BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1894

Portland General Electric Company, Complainant, v. Pacific Northwest Solar, LLC, Defendant.	REQUEST FOR ALJ CERTIFICATION BY PACIFIC NORTHWEST SOLAR, LLC

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I. INTRODUCTION

Pursuant to OAR 860-001-0110, Pacific Northwest Solar, LLC ("PNW Solar") respectfully requests that Administrative Law Judge ("ALJ") Allan Arlow certify the ruling issued October 27, 2017 ("Ruling") in the above-captioned contested case proceeding before the Oregon Public Utility Commission ("OPUC"). The Ruling: 1) denies a motion to dismiss for lack of personal jurisdiction; and 2) was issued on grounds that the OPUC has primary subject matter jurisdiction, an issue not raised in the Motion to Dismiss and not briefed by the parties. PNW Solar will experience undue prejudice and good cause exists to certify the Ruling because PNW Solar is being required to participate in a case in which the OPUC does not have personal jurisdiction over it or primary jurisdiction over the subject matter. In addition, PNW Solar is unduly prejudiced and there is good cause to certify the Ruling because it was issued on grounds that were not raised in the Motion to Dismiss and not briefed. The ALJ should certify the Ruling to the OPUC, and the OPUC should vacate the Ruling and dismiss PGE's complaint because the OPUC lacks personal jurisdiction over PNW Solar and does not have primary subject matter jurisdiction.

II. BACKGROUND

This dispute concerns a simple contract dispute regarding four power purchase agreements ("PPAs") between PNW Solar and Portland General Electric Company ("PGE"). These existing PPAs were entered into between PGE and PNW Solar for the sale of electricity generated by PNW Solar's qualifying facilities ("QFs") under the Public Utility Regulatory Policies Act ("PURPA"). Specifically, the parties dispute the meaning of Section 4.3, which is common to all relevant PPAs executed by the parties. That provision reads as follows:

> Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built. Seller shall not increase the

> Nameplate Capacity Rating above that specified in Exhibit A or increase the ability of the Facility to deliver Net Output in quantities in excess of the Net Dependable Capacity, or the Maximum Net Output as described in Section 3.1.11 above, through any means including, but not limited to, replacement, modification, or addition of existing equipment, except with prior written notice to PGE. In the event Seller increases the Nameplate Capacity Rating of the Facility to no more than 10,000 kW pursuant to this section, PGE shall pay the Contract Price for the additional delivered Net Output. In the event Seller increases the Nameplate Capacity Rating to greater than 10,000 kW, then Seller shall be required to enter into a new power purchase agreement for all delivered Net Output proportionally related to the increase of Nameplate Capacity above 10,000 kW.

The plain meaning of this provision allows an increase in the nameplate capacity through "any means including, but not limited to, replacement, modification, or addition of existing equipment" so long as it provides "prior written notice to PGE." If the increase results in a nameplate capacity rating greater than 10,000 kW, then a new PPA is required for the nameplate capacity above 10,000 kW. Pursuant to Section 4.3, PNW Solar provided notices to PGE regarding its intent to increase the nameplate capacity rating of two projects (Amity Solar from 4 MW to 6 MW and Butler Solar from 4 MW to 10 MW). The PPAs also allow a decrease in nameplate capacity, even without notice to PGE. While notice was not required, PNW Solar also informed PGE that it planned to decrease the nameplate capacity on two other projects (Starlight Solar from 4 MW to 2.2 MW and Stringtown Solar from 4 MW to 2.3 MW).

PGE rejected PNW Solar's notices and threatened to terminate the contracts if PNW Solar exercised its rights to change the nameplate capacity. On August 28, 2017, PNW Solar sent a demand letter to PGE requesting that PGE resolve the dispute or PNW Solar would file a lawsuit in Oregon Circuit Court. On August 31, 2017, PGE moved expeditiously and filed its Complaint and Request for Dispute Resolution with the OPUC (this case, Docket No. UM 1894). On September 6, 2017, PNW Solar filed a complaint requesting declaratory relief, breach of

contract, and treble damages (among others) with the Multnomah County Circuit Court, case number 17CV38020.

PNW Solar filed a Motion to Dismiss in this OPUC proceeding on September 19, 2017, and PGE filed a Motion to Dismiss in the Multnomah County Circuit Court proceeding on October 10, 2017 (responses and replies followed). ALJ Arlow issued the Ruling on PNW Solar's Motion to Dismiss on October 27, 2017, and this is the Ruling for which PNW Solar seeks certification. No ruling has been made yet on PGE's Motion to Dismiss in the Multnomah County Circuit Court proceeding, and oral argument has been requested but not yet set.

III. ARGUMENT

The Ruling on PNW Solar's Motion to Dismiss should be vacated for two main reasons. First, it does not specifically address PNW Solar's main argument for dismissal: that the OPUC lacks personal jurisdiction over PNW Solar. Instead, the Ruling summarily finds that the OPUC has both jurisdiction over the parties and the subject matter of this dispute, and gives three reasons for so finding, without specifically explaining how any of those reasons confer personal jurisdiction on the OPUC. Each of these conclusions is either incorrect or fails to confer jurisdiction. Second, the Ruling finds that the OPUC has primary subject matter jurisdiction, even though that issue was not part of the Motion to Dismiss and not briefed. Regardless of the procedural infirmities of the ALJ ruling on issues that were not briefed, the Ruling should be vacated because the OPUC does not have primary jurisdiction and (even if it did) a court rather than OPUC must make that determination.

A. The OPUC Should Vacate the Ruling and Dismiss the Complaint Because the OPUC Does Not Have Personal Jurisdiction Over PNW Solar

The Ruling found that the OPUC has jurisdiction over the parties without specifying how or which of the three cited authorities gives the OPUC personal jurisdiction over defendant,

PNW Solar. The Ruling appears to rely on one or more of the following: 1) that PNW Solar explicitly subjected itself to the OPUC's personal jurisdiction under Section 17 of the PPA; 2) that the "affecting its own rates" language in ORS 756.500(5) grants the OPUC personal jurisdiction over any party to a contract with a utility, if the contract might impact the utility's revenue or expenses; and/or 3) that the OPUC's statutory authority to establish rules regarding the terms and conditions of QF contracts grants it personal jurisdiction. As detailed below, none of these three authorities grants the OPUC personal jurisdiction over PNW Solar, so the OPUC should vacate the Ruling and dismiss the case.

In this case, the relevant question is whether an Oregon statute grants the OPUC personal jurisdiction over a QF in a complaint brought by a utility over a dispute in an executed contract for the utility's purchase of goods or services. The OPUC is not an agency with broad and general jurisdiction to hear all manner of contract disputes, but has limited jurisdiction based on the specific provisions of its enabling statutes. As a general matter, there must be personal jurisdiction over the defendant.[1] Specifically, agency jurisdiction depends on whether the agency has a statutory grant of authority.[2]

The OPUC has not been granted personal jurisdiction over a private, non-regulated company, like PNW Solar, regarding a contractual claim by a utility regarding the utility's purchase of goods or services, including QF electricity. First, the OPUC has personal jurisdiction over any person whose business or activities are regulated by one or more of the statutes under which the OPUC has jurisdiction to enforce.[3] This means that the OPUC has jurisdiction over PGE (who's business is regulated), but not PNW Solar (who's business is not

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1 See ORCP 4 & 21.
2 Diack v. City of Portland, 306 Or. 287, 293 (1988).
3 ORS 756.500(1).

regulated and who is specifically exempt from rate regulation). Second, the OPUC may also hear complaints brought by public utilities as to any matter affecting its own rates or service.[4] This means the OPUC has jurisdiction over utility sales and services (i.e., a sale of electricity by PGE to a private company), but not over utility purchases (i.e., a sale of goods or service by a private company to PGE). There is no personal jurisdiction over PNW Solar, as these circumstances do not apply here.

1. Personal Jurisdiction Cannot Be Conferred Upon an Agency by Stipulation

PNW Solar did not explicitly subject itself to the OPUC's jurisdiction by signing a PPA that contains Section 17. Even if PNW Solar had intended to subject itself to the OPUC's jurisdiction (which it did not), it could not do so because the OPUC's jurisdiction cannot be expanded through written agreement. If Section 17 is read to provide personal jurisdiction over PNW Solar, then that would allow private parties to broadly expand OPUC's or any other agency's jurisdiction. In addition, neither the OPUC nor PGE can limit access to PURPA standard contracts and rates by requiring that a QF subject itself to OPUC jurisdiction simply to be paid the correct avoided cost rate.

Under Oregon law, an agency's jurisdiction may not be conferred by stipulation of the parties.[5] As with all agencies in Oregon, the OPUC's jurisdiction must be found in its statutory grant of authority and the parties cannot confer jurisdiction on the OPUC by agreement or

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4 ORS 756.500(5).

5 Diack, 306 Or. at 293.

stipulation.[6] Thus, even if the PPA explicitly stated that contract disputes would be decided by the OPUC, that provision would be an invalid grant of jurisdictional authority to the OPUC.[7]

The OPUC should also consider the practical ramifications of finding that PNW Solar and PGE can agree to grant the OPUC jurisdiction over a contract dispute. Under that view, any utility could expand the OPUC's personal jurisdiction over a wide array of companies and activities, simply by entering into bi-lateral contracts stating that they want the OPUC to resolve their dispute. The fact that one of the parties (PGE) is subject to the OPUC's personal jurisdiction over certain limited regulatory matters does not resolve the fundamental problem associated with private parties agreeing to litigate their disputes before the OPUC. For example, the OPUC cannot obtain personal jurisdiction over Costco simply because PGE enters into a contract for the purchase of toilet paper or gasoline from Costco that includes provision stating that the contract is subject to the jurisdiction of any government agency that has jurisdiction over PGE. A simple contract or tort dispute between PGE and Costco belongs in court, and not before the OPUC, even though the OPUC has jurisdiction over PGE. Simply put, PGE and private parties cannot expand the OPUC's limited jurisdiction over specific individuals and subject matter through private agreements.

Section 17 also does not explicitly state that future contract disputes shall be decided by the OPUC. The PPA merely states that: "This Agreement is subject to the jurisdiction of those governmental agencies having control over either Party or this Agreement." It does not specifically call out the OPUC as the forum to resolve any disputes that might arise. It also does

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6 Id.

7 Neither PGE nor the Ruling identified any cases that supported the novel idea that the OPUC's jurisdiction can be expanded beyond what is granted in the agency's enabling statutes.

not waive objections to personal jurisdiction by its express terms. There are numerous "governmental agencies" that have some measure of control over the parties to the agreement. For example, the Federal Energy Regulatory Commission ("FERC") has jurisdiction over PNW Solar's status as a QF entitled to sell to PGE under PURPA.[8] FERC also has jurisdiction over PGE's activities as a regulated public utility under the Federal Power Act.[9] This reading of Section 17 would also therefore provide FERC, as well as numerous other governmental agencies, with jurisdiction to adjudicate almost any dispute over the PPA. It would make the clause so broad as to make it unworkable.

If the OPUC intended to adopt standard contract provisions to ensure that the OPUC will have personal jurisdiction over QFs, then such a radical and onerous provision should have been discussed in the proceedings that lead to the adoption of the standard contract. Similarly, if that had been the intent, the PPA should have been more clearly worded. PNW Solar is unaware of any discussion, testimony or briefing regarding Section 17 in the OPUC's PURPA regulatory proceedings, and neither PGE nor the ALJ cites any.

Next, Section 17 of the PPA also refers to PNW Solar's obligation to maintain licenses and approvals required for construction, operation, and maintenance. Section 17 is simply not focused on identifying any form of dispute resolution, arbitration, or mediation. Read in proper context, this section was not meant to explicitly designate the OPUC, or any other administrative agency, as decider of future contract disputes.

Requiring a QF to agree to the OPUC's jurisdiction as a pre-condition to obtaining a standard PPA would violate PURPA. Avoided cost rates set by the OPUC should be based on

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[8] See Indep. Energy Prod. Ass'n, Inc. v. Cal. Pub. Util. Comm'n, 36 F.3d 848, 856-57 (9th Cir. 1994).

[9] 16 USC 824(b).

the incremental costs that the utility avoids by purchasing a QF's energy and capacity, which should be the same for a QF regardless of the forum that adjudicates any disputed contractual provisions. Neither the OPUC nor PGE can condition availability of avoided cost rates and standard contract provisions to only those QFs that are willing to have their disputes resolved by the OPUC.

Finally, requiring a QF to subject itself to the OPUC's jurisdiction would be inconsistent with the purpose of standard contracts. The OPUC adopted standard contracts and rate schedules to facilitate and direct the process by which a QF and an Oregon electric utility enter into a contract.[10] The purpose of the OPUC approving standard contacts and schedules for each utility is to pre-establish "rates, terms and conditions that an eligible QF can elect without any negotiation with the purchasing utility" and to "eliminate negotiations . . ."[11] Therefore, it would be inappropriate and a violation of PURPA for the OPUC to require a QF to agree to the OPUC's ongoing jurisdiction simply to obtain the benefits of a standard contract and the avoided cost rates that should be broadly applicable to all similarly situated QFs.

2. The OPUC's General Ratemaking Authority Does Not Grant It Personal Jurisdiction Over QFs

A Ruling that gives the OPUC personal jurisdiction over a QF on the grounds that the QF is party to a contract that may affect utility rates also cannot stand for two reasons. First, when ORS 756.500(5) refers to "any matter affecting its own rates or service," it is referring to *rates charged by* the utility for its service, and any reading that encompasses *rates paid by* the utility is

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10 Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129, Order No. 05-584 at 6-12, 16 (May 13, 2005).

11 Id. at 12, 16.

overbroad. Second, QFs are exempted from state laws and regulations respecting the rates of electric utilities.

a. The OPUC Does Not Have Personal Jurisdiction Over All Companies that Sell a Good or Service to a Utility that Might "Affect" Rates

The application of ORS 756.500(5) to exert personal jurisdiction over a QF in a PPA contract dispute is overbroad. ORS 756.500(5) allows a utility to file a complaint as to "any matter affecting its own rates or service." While it is not clear if the Ruling is relying upon this provision to find personal or primary jurisdiction (or both), the Ruling found jurisdiction because ORS 756.500(5) provides the OPUC with jurisdiction over a utility's "complaint as to any matter affecting its own rates or service". Specifically, the Ruling explains that jurisdiction is appropriate since the costs of electricity purchases from a QF "impact the utility's revenues and expenses, which, in turn, have an impact on recovery of costs through rates charged to customers via power cost annual update tariffs and power cost adjustment mechanisms."[12]

The Ruling relied upon *Roats Water System, Inc. v. Golfside Investments, LLC and Oregon Public Utility Commission*, suggesting that PGE can sue any private company if its contract, tort or other claim could result in a rate change.[13] *Roats Water System* does not stand for that broad of a conclusion, and instead applied ORS 756.500(5) to allow a utility to sue a retail customer over a contract dispute regarding certain aspects of its retail payments that incorporated the utility's retail tariff, which was directly regulated by the OPUC.[14]

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12 Ruling at 3.

13 See id. at n.1 (citing 225 Or. App. 618, 202 P.3d 199 (2009)).

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

A review of the plain language of ORS 756.500(5) explains that it only applies to the rates paid to a utility for the utility's services, and not the prices paid by a utility for goods and services from private businesses. ORS 756.500(5) specifically provides that:

> Notwithstanding subsection (1) of this section, any public utility or telecommunications utility may make complaint as to any matter affecting *its own rates or service* with like effect as though made by any other person, by filing an application, petition or complaint with the commission.[15]

Applying *Roats Water System* to any third-party supplier that sells a good or service to PGE overreaches the purpose of ORS 756.500(5). *Roats Water System* stands for the well-established concept that the OPUC can adjudicate a retail rate dispute between a utility and its customer.

The Ruling appears to reason that because PGE is buying a commodity from a seller of goods or services that may impact the rates PGE's customers pay, then the OPUC has personal jurisdiction over that seller. The only potential limitation on the OPUC's jurisdiction under this theory is whether the economic value of the good or service purchased by the utility is large enough to have an impact on the rates charged to customers. Under this approach, PGE could subject any company to the OPUC's jurisdiction simply because it sells PGE a product for which the costs will ultimately be included rates. This would result in an unprecedented and sweeping expansion of the OPUC's jurisdiction, as PGE includes the costs of thousands of different products in rates. Additionally, as the OPUC, itself, has explained, it "does not have jurisdiction over each and every activity of a utility, its employees, or its agents" and "contract claims properly belong before a court of law."[16]

Further, PGE does not have the ability to forum shop and displace any other governmental authority or court's ability to adjudicate contract and tort claims. It would also

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15 ORS 756.500(5) (emphasis added).

16 Re K.S. v. Qwest Corp., Docket No. UCR 98, Order No. 08-112 at 2 (Jan. 31, 2008).

inappropriate for the OPUC to expand its jurisdiction over any activity that affects the utility's rates because the OPUC has interpreted its enabling statutes to be biased in favor of the interests of utilities over other private businesses. The OPUC's primary statutory responsibility is to balance the interests of the utility investor and the consumer in establishing fair and reasonable retail rates charged to consumers.[17] The OPUC is specifically tasked with ensuring that a utility, such as PGE, has adequate revenue, including an opportunity earn profits "commensurate with the return on investments in other enterprises having corresponding risks" and "[s]ufficient to ensure confidence in the financial integrity of the utility, allowing the utility to maintain its credit and attract capital."[18] While the Oregon's goal is to promote QF development and the OPUC has been charged to promote wholesale and retail competitive markets,[19] the OPUC has no such responsibility to protect the profitability of QFs[20] or any other businesses.

Again, a review of the practical results illustrates the flaws in an "affects-rates" argument. After PGE enters into a decision to purchase power or build a new power plant, the OPUC cannot alter or adjudicate disputes over those contract terms. This is because the OPUC's

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17 ORS 756.040.

18 Id.

19 See ORS 758.515 (stating Oregon's goal is to promote QF development); ORS 757.646 (responsibility "to mitigate the vertical and horizontal market power" and "eliminate barriers to the development of a competitive retail market structure."); ORS 469A.075(4)(d) (the OPUC shall develop rules that allow for "diverse ownership of renewable energy sources that generate qualifying electricity.").

20 In the Matter of Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129, Order No. 05-584 at 8, 30-31 (May 13, 2005); Snow Mountain Pine Co. v. CP Nat'l Corp., Docket No. UM 11, Order No. 84-895 (Nov. 13, 1984) ("Snow Mountain alleges in its brief that a September, 1983, rate would make the project unfeasible. … Whether the rate paid by the utility is fair, just, and reasonable is not dependent upon the profit or loss realized by the cogenerator at any given time. The commissioner's duty is to encourage cogeneration by requiring the utility to pay its avoided cost. But the commissioner cannot require a utility to pay an amount greater than its true avoided cost.").

authority does not extend to any business dispute between PGE and other parties, but is merely to adjust PGE's retail rates it may charge its captive customers for regulated services. For example, PGE has elected to build and own its new Carty generation station, which is $150 million over budget. Despite the fact that charging the customers an extra $150 million could significantly "affect" rates, PGE cannot haul any of the parties to those contracts into the OPUC and ask the OPUC to decide whether PGE, the construction companies, or the insurance companies are responsible for paying the cost overruns.

It would be inappropriate for an agency with the statutory mission to help ensure that PGE has an opportunity to earn a profit and protect ratepayers from bad utility decisions to adjudicate a $150 million dispute between PGE and other private companies. Instead, a court gets to decide whether, under the terms of those contracts, PGE is responsible for the $150 million, and then the OPUC can decide to allow (or not allow) PGE to pass those costs on to its retail customers. The OPUC is powerless to intervene in any contractual disputes between PGE and private parties to save PGE from any ill-advised contracts that PGE would like to ask the OPUC to revise to keep its retail rates lower. Those contracts, as well as the executed PNW Solar PPA contract, are beyond the control of the OPUC, and the OPUC would have no personal jurisdiction over those parties or PNW Solar.

Last, there is one case where the OPUC resolved a dispute over an executed standard PURPA contract.[21] That complaint was brought by a QF against a public utility. The OPUC has jurisdiction to hear complaints brought against utilities under ORS 756.500(1), but in this case the utility is bringing the complaint against a QF. Therefore, the jurisdictional hook in the *PaTu*

[21] PaTu Wind Farm, LLC v. Portland General Elec. Co., Docket No. UM 1566, Order No. 12-316 at 9 (Aug. 21, 2012) and Order No. 14-287 at 13 (Aug. 13, 2014).

Wind Farm case has nothing to do with the requirement in ORS 756.500(5) that a utility can sue a person on a "matter affecting is own rates and services."

b. The OPUC Does Not Have the Authority to Change the Rates in Executed PURPA Contracts

A conclusion that a PURPA contract's rates and the terms of sales under the terms of executed PURPA contract would be preempted by federal law because the terms of the PPA cannot be ignored in favor of a competing policy objective (like protecting PGE by increasing its rates or protecting customers by lowering PGE's rates). Such an assertion of personal jurisdiction premised on the ability to exert ongoing regulatory authority over the PPA or the rates that would apply to the additional capacity allowed to be constructed under the terms of the executed PPA. In fact, this rule is so well established that in *Freehold Cogeneration Associates v. Board of Regulatory Commission of the State of New Jersey*, the Third Circuit enjoined a state commission's re-examination of a fixed-price PURPA contract well before the process was complete.[22] In light of these well-established legal principles, applying the *Roats Water System* case to exert personal jurisdiction over a QF fails.

QFs are explicitly exempted from state laws and regulations respecting the rates of electric utilities.[23] Congress intended to exempt QFs from state and federal utility rate regulations, and executed QF contracts and rates are not subject to the same utility-type regulation that applies to retail electric contracts.[24] FERC explained that 18 CFR 292.304(b)(5) is intended to provide "certainty with regard to return on investment in new technologies."[25]

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22 44 F.3d 1178, 1189 (3rd Cir. 1995).

23 See 16 USC 824a; 18 CFR 292.602(c).

24 Freehold Cogeneration Associates, 44 F.3d at 1190-92.

25 Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utilities Regulatory Policies Act of 1978, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980).

"The import of [Section 292.304(b)(5)] is to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances."[26] Additionally, in affirming FERC's full avoided cost rule, the U.S. Supreme Court cited at length from the legislative history of Section 210(b) of PURPA, regarding the rate to be paid to QFs, and concluded: "Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities to utilities."[27]

The Ninth Circuit's decision in *Independent Energy Producers Association, Inc.,* is directly on point here and controlling in Oregon.[28] In that case, the California Public Utilities Commission ("CPUC") sought to reopen long-term PURPA contracts with fixed rates and change the terms of payment set forth in the agreements under the guise of regulating the QFs' operating characteristics.[29] The Ninth Circuit Court of Appeals explained:

> The underlying motivation behind the CPUC program is to lower the rates set in appellees' standard offer contracts because they are higher than the Utilities' current avoided costs. As noted above, this differential exists because the standard offer contracts lock the Utilities into paying rates that were calculated on incorrect assumptions about the future cost of fossil fuels, the primary fuel source used by the utility to generate electric energy. However, the fact that the prices for fuel, and therefore the Utilities' avoided costs, are lower than estimated, does not give the state and the Utilities the right unilaterally to modify the terms of the standard offer contract. Federal regulations provide that QFs are entitled to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed.[30]

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26 Id.

27 Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp., 461 U.S. 402, 414 (1983).

28 Indep. Energy Prod. Ass'n, Inc., 36 F.3d at 848.

29 Id. at 849.

30 Id. at 858 (citing 18 CFR 292.304(d)(2)); see also Wilson v. Harlow, 860 P.2d 793, 799-800 (Okla. 1993) (holding that 18 CFR 292.304(b)(5) and (d)(2) provide QFs the "right to receive the benefit of the contract even if, due to changed circumstances, the contract price for power at the time of delivery is unfavorable to the utility," and thus preempted contrary state law); Smith Cogeneration Mgmt. v. Corp. Comm'n, 863 P.2d 1227, 1240-41 (Okla. 1993) (same).

FERC has itself explained, interpreting its own regulation, as follows: "If we were to . . . allow the reopening of QF contracts that had not been challenged at the time of their execution, financeability of such projects would be severely hampered. Such a result is not, in our opinion, consistent with Congress's directive that we encourage the development of QFs."[31] Likewise, in *Freehold Cogeneration Associates*, the Third Circuit held "once the [state utility commission] approved the power purchase agreement between Freehold and [the utility] on the ground that the rates were consistent with avoided cost, any action or order by the [state commission] to reconsider its approval or to deny the passage of those rates to [utility's] consumers under purported state authority was preempted by federal law."[32]

3. The OPUC's Statutory Rulemaking Authority Does Not Grant It Personal Jurisdiction Over QFs Post-Execution Contract Disputes

The Ruling also appears to conclude that the OPUC has personal jurisdiction over PNW Solar because the standard contract forms were adopted pursuant to the OPUC's authority to regulate PGE and PURPA. Specifically, the Ruling states:

> [T]he Commission has authority to regulate PGE pursuant to ORS 756.040 and to regulate the terms and conditions of PPAs pursuant to ORS 758.535. The terms and conditions of PGE's PPA with PNW are a direct result of the exercise of that authority.[33]

The Ruling references ORS 758.535, which does not apply in these circumstances. That statute provides that "[t]he terms and conditions for the purchase of energy or energy and capacity from a [QF] shall…[b]e established by *rule* by the [OPUC] if the purchase is by a

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31 New York State Elec. & Gas Corp., 71 FERC ¶ 61,027, at 61,117-18 (1995).

32 44 F.3d at 1194; accord In Re Petition of Atlantic City Elec. Co., 708 A.2d 775, 778-79 (N.J. Super. 1998); West Penn Power Co. v. Penn. Pub. Util. Comm'n, 659 A.2d 1055, 1066 (Pa. Cmmw. Ct. 1995).

33 Ruling at 2.

public utility."[34] Specifically, this statute is a grant of *rulemaking* authority upon the OPUC to set the terms and conditions for utility purchases of QF power. The OPUC has adopted rules implementing ORS 758.535, some of which identify terms and conditions for the purchase of QF power.[35]

The standard contract provisions at issue here were not adopted pursuant to the OPUC's rulemaking authority. Instead, Section 4.3 was ordered adopted after a contested case proceeding and formally adopted at OPUC public meetings. None of the specific "terms and conditions" in the standard PPA, let alone Section 4.3, were adopted in a rulemaking proceeding. Section 4.3 cannot be located in the Oregon administrative rules, nor any limitation on changing the nameplate capacity of a QF.

Next, even if the terms and conditions were adopted through a rulemaking, that does not necessarily mean that the OPUC has personal jurisdiction over any private business that avails itself of the rule. The standard contracts themselves are not rules but only contracts that PGE has entered into based on an OPUC order. If an agency has rulemaking authority to adopt rules (in its legislative function), then that does not necessarily mean that it has authority over individuals (in the agency's judicial function). Agency rules (or contracts entered into because an agency requires it) can be applied by courts, and administrative agencies do not automatically have personal jurisdiction simply because a rule may be at issue in a contract interpretation case. Therefore, the mere existence of the OPUC's rulemaking authority pursuant to PURPA does not grant it personal jurisdiction over PNW Solar.

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34 ORS 758.535 (emphasis added).

35 OAR 860-029.

B. The OPUC Should Vacate or Strike Portions of the Ruling Finding That the OPUC has Primary Subject Matter Jurisdiction Because the OPUC Does Not Have Primary Jurisdiction and Cannot Invoke the Doctrine *Sua Sponte*

The OPUC should vacate or strike portions of the Ruling finding that the OPUC has primary subject matter jurisdiction because the OPUC does not have primary subject matter jurisdiction. If the OPUC finds on its own that it does not have subject matter jurisdiction at all, it should dismiss the case; however, the OPUC cannot invoke jurisdiction under the grounds of primary jurisdiction because that doctrine is invoked by judges to disclaim jurisdiction and not agencies to claim jurisdiction. In addition, the OPUC does not have primary jurisdiction over an executed PURPA contract. Nearly all state and federal courts that have reviewed the issues have found that, while state commissions often have primary jurisdiction over the formation of a legally enforceable obligation or contract under PURPA, state commissions do not have primary jurisdiction to resolve a dispute regarding a fully executed fixed price contract. This is because courts are better equipped to resolve contractual disputes than state agencies. Finally, it was inappropriate to find that the OPUC has primary subject matter jurisdiction without that issue being fully briefed.

1. Certification Is Warranted Because Subject Matter Jurisdiction Was Neither Raised in the Motion to Dismiss Nor Briefed by PNW Solar

The OPUC should vacate the Ruling finding that the OPUC has primary subject matter jurisdiction because PNW Solar did not move to dismiss on those grounds and the issue was not fully briefed by the parties. Lack of subject matter jurisdiction can be raised at any time and is not waived if it is not raised in a defendant's first filing, and a tribunal can, on its own, conclude

that it does not have subject matter jurisdiction.[36] Otherwise, rulings on motions should be limited to the issues raised by the initiating motion.

Here, PNW Solar moved to dismiss for lack of personal jurisdiction but did not move to dismiss for lack of subject matter jurisdiction with the understanding that it could raise the issue of subject matter jurisdiction at any time. PNW Solar specifically noted in its Motion to Dismiss that it was not addressing subject matter jurisdiction.[37] Additionally, in its Reply, PNW Solar reiterated that it was not seeking dismissal based on lack of subject matter jurisdiction at that time but would raise it in the future if personal jurisdiction was found.[38] The Ruling, however, concluded that the OPUC has primary subject matter jurisdiction. Because the Ruling finds that there is primary subject matter jurisdiction, without giving PNW Solar the opportunity to brief the issue, PNW Solar's opportunity to respond to that argument and be heard on the matter is substantially impaired. Therefore, the ALJ should certify the decision to the OPUC for resolution to allow PNW Solar an opportunity to address the issue of primary jurisdiction, and the OPUC should reverse the ALJ's conclusion that the OPUC has primary jurisdiction.

2. The OPUC Does Not Have Primary Subject Matter Jurisdiction

As with the issue of personal jurisdiction, the Ruling does not specifically state which of the authorities cited grants the OPUC primary subject matter jurisdiction. Without directly tying any of the justifications to the concept of primary jurisdiction, the Ruling appears to rely on one or more of the following: 1) that the OPUC's statutory authority to establish rules regarding the terms and conditions of QF contracts grants it primary jurisdiction over executed contracts; 2) that the "affecting its own rates" language in ORS 756.500(5) grants the OPUC primary

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36 See ORCP 21.
37 See PNW Solar's Motion to Dismiss at 5 n.8.
38 See PNW Solar's Reply To PGE Response to Motion to Dismiss at 1 n.1.

jurisdiction to interpret any contract with a utility if the contract might impact the utility's revenue or expenses; and/or 3) that Section 17 of the PPA grants the OPUC primary jurisdiction over a later contract dispute. As detailed below, none of these arguments prevail and the OPUC does not otherwise have primary jurisdiction.

Primary jurisdiction is "[t]he right or responsibility of an administrative or regulatory agency to pass initially on controversies involving matters of fact or discretion within its sphere before relief is sought in the courts."[39] Primary jurisdiction is a doctrine used by the courts to transfer initial decision-making from the court to the agency where both entities have jurisdiction and a potential for conflict exists.[40] "Where no agency has or retains jurisdiction. . . there is no reason for a court to 'refrain' from exercising its jurisdiction."[41]

There are two types of primary jurisdiction.[42] The first type is statutory primary jurisdiction where a statute "specifically requires courts to apply the primary jurisdiction doctrine to a class of disputes."[43] The second type is judicially invoked primary jurisdiction "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."[44]

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39 Boise Cascade Corp. v. Bd. of Forestry, 325 Or. 185, 191 n.8 (quoting Webster's Third New Int'l Dictionary 1800 (unabridged ed. 1993)).

40 Verizon Nw., Inc., v. Portland General Elec. Co., 2004 LEXIS 32565 at 10, 2004 WL 97615 (D. Or. 2004).

41 Or. Trail Elec. Consumers Coop v. Co-Gen Co., 168 Or. App. 466, 473 n.6 (2000).

42 In addition to not explaining why the OPUC has primary jurisdiction, the Ruling does not explain what type of primary jurisdiction provides the OPUC with jurisdiction over PNW Solar.

43 Boise Cascade Corp. 325 Or. at 191 (quoting Kenneth Culp Davis and Richard J. Pierce, Jr., II Administrative Law Treatise § 14.1, 276 (3d ed. 1994).).

44 Id. at 192.

The primary jurisdiction doctrine is, essentially, a tool used by the courts or the legislature to send a case to an agency. Other than the Ruling at issue, PNW Solar has located no instances where the OPUC itself has decided that it has primary jurisdiction, but there are some OPUC decisions acknowledging and following a court ruling that the OPUC has primary jurisdiction.[45] This may be because, if the primary jurisdiction doctrine applies, it is not proper for the OPUC to determine so *sua sponte* but for the OPUC to await a ruling from a court deferring primary jurisdiction to the OPUC. PNW Solar has located no Oregon case that specifically deferring primary jurisdiction to the OPUC on an executed PURPA contract, but there are cases in which Oregon courts have interpreted executed PURPA contracts.

In general, there is no "fixed formula" for invoking judicial primary jurisdiction, but courts look to three factors: "(1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue, (2) the need for uniform resolution of the issue, and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities."[46] Balanced against these factors is the likelihood that dismissal will unduly delay resolution of the dispute before the court.[47]

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45 See In re The Application of Portland General Elec. Co. for an Investigation into Least Cost Plan Plant Retirement; Revised Tariffs Schedules for Electric Service in Or. Filed by Portland General Elec. Co.; Portland General Elec. Co.'s Application for an Accounting Order and for Order Approving Tariff Sheets Implementing Rate Reduction, Docket No. DR 10, UE 88 & UM 989, Order No. 08-487 at 16-17 (Sept. 30, 2008) (following the Oregon Supreme Court's ruling that the OPUC had primary jurisdiction); see also In re Complaint of The Or. Exchange Carrier Ass'n et al. v. LocalDial Corp., Docket No. UCB 19, Order No. 04-358, 1 n.2 (noting that the claim came to the OPUC from the circuit court on the grounds of primary jurisdiction).

46 Boise Cascade Corp., 325 Or. at 191.

47 Id.

Where an action falls in an area traditionally adjudicated by the courts, a court will generally not find that an agency has primary jurisdiction.[48] In *Boise Cascade Corp. v. Board of Forestry*, the agency denied Boise Cascade's logging permit and Boise Cascade brought an inverse condemnation action in circuit court alleging that the effect of the Board's decision was a taking.[49] The court mainly analyzed the first factor and reasoned that an inverse condemnation action "traditionally falls within an area adjudicated by courts," and the Board of Forestry did not have any particular expertise to determine whether a taking had occurred.[50] Therefore, the court concluded that the Board did not have primary jurisdiction.[51]

On the other hand, where a dispute requires that a court interpret a policy within an agency's delegated authority, the court will defer to the agency under the doctrine of primary jurisdiction.[52] For example, in *Dreyer v. PGE*, a group of utility customers (ratepayers) brought a case in circuit court against PGE to recover an overpayment after a court ruled (in another proceeding) that PGE had unlawfully included in its rates certain amounts attributed to a return on its investment in the Trojan nuclear plant.[53] A central issue to the case was whether the OPUC has the statutory authority to issue refunds.[54] At the time of filing, another action filed by a ratepayer advocacy group was already pending before the OPUC on the issue of whether PGE owed its ratepayers for the overpayment.[55] In applying the *Boise* three-factor test, the court in

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48 Id.
49 Id.
50 Id. (comparing Dunn v. City of Redmond, 82 Or. App. 36 (1986) where the Land Use Board of Appeals has exclusive jurisdiction to review land use decisions including its constitutionality).
51 Id.
52 341 Or. 262, 287 (2006).
53 Id. at 273.
54 Id. at 285.
55 Id. at 270.

Dreyer reasoned that: 1) the action pending before the OPUC had the potential to resolve the dispute; 2) the present action concerns retail rates, which is within the OPUC's specialized knowledge; and 3) the resolution of a central issue in the action required interpretation of a policy issue within the OPUC's delegated authority to decide (i.e., whether the OPUC has the authority to issue refunds).[56] Therefore, the court found that the OPUC had primary jurisdiction, and the action should be held in abeyance pending the outcome of the action before the OPUC.[57]

Again, it is useful to compare another area in which the OPUC may have primary jurisdiction, which include a utility's obligation to *enter into PURPA contracts* prior to execution.[58] Primary jurisdiction may be warranted because of the unique manner in which PURPA requires electric utilities to enter into contract with QFs. Section 210 of PURPA "seeks to encourage the development of cogeneration and small power production facilities."[59] Congress found it to be necessary to force utilities to enter into contracts with QFs because "traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities."[60]

The federal PURPA therefore directs the FERC to establish regulations to implement the requirement that electric utilities must purchase electric energy from QFs.[61] FERC has established rules that allow a QF to force a utility to buy its electricity absent a contract, but through a "legally enforceable obligation."[62] The Oregon PURPA similarly directs utilities to

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56 Id. at 285-86.
57 Id. at 287.
58 See Snow Mountain Pine Co. v. Mauldin, 84 Or. App. 590, 597 (1987); see also Indep. Energy Prod. Ass'n, Inc., 36 F.3d at 856-859.
59 FERC v. Mississippi, 456 U.S. at 750; 16 USC 824a-3(a).
60 FERC, 456 U.S. at 750.
61 16 USC 824a-3(a)(2).
62 18 CFR 292.304(d); FLS Energy Inc., 157 FERC ¶ 61,211 at PP 23-25 (2016).

enter into contracts with QFs.[63] The OPUC has adopted rules implementing this federal and state mandate.[64] Thus, utilities do not voluntarily enter into contracts with QFs the way in which they purchase other goods and services, but are legally obligated to do so because of federal and state PURPAs and their implementing rules.

In *Snow Mountain Pine Co. v. Mauldin*, a QF filed a complaint with the OPUC to compel a regulated utility to purchase energy from the QF and to set the price paid to the QF.[65] On appeal of the OPUC's order, the court reasoned that a utility cannot deprive a QF of its right to sell power "merely by refusing to enter into a contract" because the utility's obligation to purchase QF power is imposed by law under the PURPA "statutes, regulations, and administrative rules."[66] Because the obligation to sell power to a utility is based on statutes and rules, the question of whether the utility is required to purchase electricity is often addressed in state or federal administrative proceedings.[67] Therefore, if the court were faced with a complaint to force a utility to enter into a long-term contract with a QF, then primary jurisdiction potentially could be invoked so that the court should defer to the OPUC's and FERC's expertise to determine whether the utility is obligated to enter into a contract.

The dispute between PNW Solar and PGE does not address whether or not PGE must enter into a contract with PNW Solar but PGE's decision not to comply with the terms of the contract. Issues related to breach of contract, anticipatory repudiation, and damages for these

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63 ORS 758.525(2) ("An electric utility shall offer to purchase energy or energy and capacity whether delivered directly or indirectly from a qualifying facility.").

64 OAR 860-029-0030 ("Each public utility shall purchase, in accordance with OAR 860-029-0040, any energy and capacity in excess of station service (power necessary to produce generation) and amounts attributable to conversion losses, which is made available from a qualifying facility".).

65 84 Or. App. at 593.

66 Id. at 598-600.

67 See Pioneer Wind Park I, LLC, 145 FERC ¶ 61,215 at P. 35 (2013).

types of violations are within the traditional expertise of courts of law, and the OPUC is ill-suited to resolve.

While Oregon courts have had no difficulty in taking up contractual disputes between QFs and utilities, the issue regarding whether the OPUC has primary subject matter jurisdiction over a dispute regarding an executed PURPA PPA appears to be an issue of first impression in Oregon. Other jurisdictions offer persuasive authority finding that state commissions do not have primary jurisdiction, including the Second Circuit and Third Circuits (applying New York law), Montana, Louisiana, Maine, New York, and Texas.[68]

The Second Circuit found that the New York state commission did not have primary jurisdiction over the adjudication of breach of contract disputes where the state statute spoke only to the commission's authority to require utilities to enter into PPAs.[69] The court further found that "[e]ven if the [commission] could exercise proper jurisdiction over this case, . . . [the court] would nevertheless find the primary jurisdiction doctrine inappropriate because the issues of contract interpretation here are neither beyond the conventional expertise of judges nor within the special competence of the [commission]."[70] In other contract disputes in New York between QFs and utilities, the federal District Courts of New York also refused to give the state commission primary jurisdiction, if the courts can resolve the issue without the technical knowledge of the commission.[71]

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68 There may be other state and federal court decisions regarding primary jurisdiction, but state trial court orders are generally not published and difficult to research.

69 Fulton Cogeneration Associates v. Niagara Mohawk Power Corp., 84 F.3d 91, 97 (2nd Cir. 1996).

70 Id.

71 See Long Lake Energy Corp. v. Niagara Mohawk Power Corp., 700 F. Supp. 186, 189 (S.D.N.Y. 1988) (finding no primary jurisdiction over an antitrust issue between a QF and a utility where the agency does not have the authority to grant relief in the form of treble damages and a PURPA congressional conference report specifically indicated an

The Supreme Court of Maine agrees.[72] In the *Benton Falls Associates* case, the court found that the state commission did not have primary jurisdiction where the dispute was over an interpretation of a PURPA contract.[73] The court reasoned that "the present case concerns a contract dispute more within the particular expertise of the courts than the [state commission]").[74]

Applying Louisiana law, a federal district court reached the same conclusion that contract claims should be resolved by a court and not a state agency under the doctrine of primary jurisdiction.[75] The court interpreted the doctrine of primary jurisdiction similar to Oregon's in which "a court is permitted, but not required, to defer to a government agency when (1) the agency has concurrent jurisdiction over an issue, and (2) the court desires to defer to the agency's special expertise."[76] The court explained that "[a]t issue in this case are contract claims. Contract claims do not require the resolution of predicate factual issues within the [Louisiana Public Service Commission's] special expertise."[77] Then the court ultimately concluded that it, and not the state agency, "has the special expertise with which to interpret contracts, and to determine whether breaches of contract occurred."[78]

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intent not to give state commissions primary jurisdiction over antitrust cases); In re Magnesium Corp. of America, 278 BR 698, 710-711 (Bankr. S.D.N.Y., 2002) (finding no primary jurisdiction where a QF's right to interruptible service under FERC's PURPA rule 18 CFR 292.305(b)(1) requires only a plain reading of the statute and not the specialized knowledge of the Commission; but finding primary jurisdiction as to the actual rates to be charged and how the interruptible service should be implemented because rate-setting is within the agency's technical knowledge and beyond the usual expertise of judges).

72 See Benton Falls Associates v. Cent. ME Power, 828 A.2d 759 (Me., 2003).

73 Id.

74 Id. at 764.

75 Occidental Chem. Corp. v. La. PSC, 494 F. Supp. 2d 401 (M.D.La. 2007).

76 Id. at 415.

77 Id.

78 Id.

While not addressing jurisdictional questions, other states courts have resolved contract disputes regarding executed PURPA contracts. Montana has allowed disputes under an executed PURPA contract to be addressed through the ordinary judicial process, rather than the state utility regulatory agency.[79] Similarly, the Texas state court has resolved breach of contract claims regarding the sale of power under PURPA.[80]

On the other hand, there are cases in which a court found primary jurisdiction, but they did not address contract interpretation and the primary jurisdiction was in favor of FERC, not a state commission. For example, in two cases, a court found that FERC (not a state commission) had primary jurisdiction to decide whether an entity was a QF.[81] As indicated above, FERC has ongoing statutory authority over whether an entity is a QF, and PURPA pre-empts state commissions on this issue, so it makes sense that primary jurisdiction would be awarded to FERC in such a scenario.

In the *City of Boulder v. Public Service Co.*, the court found that the state commission had primary jurisdiction.[82] The court explained that the plaintiffs did not actually allege a contractual dispute, but the dispute regarded whether the state commission miscalculated the

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79 Colstrip Energy Ltd. P'ship v. Nw. Corp., 253 P.3d 870 (Mont. 2011) (contract claims filed in court, but resolved by an arbitrator pursuant to the arbitration provision of the contract).

80 BP Chemicals, Inc. v. AEP Texas Cent. Co., 198 S.W.3d 449 (Tex. App. 2006).

81 See In re Megan-Racine Associates, Inc., 180 BR 375, 381-382 (1995) (reasoning that the bankruptcy court did not have relevant factual or legal expertise over QF issues, and the plain language of PURPA places the determination of whether an electric generation facility is a QF in FERC's discretion and expertise); see also Potomac Elec. Power Co. v. Panda Brandywine, L.P., 99 F. Supp. 2d 681 (D. Md. 2000) (reasoning that the doctrine of primary jurisdiction in favor of FERC is properly applied to the legal question of whether an electricity generation facility meets PURPA's statutory definition to be considered a legitimate QF).

82 996 P.2d 198 (Colo. App. 1999).

price.[83] The court explained that: "Plaintiff's claim for breach of contract is grounded in the notion that the rates were improperly calculated by [the purchasing utility] in its tariff filings and … requested, in essence, not the enforcement of the terms of the PPAs between the parties, but rather the modification of rates set forth in PUC-approved tariffs."[84] Therefore, if the plaintiffs had a dispute about an actual contract provision rather than the price set by the state agency, then there would have been jurisdiction over which the court could exercise.

PNW Solar has located one case in which a court has found primary jurisdiction over a dispute regarding an executed PURPA contract.[85] In this unpublished opinion, the Pennsylvania trial court relied on Pennsylvania law, which specifically provided the state agency with the "authority to review and modify contracts entered into by public utilities."[86] The state agency had adopted rules pursuant to this statute that specifically provided for "informal and formal PUC assistance in the resolution of disputes between an electric utility and a QF."[87] There is no such similar Oregon law or rule that provides the OPUC with the express authority to resolve contract disputes between utilities and QFs.

The Oregon courts have addressed and resolved PURPA contractual disputes and specifically found that courts have jurisdiction to resolve such disputes. The Oregon Court of Appeals interpreted a PURPA contract noting that "the determination of parties' rights under a contract is a common-law issue that falls within a circuit court's general jurisdiction."[88] As the Court of Appeals explained:

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83 Id. at 203.
84 Id. at 204.
85 Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co., CIV. A. 95-4885, 1996 WL 32891 (Jan. 23, 1996).
86 Id. at *2.
87 Id.
88 Or. Trail Elec. Consumers Coop., 168 Or. App. at 473.

> The threshold question for the parties and the court below was one of jurisdiction. Likewise, that is a threshold question for our review on appeal. The issue arises because of the contract's reference to the 'Public Utility Commissioner, or his successor.' That language immediately invites uncertainty as to whether a dispute over possible modification authority belongs in circuit court or in an administrative proceeding before the Public Utility Commission (PUC), which is the successor to the Commissioner. OTECC anticipates that concern on appeal, as it did below, and asserts circuit court jurisdiction for reasons that run to the merits of OTECC's position. That is, OTECC argues that the contract provides for modification, explains at some length why the parties are no longer subject to general regulatory oversight by the PUC, and contends, for several reasons, that authority to modify the contract necessarily is now vested in a circuit court.
>
> The trial court, however, correctly identified a more straightforward ground for jurisdiction. It determined that, apart from whatever other remedy OTECC may be seeking, *the action requires a declaration of the parties' rights under the contract, which is an issue that a circuit court has jurisdiction to decide. We agree. As we previously have held, the determination of parties' rights under a contract is a common-law issue that falls within a circuit court's general jurisdiction*.[89]

Oregon courts have repeatedly exercised their jurisdiction to resolve contractual disputes between QFs and utilities. For example, in *PacifiCorp v. Lakeview Power Co.*, the Oregon courts interpreted a similar contractual provision to that at issue here.[90] The QF, Lakeview Power Co. ("Lakeview"), first sued its utility, PacifiCorp, for repudiating its contract prior to Lakeview being able to complete its electric generation facility.[91] Later and after that lawsuit was settled, PacifiCorp brought a declaratory judgment action against Lakeview claiming contractual default, and Lakeview "counterclaimed, alleging breach of contract and violations of ORS chapter 758, the Oregon analog of the federal [PURPA]."[92] While Lakeview sued under the Oregon PURPA, the heart of the dispute was a contractual interpretation, which both the trial and appellate court exercised their expertise to interpret.[93]

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89 Id. at 473-74 (emphasis added) (citations omitted).
90 131 Or. App. 301 (1994).
91 Id. at 303.
92 Id.
93 Id. at 303-07.

Similarly, the Oregon courts addressed a more complex PURPA contractual dispute between a QF, Water Power Company ("Water Power"), and a utility, PacifiCorp.[94] Water Power requested that the OPUC arbitrate the issue of whether PacifiCorp was obligated to enter into a contract with Water Power.[95] After the OPUC's arbitration, Water Power and PacifiCorp entered into a contract.[96] Additional disputes occurred, and eventually, Water Power elected to no longer seek OPUC assistance and directly brought a breach of contract claim as well as PURPA statutory violations against PacifiCorp in court.[97] The Circuit Court fully adjudicated the dispute, which was appealed to the Oregon Court of Appeals.[98]

In *Water Power Co.*, the trial and appellate courts interpreted both the contract and PURPA. The Court of Appeals recognized that "a utility's obligation to purchase power arises and what purchase rates apply" are "matters that the regulations and rules covered."[99] The Court of Appeals explained that the federal and state PURPA, "regulations and rules, on the other hand, do not cover the" the specific contractual dispute at issue, which was the "location of points of delivery or deadlines for transmission agreements."[100] Instead, both courts read the power purchase agreement, which resolved the legal issue in dispute.[101] The Oregon Court of Appeals in *Water Power Co.* recognized that the OPUC has jurisdiction over whether and under what terms the QF and the utility *enter into a contract*, but after that contract is executed, the court is the proper tribunal to interpret the plain meaning of the contract.

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94 Water Power Co. v. PacifiCorp, 99 Or. App. 125 (1989).
95 Id. at 128.
96 Id.
97 See id. at 127, 130.
98 Id. 132-35.
99 Id. at 132.
100 Id.
101 Id.

In this case, the OPUC does not have primary subject matter jurisdiction under either statutory primary jurisdiction or judicially invoked primary jurisdiction. PNW Solar is aware of no federal or Oregon statute that specifically requires courts to apply the primary jurisdiction doctrine to disputes between a QF and a utility over an executed contract. The only rule PNW Solar could find that was even remotely on point was the 1980 version of 18 CFR 292.401(a) which read in full:

> State regulatory authorities. Not later than one year after these rules take effect, each State regulatory authority shall, after notice and an opportunity for public hearing, commence implementation of Subpart C (other than § 292.302 thereof). Such implementation may consist of the issuance of regulations, *an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C*, or any other action reasonably designed to implement such subpart (other than § 292.302 thereof). (emphasis added)

This section was removed as being obsolete because the requirements were implemented by the end of 1981.[102] The dispute resolution function in that section was primarily meant to apply only during that initial implementation phase and only with regard to disputes arising under Subpart C. Therefore, absent any statute specifically granting the OPUC the power to resolve disputes arising out of executed contracts or requiring that courts defer primary jurisdiction to the OPUC, the OPUC does not have statutory primary jurisdiction.

The OPUC also does not have judicially-invoked primary jurisdiction in this case because this case requires interpretation of a contract, an area traditional adjudicated by the courts and does not require interpretation of a policy within the OPUC's delegated authority. Similar to the inverse condemnation claim in the *Boise* case, the contract interpretation claim in this case is a claim that traditionally falls within an area adjudicated by courts.[103] Additionally, the OPUC

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102 See 57 Fed. Reg. 21,731, 21,732 (May 22, 1992).

103 The law on contract construction and interpretation is based in Oregon common law. Courts first look to the text of the disputed provision in the context of the document as a

does not have any specialized knowledge in the area of contract interpretation. Unlike the central issue in *Dreyer* case (whether the OPUC had statutory authority to order refunds to ratepayers), the central issue in this case (whether the contract allows PNW Solar to change its nameplate capacity rating) does not require interpretation of a policy issue within the OPUC's delegated authority. Instead it requires that the tribunal interpret the contract language. Further, unlike the dispute in the *Snow Mountain* case, which was over the utility's obligation to *enter into a contract*, this dispute concerns an interpretation of an already executed contract. It is also persuasive that numerous other courts have declined to invoke the doctrine of primary jurisdiction in instances where the court is asked to interpret a contract between a utility and QF. Last, it is instructive, that while Oregon courts have never specifically ruled on whether the OPUC has primary jurisdiction over executed contracts, QFs have brought suit in circuit court and the courts have held that they have jurisdiction to hear the matter and decided the cases on the merits. Therefore, the OPUC does not have primary jurisdiction over this dispute, and (if it did) the OPUC cannot invoke the doctrine on its own.

3. Like Personal Jurisdiction, Discussed Above, Primary Subject Matter Jurisdiction Cannot Be Conferred Upon an Agency by Stipulation

The OPUC does not have primary subject matter jurisdiction over this dispute by reason of the PPAs' Section 17. As indicated above in the section on personal jurisdiction, an Oregon administrative agency's jurisdiction may not be conferred by stipulation of the parties.[104] As with all agencies in Oregon, the OPUC's jurisdiction must be found in its statutory grant of

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whole to determine whether an ambiguity exists, then if the provision is ambiguous, courts look to extrinsic evidence regarding the intended meaning, and finally, if that still does not resolve the ambiguity the courts look to appropriate "maxims of construction." Yogman v. Parrott, 325 Or. 358 (1997).

104 Diack, 306 Or. at 293.

authority and the parties cannot confer jurisdiction on the OPUC by agreement or stipulation. Section 17 does not "explicitly" state that future contract disputes shall be decided by the OPUC, and even if did, that provision would be an invalid grant of jurisdictional authority to the OPUC by stipulation. As indicated above, parties simply cannot expand an agency's jurisdiction (whether personal or subject matter) by stipulation. Therefore, the Ruling that the OPUC has primary subject matter jurisdiction cannot stand under Oregon law and should be vacated.

In addition, as it pertains specifically to subject matter jurisdiction, the OPUC has found that Section 17 cannot expand its jurisdiction beyond its statutorily granted jurisdiction.[105] In *PaTu*, a QF filed a complaint against PGE and argued that the OPUC has primary jurisdiction over "claims for declaration of the meaning of the contract entered into pursuant to the OPUC's implementation of PURPA." PGE argued that regardless of whether it is a contract dispute, the matter was preempted by the Federal Power Act. The ALJ concluded that OPUC lacked jurisdiction over transmission of a QF output to a utility. Thus, the OPUC has recognized that Section 17 does not expand its jurisdiction over subject matters in which it does not have jurisdiction. Therefore, in this case Section 17 also does not expand the OPUC's subject matter jurisdiction, and its jurisdiction should be found in the OPUC's statutory grant of authority.

C. The OPUC's Exercise of Jurisdiction in This Case Violates PNW Solar's Constitutional Right to a Jury Trial

If the OPUC exercises jurisdiction in this matter to declare the parties' rights under the PPA or determine whether a breach of the contract occurred, it will violate PNW Solar's right to a jury trial in Oregon. Article VII, Section 3 of the Oregon Constitution provides that "[i]n actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be

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105 PaTu Wind Farm, LLC v. Portland General Elec. Co., Docket No. UM 1566, Order No. 12-316 at 8-9 (Aug. 21, 2012).

preserved."[106] Further, Article I, Section 17 provides that "[i]n all civil cases the right of Trial by Jury shall remain inviolate."[107] Reading these provisions together, Article I, Section 17 provides a jury trial right in common-law claims and defenses that were customarily tried by a jury when Oregon adopted its constitution, and those claims and defenses of like nature.[108] There is no right to a jury trial in cases in equity or admiralty.[109] An action for declaratory judgment requesting the construction of contracts is an action at law.[110] Therefore, in an action for declaratory judgment on the construction of contracts there is a right to a trial by jury. Additionally, juries have traditionally determined whether a breach of a contract has occurred and the amount of damages.[111]

In this case, if the OPUC exercises jurisdiction, PNW Solar's constitutional right to have its rights and obligations under the PPA declared by a jury and to have a jury determine whether a breach has occurred will be violated. What PGE seeks by filing its "Complaint and Request for Dispute Resolution," is a declaration of the parties' rights and obligations under the contract and to determine whether a breach of that contract has occurred by either of the parties. The OPUC does not provide for jury trials. PNW Solar is guaranteed a right to a trial by jury for actions that would declare its rights under a contract and in actions that would determine whether a breach has occurred. Therefore, because the outcome of this OPUC proceeding would declare what the parties' rights and obligations are and/or whether a breach occurred, the fact that no jury is available, means that PNW Solar's right to a jury trial would be violated. Therefore, the OPUC

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106 Or Const. Art VII § 3.
107 Or Const. Art. I § 17.
108 McDowell Welding & Pipefitting, Inc. v. U.S. Gypsum Co., 345 Or. 272, 279, 193 P.3d 9 (2008).
109 Id.
110 C & B Livestock, Inc. v. Johns, 273 Or. 6, 10, 539 P.2d 645 (1975).
111 Molodyh v. Truck Ins. Exchange, 304 Or. 290, 296, 744 P.2d 992 (1987).

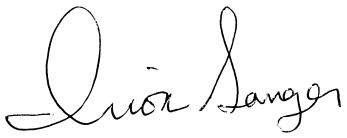
should dismiss this action and allow the action to proceed before the Multnomah County Circuit Court.

IV. CONCLUSION

The Ruling should be certified to the OPUC because PNW Solar will experience undue prejudice and good cause exists because the Ruling it requires PNW Solar to participate in a case where the OPUC does not have personal jurisdiction over it, and the Ruling was issued on grounds that were not raised in the Motion to Dismiss and not briefed. In the end, the OPUC should vacate the Ruling and dismiss PGE's complaint on the grounds that the OPUC does not have personal jurisdiction over PNW Solar or primary subject matter jurisdiction.

Dated this 13th day of November, 2017.

Respectfully submitted,



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