarding both personal and subject matter

¹ *Portland Gen. Elec. Co. v. Pac. Nw. Solar, LLC*, UM 1894, Complaint and Request for Dispute Resolution (Aug. 31, 2017) (PGE’s Complaint).

² Docket No. UM 1894, PNW Solar’s Motion to Dismiss at 1 (Sept. 19, 2017) (PNW Solar’s MTD).

³ Docket No. UM 1894, Order Denying Motion to Dismiss at 2 (Oct. 27, 2017) (Order Denying MTD).

⁴ Docket No. UM 1894, Request for ALJ Certification by Pacific Northwest Solar, LLC (Nov. 13, 2017) (Request for Cert.).

1 jurisdiction.⁵ PNW Solar also belatedly raises an unpersuasive claim concerning PNW Solar's
2 right to a jury trial in this case.

3 PNW Solar's Request for Certification is without basis and should be rejected.
4 Certification to the Commission is appropriate where (a) the ruling may result in substantial
5 detriment to the public interest or undue prejudice to a party; (b) the ruling denies or terminates a
6 person's participation; or (c) other good cause exists.⁶ PNW Solar fails to meet any of these
7 thresholds for the following reasons: **First**, the ALJ clearly addresses PNW Solar's **personal**
8 **jurisdiction** argument and properly finds that the Commission has jurisdiction over the parties
9 both because (1) PNW Solar explicitly subjected itself to Commission jurisdiction under the
10 terms of the PPAs; and (2) the price for a utility's purchase of energy from a QF is a matter
11 affecting that utility's rates, providing for personal jurisdiction under ORS 756.500(5). **Second**,
12 the ALJ's decision properly concluded that the Commission has **subject matter jurisdiction** as a
13 necessary predicate finding to personal jurisdiction. The Commission has primary (if not
14 exclusive) subject matter jurisdiction to resolve this dispute under its Complaint statute for no
15 less than three separate bases: (1) the Commission has jurisdiction over the terms and conditions
16 in a Standard PPA pursuant to ORS 758.535; (2) PNW Solar is engaged in the sale of electricity
17 to a public utility; and (3) the dispute concerns a "matter affecting [PGE's] rates."⁷ **Third**, the
18 Commission's exercise of jurisdiction does not violate PNW Solar's constitutional right to a jury
19 trial because this is not a simple contract case that requires a jury trial; and in any event, the
20 Multnomah County Circuit Court, in which PNW Solar has pending actions, will decide the
21 deference to be accorded to the Commission's decision in this docket and whether a jury trial is
22 warranted. **Finally**, PNW Solar has provided a separate basis for the Commission's jurisdiction
23 by filing six interconnection complaints that implicate the central issue in this case.

⁵ Request for Cert. at 3.

⁶ OAR 860-001-0110(2).

⁷ ORS 756.500(1), (5).

1 The Commission should deny PNW Solar’s Request for Certification and proceed to the
2 merits of the case: whether Section 4.3—including in the Standard PPA at the Commission’s
3 direction and to implement the Commission’s state and federal PURPA policies—allows PNW
4 Solar to materially revise the amount of generation PGE is required to purchase under its
5 executed PPAs, while maintaining now out-of-date avoided cost prices. If the Commission
6 determines that certification is appropriate, it should affirm the ALJ’s ruling and deny PNW
7 Solar’s motion to dismiss.

II. BACKGROUND

8 In the first half of 2016, PNW Solar executed the six Standard PPAs at issue in this
9 complaint.⁸ These PPAs include avoided cost pricing as approved by the Commission on August
10 25, 2015, with initial delivery dates set for November 1, 2017. More than a year after executing
11 the six Standard PPAs, between May and June of 2017, PNW Solar contacted PGE and stated
12 that it planned to materially revise the nameplate capacity ratings of four of the six QFs, as
13 reflected in the table below. Together, these changes would result in an overall increase of 4.5
14 MWac.

QF Project	Original PPA Size	Requested Size	Change
Butler	4 MWac	10 MWac	+6 MWac
Duus	10 MWac	10 Mwac	none
Firwood	10 MWac	10 MWac	none
Starlight	4 MWac	2.2 MWac	-1.8 MWac
Stringtown	4 MWac	2.3 MWac	-1.7 MWac
Amity	4 MWac	6 MWac	+2 MWac

15 Importantly, since the date PNW Solar executed its PPAs, PGE’s avoided cost prices have been
16 updated twice, on June 7, 2016, and again on June 1, 2017, resulting in substantially lower rates.

⁸ See *In the Matter of Portland General Electric Company Information Filing of Qualifying Facility Contracts or Summaries per OAR 860-028-0020(1)*, Docket No. RE 143,

1 Thus, PNW Solar is requesting to maintain the right to out-of-date avoided cost prices while
2 materially modifying its agreed-upon production capacities.

3 To justify its request, PNW Solar asserted that Section 4.3 of the Standard PPAs provides
4 for material revision of projects' sizes, even pre-construction. Section 4.3 reads:

5 Upon completion of construction of the Facility, Seller shall provide PGE an As-
6 built Supplement to specify the actual Facility as built. Seller shall not increase
7 the Nameplate Capacity Rating above that specified in Exhibit A or increase the
8 ability of the Facility to deliver Net Output in quantities in excess of the Net
9 Dependable Capacity, or the Maximum Net Output as described in Section 3.1.11
10 above, through any means including, but not limited to, replacement,
11 modification, or addition of existing equipment, except with prior written notice
12 to PGE. In the event Seller increases the Nameplate Capacity Rating of the
13 Facility to no more than 10,000 kW pursuant to this section, PGE shall pay the
14 Contract Price for the additional delivered Net Output. In the event Seller
15 increases the Nameplate Capacity Rating to greater than 10,000 kW, then Seller
16 shall be required to enter into a new power purchase agreement for all delivered
17 Net Output proportionally related to the increase of Nameplate Capacity above
18 10,000 kW.⁹

19 PGE responded to PNW Solar by letter on July 21, 2017, correcting PNW Solar's interpretation
20 of Section 4.3. Specifically, PGE explained that Section 4.3 permits upgrades and efficiency
21 improvements to an existing facility, and does not allow a QF to materially revise its nameplate
22 capacity pre-construction, while retaining the right to out-of-date avoided cost prices.¹⁰ This
23 understanding is consistent with the Commission's orders and rules implementing state and
24 federal PURPA policies, and particularly with Commission Order No. 06-538, which directed
25 the adoption of revised Section 4.3.¹¹

26 On August 28, 2017, counsel for PNW Solar sent a demand letter stating that, if PGE did
27 not accept the proposed nameplate capacity changes by September 1, 2017, then PNW Solar
28 would file a complaint in Circuit Court.¹² PGE has filed this Complaint with the Commission,

⁹ PGE's Complaint, Exhibit B.

¹⁰ PGE's Complaint, Exhibit C.

¹¹ *In the Matter of the Pub. Util. Comm'n of Or. Staff's Investigation Relating to Elec. Util. Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 06-538 at 37-38 (Sept. 20, 2006).

¹² PGE's Complaint, Exhibit D.

1 seeking the Commission’s clarification of Section 4.3 in light of the Commission’s own orders
2 and rules. PNW Solar then filed a Motion to Dismiss, which the ALJ denied.

3 The ALJ’s decision denying PNW Solar’s motion to dismiss rests on three distinct bases:
4 (1) the Commission has authority “to regulate the terms and conditions of PPAs pursuant to ORS
5 758.535,” and “[t]he terms and conditions of PGE’s PPA with PNW [Solar] are a direct result of
6 the exercise of that authority”;¹³ (2) PNW Solar “subjected itself to Commission jurisdiction by
7 executing the PPA”;¹⁴ and (3) the costs associated with purchasing energy from a QF is a matter
8 “affecting [a utility’s] own rates or service,” giving rise to personal jurisdiction under ORS
9 756.500(5).¹⁵

10 In the meantime, PNW Solar has proceeded to file its complaint with the Circuit Court,
11 seeking more than \$11 million in damages, costs, and attorney fees.¹⁶ PNW Solar’s complaint in
12 Circuit Court is premised on the same underlying dispute concerning the meaning of Section 4.3;
13 while also seeking relief based on related statutory and common law bases, the crux of the
14 dispute is identical. PGE has filed a Motion to Dismiss the case or, in the alternative, to stay or
15 abate the Circuit Court proceeding to allow the Commission to apply its specialized expertise
16 and expeditiously resolve the parties’ dispute.¹⁷

¹³ Order Denying MTD at 2.

¹⁴ Order Denying MTD at 2.

¹⁵ Order Denying MTD at 3.

¹⁶ *Pac. Nw. Solar, LLC v. Portland Gen. Elec. Co.*, Case No. 17CV38020, Complaint (Sept. 6, 2017).

¹⁷ Case No. 17CV38020, Motion to Dismiss (Oct. 6, 2017).

III. DISCUSSION

1 **A. The ALJ Properly Concluded That the Commission Has Personal Jurisdiction Over**
2 **PNW Solar.**

3 **1. PNW Solar has explicitly subjected itself to the Commission’s jurisdiction under**
4 **the terms of the PPAs.**

5 As the ALJ properly concluded, PNW Solar has explicitly subjected itself to the
6 Commission’s jurisdiction. Each of the PPAs signed by PNW Solar contains the same
7 provision—Section 17—stating: “This Agreement is subject to the jurisdiction of those
8 governmental agencies having control over *either Party*[.]”¹⁸ Because both parties—and
9 unquestionably PGE as a regulated utility—is subject to Commission jurisdiction, so too is the
10 parties’ agreement. However, PNW Solar argues that Section 17 does not support the
11 Commission’s exercise of personal jurisdiction because (1) “an agency’s jurisdiction may not be
12 conferred by stipulation of the parties,”¹⁹ (2) “it would be . . . a violation of PURPA for the
13 [Commission] to require a QF to agree” to the Commission’s jurisdiction “simply to obtain the
14 benefits of a standard contract,”²⁰ and (3) the Commission’s exercise of personal jurisdiction is
15 so “radical and onerous” that such an implication “should have been discussed in the
16 proceedings” that gave rise to the Standard PPA or “should have been more clearly worded.”²¹
17 All of these arguments fail.

18 First, it is indisputable that a party can voluntarily submit to jurisdiction over the
19 person.²² The single case that PNW Solar cites to the contrary, *Diack v. City of Portland*,²³

¹⁸ See PGE’s Complaint, Exhibit B at 17 (Standard PPA) (emphasis added).

¹⁹ Request for Cert. at 5.

²⁰ Request for Cert. at 8.

²¹ Request for Cert. at 7.

²² *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). Indeed, in *PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, this Commission exercised jurisdiction over a QF in a dispute concerning an executed PPA. Docket No. UM 1566, Order No. 12-316 at 5 (Aug. 21, 2012). If PNW Solar’s argument in this case is correct, then the Commission should have been unable to exercise personal jurisdiction over PáTu. Certainly, counsel for PáTu—also counsel for PNW Solar—did not object on that basis.

²³ 306 Or. 287 (1988).

1 concerned subject matter jurisdiction, not personal jurisdiction. While the court said that
2 “jurisdiction cannot be conferred by stipulation of the parties,”²⁴ the court was addressing the
3 Water Resources Commission’s subject matter jurisdiction over an application for the
4 appropriation of water, and did not purport to address personal jurisdiction. In context, it is clear
5 that the jurisdiction at issue was subject matter jurisdiction and not personal jurisdiction. Indeed,
6 PNW appears to recognize this distinction in its attempts to preserve its subject matter
7 jurisdiction argument, noting that subject matter jurisdiction—as opposed to personal
8 jurisdiction—cannot be waived in a contested case.²⁵

9 Second, PNW Solar fails to support its assertion that Commission jurisdiction over the
10 terms of and parties to a Standard PPA somehow violates PURPA. On the contrary, PNW Solar
11 acknowledges the Commission’s responsibility “to facilitate and direct” a QF’s sale of energy to
12 purchasing utilities.²⁶ Thus, far from precluding state commission jurisdiction, PURPA
13 *authorizes* the Commission to regulate QFs’ sale of energy to utilities—the activity at issue in
14 this dispute.²⁷

15 Third, PNW Solar also fails to offer any authority for its claim that Commission
16 jurisdiction would be so “radical and onerous” that the implications of Section 17’s waiver must
17 have been discussed more explicitly during Commission proceedings. The Commission’s
18 ongoing regulation and oversight of PURPA implementation is well established, eminently
19 predictable, and in need of no discussion. Indeed, PNW Solar’s position that the Commission’s
20 jurisdiction over the sale of energy from a QF to a utility should evaporate the moment the
21 parties sign a PPA is itself a significant departure that likely would have been discussed during
22 the Commission proceedings.

²⁴ *Id.* at 292.

²⁵ PNW Solar’s MTD at 11 n.26.

²⁶ Request for Cert. at 8.

²⁷ PURPA sec. 210(h).

1 In sum, personal jurisdiction—unlike subject matter jurisdiction—can be conferred by
2 agreement, and PNW Solar stipulated to the Commission’s jurisdiction. And PNW Solar’s
3 argument that it failed to understand what it signed without more extensive discussion by the
4 Commission lacks legal force. As a result, PNW Solar subjected itself to the Commission’s
5 personal jurisdiction by signing the Standard PPA.

6 **2. The Commission has personal jurisdiction because PNW Solar’s sale of energy**
7 **as a QF is regulated by the Commission.**

8 The Commission has jurisdiction to hear complaints “against any person whose business
9 or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or
10 regulation of which is conferred upon the commission.”²⁸ In other words, *jurisdiction is*
11 *appropriate where the activities of a private entity—not just the entity itself—are regulated by*
12 *the Commission.*²⁹ Here, PNW Solar is a QF engaging in the sale of energy to a utility—an
13 activity closely regulated by the Commission under PURPA and ORS 758.535. While ORS
14 756.500 does not define “business or activities,” the common definition of “activity” is “natural
15 or normal function or operation,” and the common definition of “business” is “the buying and
16 selling of commodities and services; commerce; trade.”³⁰

17 Here, PNW Solar is a QF selling electric power to a public utility—an activity is that is
18 closely regulated through PURPA and ORS 758.535.³¹ The Commission has adopted
19 comprehensive policies dictating the terms and conditions for the sale of QFs’ energy to

²⁸ ORS 756.500(1).

²⁹ Because personal jurisdiction is tied to an entity’s activities, whether or not the Commission has personal jurisdiction over an entity is *inextricably linked to whether or not the Commission has subject matter jurisdiction over the entity’s activities*. To the extent that an entity’s activities are subject to the Commission’s regulation and jurisdiction, that entity is subject to the Commission’s personal jurisdiction under ORS 756.500(1).

³⁰ *Webster’s Third New Int’l Dictionary* 22, 189 (3rd ed. 1997) (further defining “activity” as “an occupation, pursuit, or recreation in which a person is active,” among other less relevant meanings).

³¹ PURPA requires the Commission to set prices for the purchase of electricity from QFs, not to exceed the utility’s avoided cost rate. And ORS 758.535 specifically requires the Commission to set “[t]he terms and conditions for the purchase of energy” from QFs. ORS 758.535(2).

1 utilities.³² Therefore, *PNW Solar’s efforts to sell energy to PGE are activities “regulated by . . .*
2 *statutes, . . . regulation of which is conferred upon the commission.”*³³

3 PNW Solar counters by asserting that its “business is not regulated” because it is
4 “specifically exempt from *rate* regulation.”³⁴ PNW Solar’s reliance on its exclusion from rate
5 regulation is perplexing, as exemption from the Commission’s rate-setting function is not an
6 overarching shield from regulation of any kind.³⁵ Thus, the Commission retains jurisdiction over
7 entities whose business or activities are otherwise regulated by the Commission even if such
8 regulation does not extend to rate regulation.³⁶

9 **3. The Commission also has personal jurisdiction because PNW Solar’s price for**
10 **selling electricity will affect PGE’s rates.**

11 ORS 756.500(5) provides an additional basis for Commission jurisdiction. That section
12 grants the Commission jurisdiction to hear complaints from “any public utility” concerning “any
13 matter affecting [the utility’s] own rates or service[.]”³⁷ PNW Solar argues that the
14 Commission’s jurisdiction under this section is confined to the rates charged to retail
15 customers.³⁸ This interpretation would effectively rewrite the statute to exclude the word
16 “affecting.” To “affect” means “to act upon . . . to produce a *material* influence upon or
17 alteration in.”³⁹ Thus, by the statute’s plain terms, the Commission’s jurisdiction extends beyond
18 mere rates, to matters “affecting” rates. And because avoided cost prices paid by PGE for QF

³² See, e.g., *In re Pub. Utility Comm. of Or.*, Docket No. UM 1129, Order No. 05-584 at 39 (May 13, 2005) (“[W]e establish standard contract rates, terms, and conditions[.]”).

³³ ORS 756.500(1).

³⁴ Request for Cert. at 4-5 (emphasis added).

³⁵ For instance, the Commission has jurisdiction over electric cooperatives’ service territories, even though it does not have authority to set these entities’ rates. ORS 758.455 (providing for Commission review of contracts for allocation of service territory).

³⁶ ORS 756.500. Similarly, the Commission exercises safety oversight over public utility districts, even though it does not set those districts’ rates. ORS 267.230(1).

³⁷ ORS 756.500(5).

³⁸ Request for Cert. at 8-9.

³⁹ *Ass’n of Unit Owners of Bridgeview Condos. v. Dunning*, 187 Or App 595, 611 (2003) (quoting *Webster’s Third New Int’l Dictionary* 1394 (unabridged ed 1993)) (emphasis added).

1 generation flow directly into PGE’s rates through power cost annual update tariff and power cost
2 adjustment mechanism, this is a matter directly and substantially affecting PGE’s rates.⁴⁰
3 ***Indeed, it is difficult to conceive of any activity more closely and substantially affecting a***
4 ***utility’s rates for electricity sales than the costs and terms of electricity purchases.***

5 As an initial matter, PNW Solar appears to misunderstand the very nature of the
6 legislature’s jurisdictional grant by arguing that “it would be inappropriate for the [Commission]
7 to *expand* its jurisdiction over any activity that affects the utility’s rates because the
8 [Commission] has interpreted its enabling statutes to be biased in favor of the interests of utilities
9 over private businesses.”⁴¹ Certainly, there is no basis for PNW Solar’s claim that the
10 Commission is biased (nor does PNW Solar offer any). But even more oddly, PNW Solar
11 overlooks the fact that the jurisdiction it describes as “expand[ing]” is not an expansion at all,
12 but is instead based on ***precisely the language used by the legislature to describe the***
13 ***Commission’s actual jurisdiction***: “any matter affecting [the utility’s] own rates.”⁴² Thus, the
14 Commission’s exercise of jurisdiction over matters affecting a utility’s rates is not an expansion,
15 but merely an effectuation, of the legislature’s jurisdictional delegation.

16 Finally, PNW Solar argues that the Third Circuit’s decision in *Freehold*⁴³ and the Ninth
17 Circuit’s decision in *IEPA*,⁴⁴ preclude the Commission from reexamining an executed PURPA
18 contract, even where the matter would affect a utility’s rates.⁴⁵ Neither of these cases are
19 remotely relevant. Each concerned a state commission seeking to unilaterally reopen and revise

⁴⁰ See *In the Matter of PacifiCorp*, Docket No. UE 246, Order No. 12-493, 13-14 (Dec. 20, 2012) (describing the cost recovery process through power cost adjustment mechanisms).

⁴¹ Request for Cert. at 10-11 (emphasis added).

⁴² ORS 756.500(5).

⁴³ *Freehold Cogeneration Ass’n v. Bd. of Reg. Comm’n of the State of New Jersey*, 44 F.3d 1178 (3rd Cir. 1995).

⁴⁴ *Indep. Energy Prod. Ass’n, Inc. v. Cal. Pub. Util. Comm’n*, 36 F.3d 848 (9th Cir. 1994).

⁴⁵ Request for Cert. at 13.

1 wholesale rates for the benefit of ratepayers.⁴⁶ Thus, these cases stand for the proposition that a
2 state commission cannot impose new avoided cost rates on an existing contract, and their
3 holdings in no way preclude a commission from *interpreting* the meaning of a Standard PPA—
4 in particular, a Standard PPA term adopted at that commission’s direction to effectuate federal
5 and state PURPA policies. PNW Solar’s reliance on these cases is entirely misplaced.

6 In sum, because the terms and price for the purchase of electricity by a utility will
7 inevitably have a direct and material impact on the rates at which a utility sells that electricity, a
8 Standard PPA for the purchase of electricity from a QF is a “matter affecting [the utility’s] own
9 rates[.]”⁴⁷ In addition, as noted in PGE’s Response to PNW Solar’s Motion to Dismiss, the
10 Commission could take up PGE’s filing as a petition for declaratory relief under ORS 756.450,
11 which would undoubtedly provide personal jurisdiction over the parties.⁴⁸

12 **B. The Commission Has Subject Matter Jurisdiction Over This Dispute.**

13 The ALJ determined that the Commission has primary jurisdiction over this dispute.
14 PNW Solar claims that conclusion was inappropriate because PNW Solar did not have the
15 opportunity to brief the Commission’s subject matter jurisdiction.⁴⁹ PNW Solar’s argument
16 should be rejected for two reasons: *First*, PGE raised the Commission’s subject matter
17 jurisdiction over this dispute in its initial Complaint and Request for Dispute Resolution,
18 providing PNW Solar with ample opportunity to respond in its subsequent filings. *Second*, PNW
19 Solar *did* in fact address this issue in its briefing, arguing against both the Commission’s
20 exclusive⁵⁰ and primary⁵¹ jurisdictions.

⁴⁶ *Freehold*, 44 F.3d at 1183 (noting that the state commission sought to revise “power supply contracts which were no longer economically beneficial”); *IEPA*, 36 F.3d at 858 (noting that the state commission does not have “the right unilaterally to modify the terms of the standard offer contract” in order to benefit ratepayers).

⁴⁷ ORS 756.500(5).

⁴⁸ ORS 756.450 (providing jurisdiction over “any person, property, or state of facts” affected by a Commission rule); *see also* PGE’s Response to Motion to Dismiss at 10-11 (Oct. 4, 2017).

⁴⁹ Request for Cert. at 18.

⁵⁰ *See* PNW Solar’s MTD at 5 n.8 (claiming that “this Motion to Dismiss is not addressing the issue of subject matter jurisdiction” before stating that “PNW Solar disagrees . . . that the Commission has exclusive jurisdiction

1 More fundamentally, PNW Solar’s assertion that the ALJ should not have made *any*
2 *finding* on subject matter jurisdiction ignores the inescapable link between the Commission’s
3 personal and subject matter jurisdictions. To clarify, the Commission has personal jurisdiction
4 over an entity under ORS 756.500(1) if it has subject matter jurisdiction over the entity’s
5 “business or activities,”⁵² or under ORS 756.500(5) where the utility’s complaint concerns a
6 “matter affecting its own rates or service,”⁵³ as described above. ***Both of these definitions rest***
7 ***personal jurisdiction on predicate determinations of subject matter jurisdiction.*** Thus, in order
8 for the Commission to have entertained PNW Solar’s Motion to Dismiss for lack of personal
9 jurisdiction, the statutory structure required the Commission to first determine whether there is
10 subject matter jurisdiction over the underlying dispute or activities—which there is. Indeed,
11 PNW Solar demonstrated this inextricable link between the Commission’s *subject matter*
12 *jurisdiction* over an entity’s activities and the Commission’s *personal* jurisdiction over the entity
13 engaged in those activities by simultaneously discussing the Commission’s subject matter
14 jurisdiction and arguing that it was not discussing subject matter jurisdiction.⁵⁴ The ALJ
15 properly determined that the Commission has subject matter jurisdiction over this dispute in the
16 process of determining that the Commission also has personal jurisdiction over the parties.

over disputes between [QFs] and utilities regarding executed contracts,” and then proceeding to cite and discuss three cases on the subject) (emphasis in original).

⁵¹ Docket No. UM 1894, PNW Solar’s Reply in Support of Motion to Dismiss at 16 (Oct. 11, 2017) (arguing that the Commission only “obtains jurisdiction under the primary jurisdiction doctrine if a court refers the matter to the Commission”).

⁵² ORS 756.500(1).

⁵³ ORS 756.500(5).

⁵⁴ PNW Solar’s Motion to Dismiss at 6 (noting that the Commission “does not have jurisdiction over each and every activity of a utility” and that “contract claims properly belong before a court of law[,]” thereby addressing the Commission’s subject matter jurisdiction over contracts) (quoting *K.S. v. Qwest*, Docket No. UCR 98, Order No. 08-112 (Jan. 31, 2008)); *see also* PNW Solar’s Motion to Dismiss at 11 (claiming that the Commission lacks jurisdiction because “this is a matter of contract interpretation”); *see also id.* at 5 n.9 (extensively detailing reasons why PNW Solar “disagrees” that the Commission possesses subject matter jurisdiction).

1 ***1. The ALJ properly concluded that the Commission has primary jurisdiction to***
2 ***resolve this dispute.***

3 The Commission has primary jurisdiction when (1) an issue benefits from the
4 Commission’s specialized expertise, (2) uniform resolution is preferable, and (3) a judicial
5 resolution could adversely impact agency performance of its regulatory responsibilities.⁵⁵ Here,
6 PNW Solar claims that the central issue is merely a common law contract dispute, for which the
7 Commission can offer no particular expertise. PNW Solar misconstrues the nature of this case,
8 which depends on the Commission’s interpretation of its own orders and rules, as well as the
9 application of its federal and state PURPA policies—plainly issues within the Commission’s
10 specialized expertise.

11 The central issue in this case requires interpretation of a provision of a Standard PPA,
12 drafted at the Commission’s specific direction to effectuate the Commission’s policies, rules, and
13 orders. The Oregon Court of Appeals has recognized that a utility’s PURPA obligation to
14 purchase a QF’s output “is created by statutes, regulations and administrative rules,” and “is not
15 governed by common law concepts of contract law.”⁵⁶ And the Commission has resolved past
16 disputes regarding terms in PGE’s standard PPA by applying PURPA law and policy to interpret
17 the contract, recognizing that the contract was drafted by PGE at the Commission’s direction.⁵⁷

18 There is also a need for uniform resolution of this dispute because Section 4.3 is a
19 standard term in PGE’s PPAs with other QFs. Consistent guidance would ensure that Section

⁵⁵ See *Boise Cascade Corp. v. Board of Forestry*, 325 Or 185, 193 (1997); see also *Verizon Nw., Inc. v. Portland GE*, 2004 U.S. Dist. LEXIS 32565, *9-10 (D. Or. Jan. 13, 2004) (“primary jurisdiction is concerned with overlapping issues, rather than with exact parallelism in the nature of the pending claims or the available relief”) (emphasis added); see also *Wallace v. State ex rel. Public Emples. Ret. Bd.*, 245 Ore. App. 16, 30 (2011) (requiring abatement of breach-of-contract, due process, and equal treatment claims where the agency had authority to decide relevant issues); cf. *Oregon Trail Elec. Consumers Coop. v. Co-Gen Co.*, 168 Or App 466, 474 n.6 (2000) (noting that primary jurisdiction did not apply to a contractual dispute with a utility where “neither party is presently subject to [Commission] regulation” on the disputed issue).

⁵⁶ *Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 598 (1987).

⁵⁷ Order No. 12-316 at 9 (resolving a dispute regarding a term in PGE’s standard contract but declining jurisdiction over a FERC-jurisdictional, transmission-related dispute that was “not contractual in nature”); Order No. 14-287 at 13 (“To answer this question, we must interpret the contract.”).

1 4.3 effectively and uniformly implements the Commission’s policies. Indeed, these broader
2 regulatory implications suggest that a court would be particularly ill-suited to resolve this
3 dispute, as doing so would interfere with the Commission’s regulatory function.⁵⁸

4 **2. The Commission also has exclusive jurisdiction to resolve this dispute.**

5 While the Commission need not reach the issue, PGE continues to believe that the
6 Commission’s jurisdiction is actually exclusive.⁵⁹ Whether an agency has exclusive jurisdiction
7 is determined by reference to the authorizing statute.⁶⁰ When the legislature creates a
8 “comprehensive regulatory scheme” for agency implementation, it suggests that the legislature
9 intended to assign that agency exclusive jurisdiction to implement the statute.⁶¹ Here, both the
10 federal and state legislatures have tasked the Commission with implementing comprehensive
11 statutory schemes regulating a utility’s obligation to purchase a QF’s output.⁶² Therefore, the
12 Commission is the forum with exclusive jurisdiction to interpret its own order requiring
13 accommodation of post-construction facility upgrades, pursuant to its delegated authority.⁶³

14 The Commission has already acknowledged its exclusive jurisdiction over disputes
15 concerning certain contracts, such as the disputed master service agreement at issue in *Wah*
16 *Chang*.⁶⁴ In that case, the Commission reasoned that its authority to set the terms of the contract
17 pursuant to its regulatory authority authorized the Commission to resolve subsequent disputes
18 concerning that contract.⁶⁵ The Court of Appeals later affirmed the Commission’s ability to

⁵⁸ *Dreyer v. Portland General Elec. Co.*, 341 Or 262, 286 (2006) (finding that the court’s exercise of jurisdiction would interfere with the Commission’s regulatory function).

⁵⁹ In its initial Complaint, PGE noted that this dispute “presents matters within the Commission’s primary jurisdiction[.]” PGE’s Complaint at 9. This matter also falls under Commission’s exclusive jurisdiction, as explained in this section.

⁶⁰ *Ahern v. Oregon Public Employees Union*, 329 Or 428, 434 (1999).

⁶¹ *Id.*

⁶² 16 USC § 824a-3(f); ORS 758.535(2).

⁶³ 18 C.F.R. § 292.304(c).

⁶⁴ *Wah Chang v. PacifiCorp*, Docket No. UM 1002, Order No. 09-343 at 12 (Sept. 2, 2009) (noting that “there cannot be a contract case in a circuit court to enforce the [Master Service Electric Agreement]”).

⁶⁵ *Id.*

1 reevaluate the contract as an implicit extension of its statutory authority over setting the terms of
2 the contract.⁶⁶

3 Here, as in *Wah Chang*, the Commission has statutory authority to set the “rates, terms,
4 and conditions” of a Standard PPA.⁶⁷ Therefore, the Commission also has “exclusive
5 jurisdiction” over subsequent disputes concerning those terms.⁶⁸ PNW Solar now claims that the
6 Commission can only adopt rules for contract terms, and cannot review subsequent contracts.
7 This claim, unsupported by any authority, is directly controverted by recent Commission
8 precedent: In the *PáTu* proceeding, the PPA at issue was fully executed, and the Commission
9 nevertheless proceeded to consider whether the standard contract’s terms “violate[d] the
10 Commission’s orders and rules implementing PURPA and associated state law[.]”⁶⁹

11 What is most critical is that the Commission expeditiously resolve the parties’ dispute
12 concerning Section 4.3’s implementation of the Commission’s federal and state PURPA policies.
13 Both the parties and the courts would benefit from the Commission’s guidance on this question,
14 which is well within the Commission’s primary subject matter jurisdiction.

15 **C. The ALJ’s Order Preserves the Parties’ Right to a Jury Trial.**

16 In a novel new argument, PNW Solar claims that an administrative resolution of this
17 dispute would violate its constitutional right to a jury trial because this case “is an action at law”
18 involving “the construction of contracts.”⁷⁰ This argument is both submitted in the wrong forum
19 and without basis.

⁶⁶ *Chang v. PUC*, 256 Or App 151, 164 (2013) (noting that a statute authorizing the Commission to establish rates by provides implied authority—in combination with the Commission’s general regulatory authority—for the Commission to “later evaluat[e] the reasonableness of those established rates”).

⁶⁷ Order No. 05-584 at 39.

⁶⁸ Order No. 09-343 at 12.

⁶⁹ Order No. 12-316 at 5.

⁷⁰ Request for Cert. at 32-33; *see also* Or. Const. art. VII, § 3 (providing that, “[i]n actions at law, . . . the right of trial by jury shall be preserved”); Or. Const. art. I, § 17 (“In all civil cases the right of Trial by Jury shall remain inviolate.”).

1 PNW Solar has already filed a Complaint requesting a jury trial with the Multnomah
2 County Circuit Court. If that court determines that PNW Solar has right to a jury trial, it is more
3 than competent to provide a trial by jury as it sees fit. For its part, the Commission can and
4 should resolve issues within the scope of its jurisdiction as delegated by the legislature.
5 Whether PNW Solar is entitled to a jury trial is a question that the courts—not the
6 Commission—will resolve.

7 If the Commission elects to consider this issue, PNW Solar’s argument is unpersuasive
8 because it misconstrues the nature of this dispute—which is not a mere contract claim—and
9 because it is untimely, raising issues not presented for the ALJ’s consideration.

10 A party has a right to a jury trial in the classes of cases for which the right was customary
11 at the time the Oregon Constitution was adopted.⁷¹ Critically, “*it is the particular issue in the*
12 *proceeding rather than the controversy as such that dictates whether there is a right to a*
13 *jury.*”⁷² For instance, in *Salem Decorating v. National Council on Compensation Insurance*, the
14 Court of Appeals acknowledged that “[w]hile there may be contract issues between the parties,”
15 where the underlying issue concerns statutory entitlements, the case does not implicate Oregon’s
16 constitutional right to a jury trial.⁷³

17 Here, the central issue is whether, pursuant to PGE’s Standard PPA, construed together
18 with the Commission’s own orders and policies implementing state and federal PURPA statutes,
19 a QF is entitled to materially change its nameplate capacity outside of efficiency improvements
20 or other upgrades, and before the projects are even constructed. This is a question involving
21 application and interpretation of statutes and rules created well after Oregon’s constitutional
22 ratification, and involving entitlements for the sale of energy that did not exist in the 19th

⁷¹ *Cornelison v. Seabold*, 254 Or 401, 405 (1969); *Salem Decorating v. Natl. Council on Comp. Ins.*, 116 Or App 166, 169-70 (1992), *rev den* 315 Or 643 (1993).

⁷² *Salem Decorating*, 116 Or App at 170 (emphasis added).

⁷³ *Id.*; see also *State v. N.R.L.*, 249 Or App 321, 323 (2012) (noting that the type of proceeding—juvenile delinquency—was created by statute, not by common law, and thus did not invoke the right to a jury trial).

1 century. As a result, this case does not trigger Oregon’s constitutional jury trial protections.
2 Indeed, as a purely legal issue, the parties’ dispute in this case would not be the sort submitted to
3 a jury, which is responsible for factual questions only.

4 **D. PNW Solar Separately Conceded Commission Jurisdiction Over This Dispute by**
5 **Filing Six Complaints Against PGE Regarding the Same Projects.**

6 Finally, PNW Solar’s argument that the Commission lacks personal jurisdiction must fail
7 for an additional reason: PNW Solar has deliberately availed itself of the Commission’s
8 jurisdiction in six interconnection complaints that implicate the central issue in this case.⁷⁴ In
9 those six complaints, PNW Solar claims that PGE failed to timely enter into interconnection
10 agreements, in violation of statute and the Commission’s rules. After the interconnection
11 process commenced, PNW Solar asked PGE to study the revised nameplate capacity for four out
12 of six of the projects. Thus, if the Commission agrees with PGE that PNW Solar is *not* permitted
13 to materially revise its nameplate capacities pre-construction, then each of these claimed delays
14 would be moot because PNW Solar would need to return to the point in the interconnection
15 process if it were to decide to pursue interconnection of these projects at the original nameplate
16 capacities in the Standard PPAs. Accordingly, because resolution of the Section 4.3 issue could
17 effectively void PNW Solar’s interconnection complaints, PGE could also raise the issue as a
18 defense in at least four of the six interconnection proceedings.

19 Indeed, the overlap between these complaints highlights the incongruity of PNW Solar’s
20 efforts to avoid the Commission’s jurisdiction, even as it simultaneously seeks the Commission’s
21 redress for precisely the same projects, implicating the same issue. While the Commission
22 possesses independent jurisdiction to consider and resolve this case, PNW Solar has created its
23 own basis for resolution of the parties’ Section 4.3 dispute by means of its interconnection
24 complaints.

⁷⁴ See Dockets UM 1902-07.

IV. CONCLUSION

1 The ALJ's order properly concluded that the Commission has personal and subject matter
2 jurisdiction to resolve this complaint. The central issue is a legal question involving application
3 and interpretation of the Commission's own orders and rules, as well as state and federal PURPA
4 policies. Swift resolution of this complaint will be important for this and other QFs, and for the
5 resolution of other complaints brought by PNW Solar concerning the same projects.

6 The Commission should deny PNW Solar's Request for Certification or affirm the ALJ's
7 ruling, allowing the ALJ to expeditiously resolve this case.

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