BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

Portland General Electric Company, Complainant, v. Pacific Northwest Solar, LLC, Defendant	))))))))	CASE NO. UM 1894 REPLY COMMENTS TO SUMMARY JUDGEMENT MOTIONS OF THE COMMUNITY RENEWABLE ENERGY ASSOCIATION

INTRODUCTION AND SUMMARY

Pursuant to procedural ruling in this docket, the Community Renewable Energy Association ("CREA") hereby respectfully submits its reply comments to the Public Utility Commission of Oregon ("OPUC" or "Commission") in response to the summary judgment motions filed by Pacific Northwest Solar, LLC ("Pacific Northwest Solar") and Portland General Electric Company ("PGE").

CREA has been a longstanding advocate for laws and policies implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA") because PURPA is an important renewable energy mandate that results in renewable energy development in CREA's member counties in rural Oregon. Given its policy-level focus, CREA does not ordinarily intervene in disputes before the Commission between individual qualifying facility ("QF") parties and the purchasing utility.

However, intervention was necessary here because this proceeding has importance far beyond the discrete meaning of the contract term at issue in PGE's standard contract. CREA's concern is that PGE's stance in this case – already adopted in part by the Commission – creates a

precedent with an adverse impact on Oregon's PURPA developers by undermining the assurance investors need to develop and finance PURPA projects. Specifically, PGE has asked this Commission to: usurp the authority of the courts to adjudicate contract disputes; convert long-term PURPA contracts into non-contractual arrangements that can, in effect, be modified to reduce PURPA expenses to utilities; and therefore, in effect, repeal the QF's right to a long-term contractual obligation to sell its output with rates and terms locked in at the time the obligation is incurred under 18 C.F.R. § 292.304(d)(2)(ii).

Thus far, the Commission has adopted PGE's incorrect arguments by asserting jurisdiction over this dispute, but CREA urges the Commission to reverse course and reaffirm the contractual rights of QFs.

BACKGROUND

This dispute regards the meaning of three executed power purchase agreements under which Pacific Northwest Solar's QFs are obligated to sell their entire net output to PGE after completion of development and construction. The parties disagree over whether Section 4.3 of those agreements allows Pacific Northwest Solar to construct the facilities with an increased or decreased nameplate capacity from that specified in their contracts at the time of execution. After a dispute arose and Pacific Northwest Solar stated it would bring a court action, PGE immediately initiated this proceeding at the Commission. Even though Pacific Northwest Solar thereafter filed a complaint alleging contract claims in circuit court, this Commission issued an order that the Commission, rather than the circuit court, would resolve the dispute. Apparently needing prompt resolution, Pacific Northwest Solar agreed to abate the circuit court proceeding

rather than continue to litigate the jurisdictional issues at this time.

Now that PGE has filed its summary judgment motion, it is easy to see that PGE wished to keep this case out of court because PGE does not want traditional contract law applied in this case. Instead, PGE invokes alleged facts and arguments that would have no relevance under traditional contract analysis. For example, PGE advocates for an interpretation of the contracts that will relieve it of "mandatory purchases at outdated and more expensive avoided cost prices." *PGE's Summary Judgment Motion* at 2. PGE asserts "if PNW Solar is permitted to revise the size of its projects as now proposed . . . these changes would result in an increased cost to PGE's customers of $5,354,282." *Id.* at 3. PGE even reaches beyond the parties to assert "if all pre-operational QFs subject to the identical Standard PPA provision at issue here were permitted to materially revise their capacity pre-construction, then PGE and its customers could be exposed to additional unplanned purchase obligations of up to 186 MW." *Id.* at 3-4.

PGE fails to recite or discuss Oregon's rules for contract interpretation in its motion for summary judgment, even though those rules are both well established, *see Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997), and directly applicable to interpretation of PURPA contracts, *Or. Trail Elec. Consumers Coop., Inc. v. Co-Gen Co.*, 168 Or App 466, 473-74, 7 P3d 594 (2000). Instead, PGE primarily relies on speculation as to the adverse impact on PGE and its retail ratepayers if Pacific Northwest Solar prevails. Such arguments are irrelevant in a dispute over a contract's interpretation. Indeed, PGE's entire argument is entirely backwards as a matter of contract interpretation. Instead of first providing any basis to conclude the contract is ambiguous, as is generally necessary to consider any extrinsic evidence, *see Yogman*, 325 Or

at 361, PGE starts its arguments with extrinsic evidence related to issues the Commission allegedly "considered" when it deliberated prior to issuing the order leading to the contract term at issue. *PGE's Summary Judgment Motion* at 6-9. Although PGE eventually provides some discussion of the "plain terms" of the contract in the middle of its brief, PGE includes a final section with the heading: "Allowing QFs to Materially Modify Their Facilities' Output At Will Undermines Clear and Reliable Resource Planning and Could Expose Customers to Substantial and Unpredictable Cost Increases." *Id.* at 12-14 (bold print removed). This obvious appeal to impacts on PGE's retail ratepayers may be a relevant argument to make if the question regarded what PGE's *future* contracts should allow, but it has no relevance under Oregon's principles of contract interpretation as to the meaning of Section 4.3 in the executed agreement here.

Therefore, it is now abundantly clear that PGE intends to establish, in effect, that an executed standard contract under this Commission's implementation of PURPA is not really a contract that may be interpreted and enforced under contract law. According to PGE's arguments, the contract's terms are apparently subject to modification by this Commission at PGE's urging where necessary to protect PGE's retail ratepayers from expensive PURPA purchases. Under PGE's proposed method of contract interpretation, ordinarily irrelevant issues such as the cost impact on PGE's retail ratepayers are apparently relevant, and common law contract interpretation principles can be ignored.

ARGUMENT

A. The Commission Should Not Usurp Judicial Jurisdiction Over Contract Disputes

The critical point that CREA wishes to stress is that the Commission's implementation of

PURPA should provide QFs with the right to binding contractual rights to sell to the utility under the terms of a contract. *See* 18 C.F.R. § 292.304(d)(2)(ii). Under federal law, "although a PURPA-governed agreement is unenforceable prior to approval by the relevant state agency, the rights of the parties, once their agreement receives such approval, are to be determined by applying normal principles of contract interpretation." *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F3d 129, 139 (3d Cir. 1998). By definition, contracts are enforceable in the courts, and courts have traditionally been the forum to resolve common law contract disputes between Oregon QFs and utilities. *Or. Trail Elec. Consumers Coop.*, 168 Or App at 473-74 (holding, in a PURPA contract dispute, "the determination of parties' rights under a contract is a common-law issue that falls within a circuit court's general jurisdiction").

In contrast, the Commission is a quasi-legislative agency that is primarily designed to set rates on a prospective basis after applying economic principles. PURPA preempts any attempt by the Commission to directly or indirectly revise the rates or terms of PURPA contracts once they are executed, and therefore the Commission's expertise in rate-setting becomes wholly irrelevant once the PURPA contract is executed. *See id.* at 482-84.

As CREA previously argued in its petition to intervene and as Pacific Northwest Solar more fully explained in its motion to dismiss, this Commission lacks subject matter jurisdiction over QF contract disputes. Notably, an agency's subject matter jurisdiction must be conferred by statute and can be challenged by any party at any time, including for the first time on appeal. *Diack v. City of Portland*, 306 Or 287, 293, 759 P2d 1070 (1988). The lack of statutory jurisdiction to award the relief PGE requests becomes even more clear after reviewing PGE's

substantive arguments in its summary judgment motion because PGE's argument is essentially that the Commission should ignore the result that contract law might dictate and do whatever it can to "interpret" the contracts to reduce PGE's perceived PURPA expense. That is not a lawful basis for the Commission's jurisdiction.

Although the Commission issued an order asserting it has jurisdiction over this dispute, the order fails to identify any Oregon statute that confers subject matter jurisdiction on the Commission to interpret and enforce executed PURPA contracts to reduce PGE's PURPA expense. *Portland General Elec. Co. v. Pacific Northwest Solar, LLC*, OPUC Docket No. UM 1894, Order No. 18-025 (Jan. 25, 2018). The only possible statutory basis for jurisdiction cited in the order was ORS 756.500, but the order only relied on ORS 756.500 for purposes of determining personal jurisdiction, not subject matter jurisdiction. *Id.* at 4-5. In any case, ORS 756.500 provides no apparent basis for jurisdiction over a complaint against a QF to interpret its executed PURPA contract because the QF and its PURPA contract are plainly not subject to the Commission's ongoing regulatory jurisdiction under PURPA.

The order also asserts that the Commission has "primary jurisdiction," stating "[w]e conclude that the ALJ was correct to find that primary jurisdiction was appropriate here." *Id.* at 7. But the Oregon Supreme Court has explained that the primary jurisdiction doctrine applies "*when a court decides* that an administrative agency, rather than a court of law, initially should determine the outcome of a dispute or one or more issues within that dispute that fall within that agency's statutory authority." *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 191-92, 935 P2d 411 (1997) (Kenneth Culp Davis and Richard J. Pierce, Jr., II *Administrative Law Treatise* §

14.1 (3d ed 1994) (emph. added). Primary jurisdiction is a doctrine that *courts invoke* to send a matter to the agency, not a doctrine the agency may itself unilaterally apply to expand its own jurisdiction over a matter where no statute confers jurisdiction. As CREA understands the procedural history here, no court asked the Commission to "determine the outcome of a dispute or one or more issues within that dispute" in this case. *Id.* To the contrary, the Commission asserted jurisdiction by issuing its order prior to the time the court had the opportunity to address the question.

Indeed, the Commission's order applied the three factors the Oregon courts must apply to determine if the court will invoke the doctrine. *Pacific Northwest Solar, LLC*, Order No. 18-025 at 6-7. Yet the order itself acknowledges "we do not intend to suggest that the Commission necessarily has primary jurisdiction over every issue involved in standard power purchase agreements." *Id.* at 7 n.15. This concession demonstrates the lack of jurisdiction. The Commission either has statutory subject matter jurisdiction to adjudicate disputes over executed PURPA contracts, or it does not have such jurisdiction. There is no basis for partial statutory jurisdiction where the Commission can apply judge-made balancing factors to determine whether it will take up the matter or not. Only courts apply those balancing factors under the primary jurisdiction doctrine.

In short, CREA is very concerned with the precedent the Commission has already set in this case, which is obviously motivated by PGE's allegations of excess power supply costs related to the PURPA contracts at issue and the Commission's apparent intent to issue binding interpretations of executed PURPA contracts to "ensure that ratepayers remain financially

indifferent to QF development." *Id.* at 7. There is no state statute that confers jurisdiction on the Commission over this matter, but the federal PURPA statute and related federal regulations certainly bar efforts to assert ongoing "regulatory" oversight to "ensure that ratepayers remain financially indifferent to QF development." *Id.* The Commission should not attempt to exert regulatory jurisdiction over executed PURPA contracts with the aim of protecting PGE's retail ratepayers.

B. The Commission Should Not Undermine Long-Term PURPA Contracts

The order issued thus far in this matter has created significant confusion and establishes a precedent that is harmful to existing and prospective Oregon QFs. CREA strongly believes that the Commission should not involuntarily haul a QF before it to respond to a utility's arguments that its executed power purchase agreement should be interpreted by Commission order with the intent of protecting the purchasing utility's ratepayers. By doing so, the Commission has already seriously undermined its existing PURPA policies and the sanctity of the contractual rights that QFs must rely upon to secure financing to construct and operate their facilities.

It is entirely inconsistent with federal law to reopen PURPA contracts or to interpret them with an intent to reduce the purchasing utility's PURPA expenses passed onto retail ratepayers. The contract at issue here arose from PURPA's requirement that this Commission implement 18 C.F.R. § 292.304(d)(2)(ii), which is expressly designed to provide QFs with the certainty of a contract. That regulation provides:

> Each qualifying facility shall have the option . . . (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility . . .be based on . . . (i) The avoided costs

> calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred.

18 C.F.R. § 292.304(d)(2). FERC explained that subpart (d)(2)(ii) "enables a qualifying facility to establish a fixed *contract* price for its energy and capacity at the outset of its obligation." *Small Power Prod. and Cogeneration Facilities; Regulations Implementing Sec. 210 of the Pub. Util. Reg. Pol. Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980) (emph. added). FERC recognized that its regulations must provide prospective developers and owners of QFs with the option to enter into long-term contracts with the predictability associated with contracts, as opposed to the unpredictability of ongoing regulatory uncertainty. 45 Fed. Reg. at 12,224. This option was intended to provide the "certainty" necessary to invest in a generation facility in the market controlled by reluctant utility purchasers. *Id.*

The regulation reflects Congressional intent. Congress recognized that "'cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis a vis the sale of power to the utility.'" *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 US 402, 414 (1983) (quoting H. R. Conf. Rep. No. 95-1750, pp. 97-98 (1978)). Unlike traditional utilities that are legally entitled to charge end-use customers all prudently incurred costs of electric service, the QF's "'risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable.'" *Id.* Accordingly, FERC's regulation is intended "to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with the need for [QFs] to be able to enter into *contractual commitments* based, by necessity, on estimates of future avoided costs." 45 Fed. Reg. at 12,224 (emph. added).

Since 1980, FERC has consistently affirmed the right of QFs to long-term avoided cost contracts with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred. *Allco Renewable Energy, Ltd. v. Mass. Elec. Co.*, 208 F Supp 3d 390, 398-400 (D Mass 2016) (quoting *JD Wind 1, LLC*, 130 FERC ¶ 61,127, 61,631 (Feb. 19, 2010)), *accord Windham Solar LLC*, 156 FERC ¶ 61,042, at P 5 (July 21, 2016); *Va. Elec. and Power Co.*, 151 FERC ¶ 61,038, at PP 24-25 (Apr. 16, 2015); *Hydrodynamics Inc.*, 146 FERC ¶ 61,193, at PP 31-33 (Mar. 20, 2014); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 32 (Oct. 4, 2011); *N.Y. State Elec. & Gas Corp.*, 71 FERC ¶ 61,027, 61,115-16 (Apr. 12, 1995).

PURPA has a history of state commissions and utilities unsuccessfully attempting to take some regulatory action aimed at creatively rearranging the contractual arrangement after the PURPA contract has been executed. *See Freehold Cogeneration Associates, L.P. v. Board of Regulatory Com'rs of State of N.J.*, 44 F3d 1178, 1194 (3rd Cir 1995) (holding "once the [state utility commission] approved the power purchase agreement between Freehold and JCP & L on the ground that the rates were consistent with avoided cost, any action or order by the [commission] to reconsider its approval or to deny the passage of those rates to JCP & L's consumers under purported state authority was preempted by federal law"); *Independent Energy Producers Ass'n, Inc. v. California Public Utilities Com'n*, 36 F3d 848, 858 (9th Cir 1994) (holding that "the fact that the prices for fuel, and therefore the Utilities' avoided costs, are lower than estimated [at the time of execution of the PPA], does not give the state and the Utilities the right unilaterally to modify the terms of the standard offer contract"); *Idaho Wind Partners 1*,

LLC, 140 FERC ¶ 61,219, at PP 40-41 & n 42 (Sept. 20, 2012) (ruling Idaho Public Utilities Commission could not implement an extra-contractual curtailment procedure on wind QFs with long-term PURPA contracts that provided no such curtailment right).

It is likewise unlawful for the Commission to convert the long-term PURPA contracts here into something other than contracts. If PGE is to prevail here, it must do so by demonstrating its interpretation of Section 4.3 is the better interpretation based on the rules of contract interpretation, not because a contrary result will allegedly harm its ratepayers.

CREA wishes to stress that the Commission has already sent the wrong signal to prospective PURPA developers and others interested in participating financially in Oregon PURPA projects by asserting jurisdiction over PGE's complaint *against a QF* at the Commission. Such action undermines the certainty that is needed to invest in long-term PURPA contracts without the fear that the assumptions and terms relied upon will be subject to ongoing Commission oversight and interpretation designed to "ensure that ratepayers remain financially indifferent to QF development." *Pacific Northwest Solar, LLC*, Order No. 18-025 at 7.

In summary, QFs need assurance that once they execute a PURPA contract with an Oregon utility that contract is interpreted and enforced in the same manner as any other binding contract, and to inject ongoing regulatory considerations into that analysis seriously undermines the ability to develop and operate QF projects in Oregon.

C. PGE's Proposed Rules Would Result in a Failure to Implement PURPA

The Commission should also reject PGE's proposal to change the contractual nature of executed standard contracts because to do so would result in a failure to lawfully implement

PURPA. As noted above, the contracts at issue arose from this Commission's implementation of FERC's regulation requiring long-term contracts, 18 C.F.R. § 292.304(d)(2)(ii). CREA had always understood that blank standard contract forms would be completed and executed to become binding *contracts* just like any other contracts, which as noted above are interpreted and enforced under normal contract interpretation rules. However, if PGE is correct that executed standard contracts are not contractual arrangements and are instead governed by some other body of law and ongoing regulatory considerations like the impact on PGE's retail ratepayers, then the Commission has failed to implement PURPA by failing to require PGE to enter into long-term contracts with fixed prices and terms, as required by 18 C.F.R. § 292.304(d)(2)(ii). *See* 16 U.S.C. § 824a-3(f) (requiring the Commission to implement FERC's PURPA regulations); 16 U.S.C. § 824a-3(h)(2) (allowing for enforcement in federal court for failure to implement FERC's PURPA regulations). The Commission should therefore reject PGE's arguments for this additional reason.

CONCLUSION

As explained above, CREA respectfully requests that the Commission resolve this dispute in a manner that reaffirms QFs' right to long-term contracts governed by contract law and reject PGE's arguments relying upon irrelevant impacts on its retail ratepayers.

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