



ALISHA TILL
Direct (503) 290-3628
alisha@mrg-law.com

October 4, 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 Motion to Dismiss

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 Motion to Dismiss.

Please contact this office with any questions.

Very truly yours,

Alisha Till
Administrative Assistant

Attachment

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1894

Portland General Electric Company,
Complainant,

v.

Pacific Northwest Solar, LLC,
Respondent.

**PORTLAND GENERAL ELECTRIC
COMPANY'S RESPONSE TO
PACIFIC NORTHWEST SOLAR,
LLC'S MOTION TO DISMISS**

I. INTRODUCTION

1 Portland General Electric Company (PGE) filed a Complaint and Request for Dispute
2 Resolution (Complaint), asking the Public Utility Commission of Oregon (Commission) to
3 resolve a disagreement that has arisen between itself and Pacific Northwest Solar (PNW Solar)—
4 a developer of several qualifying facilities (QF) with whom PGE has executed standard power
5 purchase agreements (Standard PPAs) pursuant to the Public Utilities Regulatory Policies Act
6 (PURPA). Specifically, PGE has asked the Commission whether PGE must accommodate PNW
7 Solar's request to materially revise the amount of generation PGE is required to purchase under
8 its executed PPAs, while retaining its right to now out-of-date avoided cost prices. PNW Solar
9 has moved to dismiss the Complaint, arguing that: (1) the Commission does not have jurisdiction
10 over the dispute because it lacks personal jurisdiction over PNW Solar; and (2) PGE's filing does
11 not constitute a complaint because it lacks paragraph numbers, a concise statement of the facts, a
12 basis for relief, or citation to the authority under which the filing was made.¹

13 PNW Solar's Motion is without basis and should be rejected. **First**, PNW Solar has
14 explicitly subjected itself to Commission jurisdiction by the terms of the PPAs. **Second**, the

¹ PNW Solar's Motion to Dismiss (MTD) at 1.

1 Commission has jurisdiction to resolve this dispute under its Complaint statute, because PNW
2 Solar is engaged in the sale of electricity to a public utility, and because the dispute concerns a
3 “matter affecting [PGE’s] rates[.]”² *Third*, PGE’s Complaint includes all necessary substantive
4 components; PNW Solar’s concern over other, superficial matters (such as paragraph numbers,
5 etc.) elevates form over substance and does not warrant dismissal—particularly in light of the
6 Commission’s liberal construction of its procedural rules.³ *Finally*, in addition to the Complaint
7 procedure, this Commission has jurisdiction to resolve this dispute pursuant to its authority to
8 issue declaratory rulings, and the Commission may exercise its discretion to treat PGE’s filing as
9 a petition under ORS 756.450.

10 Regardless of whether PGE’s filing is treated as a complaint, a petition for declaratory
11 ruling, or otherwise, this Commission can and should resolve this dispute. The Commission not
12 only has the authority to do so, it has exclusive jurisdiction to answer the key question raised.
13 Therefore, the Commission should deny PNW Solar’s Motion and provide the parties with the
14 prompt direction they require.

15 **A. The Commission has jurisdiction to resolve this dispute.**

16 PNW Solar claims that the Commission lacks personal jurisdiction to resolve this dispute
17 because PNW Solar is a “private, non-regulated company.”⁴ On the contrary, PNW Solar has
18 subjected itself to Commission jurisdiction—and has made itself the proper subject of a
19 complaint—by entering into an agreement to sell energy to PGE under a PPA developed and
20 approved by the Commission to implement state and federal PURPA statutes. Because these
21 activities are plainly regulated by the Commission, and because PNW Solar’s efforts to revise on
22 a unilateral basis the nameplate capacities of several of its QFs will clearly affect PGE’s rates,
23 the Commission has jurisdiction under ORS 756.500.

² ORS 756.500(1), (5).

³ OAR 860-001-0000(1).

⁴ PNW Solar’s MTD at 3.

1 In addition, the Commission could take up PGE’s filing as a petition for declaratory relief
2 under ORS 756.450, which would undoubtedly provide personal jurisdiction over the parties.⁵

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

5 PNW Solar’s Motion must fail for the simple and incontrovertible reason that that PNW
6 Solar has explicitly subjected itself to the Commission’s jurisdiction. Each of the PPAs signed
7 by PNW Solar contains the same provision stating: “This Agreement is subject to the jurisdiction
8 of those governmental agencies having control over *either* Party or this Agreement.”⁶ PNW
9 Solar may argue that the Commission does not control private companies, but it cannot credibly
10 argue that the Commission does not exercise control over PGE. Thus, the Commission has
11 jurisdiction over PNW Solar—and disputes over the PPAs—on this basis alone.

12 **2. The Commission has personal jurisdiction because PNW Solar’s sale of QF**
13 **electricity is regulated by the Commission.**

14 The Commission has jurisdiction to hear complaints “against any person whose business
15 or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or
16 regulation of which is conferred upon the commission.”⁷ In other words, *jurisdiction is*
17 *appropriate where the activities of a private entity—not just the entity itself—are regulated by*
18 *the Commission.*⁸ While ORS 756.500 does not define “business or activities,” the common

⁵ ORS 756.450 (providing jurisdiction over “any person, property, or state of facts” affected by a Commission rule).

⁶ See Section 17 of the PPA attached as Exhibit B to PGE’s Complaint, at p. 17 (emphasis added).

⁷ ORS 756.500(1).

⁸ 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). This connection explains why, while PNW Solar’s motion purports to challenge only personal jurisdiction, it also discusses the Commission’s subject matter jurisdiction over the parties’ Standard PPAs. See PNW Solar’s Motion to Dismiss at 5 n.8 (“While this Motion to Dismiss is not addressing the issue of subject matter jurisdiction, PNW Solar disagrees . . . that the Commission has exclusive jurisdiction over disputes between [QFs] and utilities regarding executed contracts[.]”) (emphasis in original), 11 n.26; see also *id.* at 6 (quoting *K.S. v. Qwest*, Docket No. UCR 98, Order No. 08-112 (Jan. 31, 2008)) (noting that the Commission “does not have jurisdiction over each and every activity of a

1 definition of “activity” is “natural or normal function or operation,” and the common definition
2 of “business” is “the buying and selling of commodities and services; commerce; trade.”⁹ Thus,
3 under the plain language of the statute, the Commission has jurisdiction over a private business
4 such as PNW Solar that enters into an agreement that is the subject of Commission regulation.

5 For instance, in UM 1670, a private company and its three subsidiary wind energy
6 generation facilities (collective, Caithness) argued that they were not proper parties to a
7 complaint brought by Columbia Basin Public Utility District (Columbia Basin), because they
8 were “not a ‘public utility’ subject to [the Commission’s] regulation[.]”¹⁰ The Commission
9 disagreed, noting that ORS 756.500(1) “broadly permits complaints” against entities engaged in
10 activities subject to the Commission’s regulation. Because Columbia Basin challenged
11 Caithness’ provision of electric services—an activity subject to the Commission’s regulation—
12 the Commission had “jurisdiction to determine whether the actions of the Caithness defendants
13 are consistent” with the Commission’s statutory oversight.¹¹

14 Here, PNW Solar asserts without explanation that neither its business nor its activities are
15 regulated by the Commission, and therefore ORS 756.500(1) does not apply.¹² But this is clearly
16 incorrect. PNW Solar is a QF selling electric power to a public utility—an activity is that is
17 closely regulated through PURPA and ORS 758.535.¹³ The Commission has adopted

utility” and that “contract claims properly belong before a court of law[.]” thereby addressing the Commission’s subject matter jurisdiction over contracts).

⁹ *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).

¹⁰ *Columbia Basin Elec. Coop., Inc. v. PacifiCorp*, Docket No. UM 1670, Order No. 15-110 at 9 (Apr. 10, 2015).

¹¹ *Id.*

¹² PNW Solar’s MTD at 3 n.1 (“As PNW Solar’s business or activities are not regulated by the Commission, [ORS 756.500(1)] does not apply.”). PNW Solar also appears to believe that it is not subject to the Commission’s jurisdiction because PNW Solar is not “a utility[.]” *Id.* at 3 (“PNW is neither a utility, nor does this dispute concern rates or service; therefore, the Commission does not have personal jurisdiction over PNW Solar.”). This argument overlooks the statute’s language, which extends jurisdiction over “any person *whose business or activities are regulated*,” not merely over utilities.

¹³ 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 comprehensive policies dictating the terms and conditions for the sale of QFs’ energy to
2 utilities.¹⁴ Therefore, under any reasonable interpretation of the Commission’s authority to
3 implement PURPA, and given the straightforward language of the Complaint statute, *PNW*
4 *Solar’s efforts to sell energy to PGE are activities “regulated by . . . statutes, . . . regulation of*
5 *which is conferred upon the commission.”* ORS 756.500(1).

6 Separately, PNW Solar appears to argue that the Commission does not have jurisdiction
7 where the contract at issue has been executed.¹⁵ This argument is directly controverted by recent
8 Commission precedent: In the *PáTu* proceeding, the PPA at issue was fully executed, and the
9 Commission nevertheless proceeded to consider whether the standard contract’s terms
10 “violate[d] the Commission’s orders and rules implementing PURPA and associated state
11 law[.]”¹⁶ Moreover, in the *Wah Chang* proceeding, the Commission found that it had exclusive
12 jurisdiction over an executed private contract for the sale of electricity by a utility.¹⁷ In the latter
13 case, the Commission reasoned that its authority to set rates in a contract extended to subsequent
14 disputes concerning those rates.¹⁸ The Court of Appeals later affirmed the Commission’s ability
15 to reopen and reevaluate an executed contract setting rates because of the Commission’s
16 authority to set the contract’s terms (in that case, the price for sale as opposed to the price for
17 purchase of electricity).¹⁹ Thus, where the Commission has authority to set the prices, terms,
18 and conditions in a contract, the Commission has jurisdiction over disputes regarding the
19 executed contract.²⁰

¹⁴ 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[.]”).

¹⁵ PNW Solar’s MTD at 11 (distinguishing *Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590 (1987), on the basis that “the dispute is not over what terms should be in a contract but over a term in an already-executed contract”). Again, this argument concerns subject matter jurisdiction.

¹⁶ *PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1566, Order No. 12-316 at 5 (Aug. 21, 2012).

¹⁷ *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]”).

¹⁸ *Id.* at

¹⁹ *Chang v. PUC*, 256 Or App 151, 164 (2013) (noting that a statute authorizing the Commission to establish rates provides implicit authority—in combination with the Commission’s general regulatory authority—for the Commission to “later evaluat[e] the reasonableness of those established rates”).

²⁰ *Id.*

1 PNW Solar further disputes the Commission’s jurisdiction by citing *K.S. v. Qwest Corp*²¹
2 for two assertions. First, PNW Solar cites *K.S* for the general—and unremarkable—point that
3 the Commission “does not have jurisdiction over each and every activity of a utility, its
4 employees, or its agents,” a point that adds little to its argument. Second, PNW Solar claims
5 that *K.S.* stands for the proposition that “contract claims properly belong before a court of
6 law.”²² This latter statement is taken entirely of context and mischaracterizes the Commission’s
7 holding.

8 In *K.S.*, a private landowner brought claims against a utility, arguing that its failure to
9 bury a neighbor’s service drop constituted a breach of a *private easement contract*.²³ The
10 Commission noted that the alleged contract—if it existed at all²⁴—would not be subject to the
11 Commission’s regulation, and thus declined jurisdiction.²⁵ Specifically, the Commission stated:
12 “*Since this contract does not fall under the tariff, the Commission cannot assert jurisdiction;*
13 *the contract claims properly belong before a court of law.*”²⁶ When taken in context, it
14 becomes clear that the Commission did *not* disclaim authority over all contracts, as PNW Solar’s
15 inappropriately edited excerpt suggests; rather, the Commission found no subject matter
16 jurisdiction over the particular—and unsubstantiated—contract at issue *because the alleged*
17 *contract was not the sort regulated by the Commission.*²⁷ These facts stand in stark contrast to
18 those presented in PGE’s Complaint, where the disputed contract is a Standard PPA—developed
19 and drafted at the Commission’s direction and pursuant to the Commission’s regulations, and
20 filed and approved through Commission proceedings.

²¹ *In the Matter of K.S. v. Qwest Corp.*, Docket No. UCR 98, Order No. 08-112 (Jan. 31, 2008).

²² PNW Solar’s MTD at 6 (quoting Order No. 08-112).

²³ Order No. 08-112 at 2. The landowner also alleged trespass.

²⁴ *Id.* (describing the “alleged contract”).

²⁵ *Id.*

²⁶ *Id.* (emphasis added)

²⁷ *Id.*

1 Thus, because PNW Solar is a QF selling electricity to a utility—an activity subject to the
2 Commission’s regulation under PURPA and ORS 758.535—PNW Solar is subject to the
3 Commission’s jurisdiction under ORS 756.500(1).

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

6 ORS 756.500(5) provides a separate and additional basis for Commission jurisdiction
7 pursuant to the Complaint statute. That section provides that the Commission also has
8 jurisdiction to hear complaints from “any public utility” concerning “any matter affecting [the
9 utility’s] own rates or service[.]”²⁸ By its terms, this section confers jurisdiction over more than
10 just a utility’s rates, but over “any matter *affecting*” those rates.²⁹ Avoided cost prices paid by
11 PGE for QF generation flow directly into PGE’s rates through power cost annual update tariff
12 and power cost adjustment mechanism.³⁰ Indeed, it is difficult to conceive of any activity more
13 closely and substantially affecting a utility’s rates for electricity sales than the costs and terms of
14 electricity purchases.

15 PNW Solar argues that allowing PGE’s Complaint to proceed would “radically expand”
16 the Commission’s jurisdiction.³¹ PNW Solar reasons that, if electricity purchases are deemed to
17 “affect” rates, every aspect of a utility’s budget—from “toilet paper to copy paper and gasoline
18 to natural gas”—would also affect rates, thereby enlarging the scope of the Commission’s
19 jurisdiction to include everything that costs utilities money.³² This slippery slope argument

²⁸ ORS 756.500(5). Again, this jurisdictional grant is more accurately described as subject matter jurisdiction, as it goes to *what* the Commission may review, not *whom*. PGE thus attempts to respect PNW Solar’s deferral of full briefing on subject matter jurisdiction while nonetheless responding to PNW Solar’s contentions on that same topic. *See* 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).

²⁹ ORS 756.500(5) (emphasis added).

³⁰ *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).

³¹ PNW Solar’s MTD at 6.

³² *Id.*

1 ignores the plain meaning of the word “affect,” which “means ‘to act upon . . . to produce a
2 *material* influence upon or alteration in.’”³³ There is nothing to suggest that the cost of toilet
3 paper will have a “material influence” on rates.³⁴ By comparison, little could be more material
4 to the rate at which electricity is sold than the price and terms at which that electricity is
5 procured.

6 Because the terms and price for the purchase of electricity by a utility will inevitably
7 have a direct and material impact on the rates at which a utility sells that electricity, a Standard
8 PPA agreement for the purchase of electricity from a QF is a “matter affecting [the utility’s] own
9 rates[.]”³⁵ The Commission thus has jurisdiction over this dispute pursuant to ORS
10 756.500(5)—in addition to its jurisdiction under ORS 756/500(1).

11 **B. PGE’s Complaint meets all substantive requirements.**

12 PGE’s filing meets all the substantive requirements of a complaint before the
13 Commission, and therefore should not be dismissed.

14 Complaints “are used to address formal requests to initiate a proceeding or for
15 Commission authorization.”³⁶ The process for filing a complaint is governed by both the
16 Commission’s rules and by the Oregon Rules of Civil Procedure (ORCP), with the
17 Commission’s rules taking priority where the two conflict.³⁷ Thus, a complaint must include (1)
18 a “plain and concise statement” of the *facts*,³⁸ (2) a “clear and concise statement of the
19 authorization, action, or *relief* sought,”³⁹ and (3) “[a]ppropriate references to the statutory
20 provision or other *authority* under which the filing is made[.]”⁴⁰ Nonetheless, the Commission

³³ *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).

³⁴ *Id.*

³⁵ ORS 756.500(5).

³⁶ OAR 860-001-0390(1).

³⁷ OAR 860-001-0000(1).

³⁸ ORCP 18A (emphasis added).

³⁹ OAR 860-001-0400(2) (emphasis added).

⁴⁰ *Id.* (emphasis added).

1 “liberally construe[s] these rules to ensure just, speedy, and inexpensive resolution of the issues
2 presented.”⁴¹ PGE’s Complaint meets each of these substantive requirements.

3 First, the Complaint states the facts succinctly: “PNW Solar executed PPAs with PGE for
4 six solar QFs[,] sent PGE a letter that requested nameplate capacity changes to four of its
5 six QFs, [and] argued that its proposal to re-size its projects is allowed under Section 4.3 of
6 PGE’s standard contract[.]”⁴² The complaint further states the key issue—that the parties “have
7 reached an impasse” regarding whether PNW Solar is permitted to “materially change its
8 nameplate capacity at will while retaining its right to out-of-date avoided cost prices.”⁴³ These
9 facts are simple and straightforward, as appropriate for a largely legal dispute. Certainly nothing
10 in ORS 756.500 or OAR 860-001-0400 suggests that disputes in complaints must be strictly
11 factual in nature. Nonetheless, PNW Solar is free to deny any aspect of PGE’s concise
12 characterization of the facts.

13 Second, the Complaint clearly states the relief sought: “PGE requests that the
14 Commission . . . confirm that PURPA, the Commission’s Orders, and PGE’s standard contract
15 do not permit PNW Solar to materially alter its facilities’ nameplate capacities under existing
16 PPAs.”⁴⁴ The Complaint also explains in detail why PGE is entitled to this relief.⁴⁵

17 Third, PGE’s Complaint cites the authority for its filing: “*Pursuant to ORS 756.500,*
18 [PGE] petitions the [Commission] to resolve a dispute that has arisen between PGE and [PNW
19 Solar].”⁴⁶ The Complaint also elaborates on the Commission’s authority for exercising
20 jurisdiction over the parties’ Standard PPAs.⁴⁷ Thus, the Complaint is substantively complete.

⁴¹ OAR 860-001-0000(1).

⁴² PGE’s Complaint at 1-2.

⁴³ *Id.* at 3.

⁴⁴ *Id.* at 1 (emphasis added).

⁴⁵ *Id.* at 3-9.

⁴⁶ *Id.* at 1 (emphasis added).

⁴⁷ *Id.* at 9 (noting that “the dispute is not simply a matter of general contract interpretation, but rather concerns an important issue of PURPA law and policy within the Commission’s unique expertise and primary jurisdiction”).

1 Separately, PNW Solar asserts that PGE’s Complaint fails for purely superficial reasons.
2 PNW Solar objects to the Complaint’s title as “Complaint and Request for Dispute Resolution,”
3 and insists that the Commission’s rules “do not contemplate such a filing.”⁴⁸ PNW Solar also
4 argues that “the document . . . fails because” it lacks “consecutively numbered paragraphs clearly
5 and concisely stating each factual allegation.”⁴⁹ These concerns elevate form over function, as
6 neither issue impairs the substance of PGE’s Complaint. Particularly in light of the
7 Commission’s “liberal” construal of the procedural rules, these purely superficial concerns
8 should not prevent the Commission from reaching a “just, speedy, and inexpensive resolution of
9 the issues presented.”⁵⁰

10 In sum, because PGE’s complaint conforms to all substantive requirements, the
11 Commission can and should resolve the parties’ dispute.

12 **C. The Commission has discretion to treat PGE’s Complaint as a Petition for**
13 **Declaratory Ruling.**

14 Should it prefer, the Commission has authority to decide this case under the declaratory
15 ruling statute. Pursuant to ORS 756.450, the Commission may issue a declaratory ruling “with
16 respect to the applicability to any . . . state of facts of any rule or statute enforceable by the
17 commission.”⁵¹ The Commission has previously determined that “[a] declaratory ruling
18 proceeding is an appropriate mechanism for declaring rights of a party *when there are disputes*
19 *about the meaning of orders* the Commission has issued.”⁵² Because resolution of this case
20 hinges on the Commission’s interpretation of its orders, rules and statutes, PGE believes the case
21 is properly the subject of a petition for declaratory ruling.

⁴⁸ PNW Solar’s MTD at 8.

⁴⁹ *Id.* at 9.

⁵⁰ OAR 860-001-0000(1).

⁵¹ ORS 756.450.

⁵² *In re Portland Gen. Elec. Co.*, Docket No. DR 22, Order No. 99-627 at 3 (Oct. 14, 1999) (emphasis added).

1 PGE recognizes that recent decisions have raised questions about whether the Commission
2 may issue a declaratory ruling to interpret a Commission order—as opposed to a statute or rule.⁵³
3 In fact, PGE’s decision to bring this action as a complaint instead of as a petition for declaratory
4 ruling was based on the lack of clarity on this point. That said, PGE notes that the only
5 Commission statement on this issue affirms its authority to issue declaratory rulings interpreting
6 Commission orders.⁵⁴

7 Even if the Commission finds that declaratory rulings cannot interpret orders alone, the
8 Commission could nonetheless issue a declaratory ruling in this case because federal and state
9 statutes and rules give the Commission responsibility for setting standard contract prices, and
10 ORS 758.535 requires the Commission to establish the terms and conditions for purchases of QF
11 energy “by rule . . . if the purchase is by a public utility.”⁵⁵ Indeed, the Commission has opened
12 a rulemaking docket to ensure compliance with ORS 758.535(2) and to incorporate its PURPA
13 orders into rules.⁵⁶ Therefore, a declaratory ruling is a legally appropriate vehicle for resolving
14 this dispute because the terms and conditions for purchases of QF energy by a utility involve
15 applications of statutes and rules. Thus, if the Commission finds that a declaratory ruling is the
16 best procedural vehicle, the Commission can exercise its discretion to treat PGE’s filing as a
17 petition for declaratory ruling under ORS 756.450.⁵⁷

18 **D. The Commission has exclusive jurisdiction to decide this case.**

19 Regardless of which procedural mechanism the Commission prefers, the underlying
20 question is one that the Commission must and should resolve because it is within the

⁵³ See *In the Matter of Cypress Creek Renewables, LLC, Petition for Declaratory Ruling*, Docket No. DR 51, Order No. 16-378 (Oct. 12, 2016) (treating a declaratory ruling filing as a complaint after Staff recommended that the filing could be treated as either a request for declaratory ruling *or* as a complaint); *Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Assoc., and Renewable Energy Coalition v. Portland Gen. Elec. Co.*, Docket No. UM 1805, Ruling (Jan. 19, 2017) (finding that issues raised in the case “may not be resolved through a declaratory ruling proceeding under ORS 756.450” and treating the filing as a complaint).

⁵⁴ Add cite.

⁵⁵ ORS 758.535(2)(a).

⁵⁶ Order No. 16-056, App’x A at 5.

⁵⁷ See Order No. 16-378 at 1 (treating a filing for declaratory ruling as a complaint).

1 Commission’s exclusive jurisdiction.⁵⁸ Thus, if the Commission declines to take up the issue
2 presented in PGE’s Complaint, PGE will be unable to receive the direction it seeks.⁵⁹

3 Whether an agency has exclusive jurisdiction is determined by reference to the
4 authorizing statute.⁶⁰ When the legislature creates a “comprehensive regulatory scheme” for
5 agency implementation, it suggests that the legislature intended to assign that agency exclusive
6 jurisdiction to implement the statute.⁶¹ Here, both the federal and state legislatures have tasked
7 the Commission with implementing comprehensive statutory schemes regulating a utility’s
8 obligation to purchase a QF’s output.⁶² Therefore, the Commission is the forum with exclusive
9 jurisdiction to interpret its own order requiring accommodation of post-construction facility
10 upgrades, pursuant to its delegated authority.⁶³

11 The Commission has already acknowledged its exclusive jurisdiction over disputes
12 concerning certain contracts, such as the disputed master service agreement at issue in *Wah*
13 *Chang*.⁶⁴ In that case, the Commission reasoned that its authority to set the terms of the contract
14 pursuant to its regulatory authority authorized the Commission to resolve subsequent disputes

⁵⁸ In its initial Complaint, PGE noted that this dispute “presents matters within the Commission’s primary jurisdiction[.]” PGE Complaint at 9. This matter also falls under Commission’s exclusive jurisdiction, as explained in this section.

⁵⁹ While PNW Solar claims not to address the Commission’s subject matter jurisdiction, it proceeds to disagree with the Commission’s exercise of exclusive jurisdiction in a lengthy footnote. PNW Solar MTD at 5 n.8. This footnote relies on three cases, each of which is plainly distinguishable. *PacifiCorp v. Lakeview Power Co.*, 131 Or App 301 (1993); *Water Power Co. v. PacifiCorp*, 99 Or App 125 (1989); *Oregon Trail Elec. Consumers Coop. v. Co-Gen Co.*, 168 Or App 466 (2000) (*OTECC*). *Lakeview Power* concerned a dispute over negotiated PPAs—not Standard PPAs effectuating the Commission’s PURPA policies. 131 Or App at 303. In *Water Power*, no party claimed exclusive jurisdiction and the court declined to consider Water Power’s assertion of primary jurisdiction because the question arose after a full jury trial and *Water Power* conceded that any error was not reversible. 99 Or App at 135 n.10. And in *OTECC*, neither party sought Commission jurisdiction, nor was there any Commission proceeding to which the court might have deferred; nor did that dispute concern the interpretation and application of a specific Commission order, which this case does. 168 Or App at 473; *see also id.* at 474 n.6 (“Where no agency has or retains jurisdiction over the dispute—as the parties agree is the case here--there is no reason for a court to “refrain” from exercising its jurisdiction.”). To the extent that PNW Solar attempted to undercut the Commission’s exclusive jurisdiction over interpretation of its own orders, but without fully briefing the issue, it summarily failed to do so.

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 Order No. 09-343 at 12 (noting that “there cannot be a contract case in a circuit court to enforce the [Master Service Electric Agreement]”).

1 concerning that contract.⁶⁵ As noted, the Court of Appeals later affirmed the Commission’s
2 ability to reevaluate the contract as an implicit extension of its statutory authority over setting the
3 terms of the contract.⁶⁶ Here, as in *Wah Chang*, the Commission has statutory authority to set
4 the “rates, terms, and conditions” of a Standard PPA.⁶⁷ Therefore, the Commission also has
5 “exclusive jurisdiction” over subsequent disputes concerning those terms.⁶⁸

6 And even if the Commission determines that its jurisdiction over this matter is not
7 exclusive, the Commission certainly has primary jurisdiction to resolve this dispute because it
8 presents a matter within the Commission’s specialized expertise, the resolution of which must be
9 uniform.⁶⁹ The Commission should take this opportunity to interpret its own orders and rules
10 and provide the parties with necessary guidance.

II. CONCLUSION

11 PGE’s Complaint concerns the meaning of a term included in a Standard PPA, drafted at
12 the Commission’s direction, filed in compliance with Commission orders, intended to effectuate
13 the Commission’s PURPA policies, and that explicitly provides for Commission jurisdiction.
14 The subject matter of the PPAs is the sale of electricity by a QF to a public utility—an activity
15 regulated by the Commission and directly affecting PGE’s rates, and therefore properly
16 addressed pursuant to the Commission’s complaint statute. For these reasons the Commission
17 has jurisdiction over PNW Solar and this Complaint.

18 PGE believes that its Complaint presents the parties’ disagreement and requests
19 resolution in an efficient and effective manner. That said, if the Commission would prefer
20 another procedural vehicle, including a declaratory ruling case, it has the authority to treat the
21 Complaint accordingly. Most crucially, the Complaint presents a question within the

⁶⁵ *Id.*

⁶⁶ *Chang*, 256 Or App at 164.

⁶⁷ Order No. 05-584 at 39.

⁶⁸ Order No. 09-343 at 12.

⁶⁹ *See Boise Cascade Corp. v. Board of Forestry*, 325 Or 185, 193 (1997).

1 Commission's exclusive jurisdiction, and the Commission can and should provide the parties
2 with the resolution they require.

DATED: October 4, 2017

MCDOWELL RACKNER & GIBSON PC



Lisa F. Rackner
Shoshana J. Baird
419 SW 11th Avenue, Suite 400
Portland, Oregon 97205
Telephone: (503) 595-3925
Facsimile: (503) 595-3928
dockets@mrg-law.com

PORTLAND GENERAL ELECTRIC COMPANY

David White
Associate General Counsel
121 SW Salmon Street, 1WTC1301
Portland, Oregon 97204
Telephone: (503) 464-7701
david.white@pgn.com

Attorneys for Portland General Electric Company