BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	)	**DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION AND SUMMARY

Pursuant to OAR 860-001-0420 and ORCP 21A(1) and ORCP 21A(3), defendants Alfalfa Solar I LLC, Dayton Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, Riley Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, and Wasco Solar I LLC (collectively, the "NewSun QFs") hereby move the Oregon Public Utility Commission (the "OPUC" or "Commission") to dismiss the pleading filed by Portland General Electric Company in this proceeding titled "COMPLAINT AND REQUEST FOR DISPUTE RESOLUTION." The NewSun QFs will refer herein to PGE's pleading as its "Request for Dispute Resolution" because the pleading fails to meet the basic statutory requirement in ORS 756.500(3) that a complaint "state all grounds of complaint" or "the violation of any law claimed to have been committed by the defendant." Instead, it includes allegations that would only support issuance of a declaratory judgment in court.

In fact, as the NewSun QFs have pointed out in their Motion for Stay, PGE's Request for Dispute Resolution regards the identical dispute that the NewSun QFs have asked the United States District Court for the District of Oregon to resolve as to the meaning of the power purchase agreements between the parties (the "NewSun PPAs"). PGE's Request for Dispute Resolution filed at this Commission and its request to "take jurisdiction"[1] from the federal court should be dismissed.

First, as already demonstrated in the Motion for Stay, PGE's Request for Dispute Resolution provides no basis for this Commission to "take jurisdiction" from the federal court. Given the supremacy of federal law, Article III, section 2 of the United States Constitution, and the diversity jurisdiction statute, 28 USC § 1332, require this Commission to dismiss this action

[1] *PGE's Request of Dispute Resolution* at p. 2.

unless the federal court defers to the Commission. Even setting the United States Constitution aside, Oregon law itself requires the Commission to dismiss under the fundamental rule that the first-filed court should resolve the dispute. That rule is embodied in ORCP 21A(3), which allows a motion for dismissal when "there is another action pending between the same parties for the same cause." ORCP 23A(3).

Second, even if there were not another action pending in federal court, this Commission would still lack jurisdiction. This dispute solely regards the meaning of a contract and requires nothing more than application of common law contract principles. The Commission has already determined that its prior orders issued before execution of the NewSun PPAs do not resolve the dispute. Additionally, the outcome will not impact the Commission's ongoing implementation of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 USC § 824a-3 *et seq.*, because the versions of PGE's standard contract at issue here are no longer offered to prospective qualifying facilities ("QFs"). None of the statutes PGE cites provide the Commission with jurisdiction to issue declaratory judgments over the meaning of executed contracts against a nonregulated entity, such as each of the NewSun QFs. Given the lack of jurisdiction, this proceeding would only result in delay and additional litigation over the effect of any order the Commission might issue. Coincidentally, delay inures to PGE's benefit. In these circumstances, the judge-made doctrine of primary jurisdiction – which must be invoked *by a court* – does not apply. In short, this Commission lacks jurisdiction and has historically abstained from interfering in the province of the courts, which are well suited to ascertain the meaning of a contract.

Accordingly, the Commission should expeditiously issue an order dismissing PGE's Request for Dispute Resolution.

BACKGROUND

As PGE alleges, the NewSun QFs and PGE disagree as to the meaning of an important aspect of the NewSun PPAs. The dispute regards the commencement date of the fifteen-year Renewable Fixed Price Option in each of the NewSun PPAs. The NewSun QFs contend that the term of the Renewable Fixed Price Option commences when the relevant NewSun QF begins delivering power to PGE (also known as the commercial operation date) and provides a period of fifteen years thereafter during which the NewSun QFs will be paid those fixed prices for their entire net output.[2] After the end of the fifteen years of sales of power at those fixed prices, the NewSun QFs contend that they will be paid the market index price for their net output. In contrast, PGE contends that – despite the fact that each of the NewSun PPAs expressly contemplates that the NewSun QF will develop a new solar facility and only then begin to deliver and sell power to PGE – the term of the Renewable Fixed Price Option commenced as soon as the parties executed the relevant NewSun PPA. According to PGE, if PGE's interpretation does not prevail, PGE would be required to pay the NewSun QFs "tens of millions of dollars in additional power costs." *PGE's Request for Dispute Resolution* at ¶ 20.

In light of the parties' disagreement, on January 8, 2018, the NewSun QFs filed their declaratory judgment action in the United States District Court for the District of Oregon. *Alfalfa Solar I LLC, et al. v. Portland General Electric Company,* No. 3:18-cv-00040-SI, complaint (D Or, Jan 8, 2018).[3] The NewSun QFs' complaint invokes the federal court's diversity jurisdiction, which is conferred by Article III, Section 2 of the United States Constitution and a federal statute, 28 USC § 1332. The NewSun QFs' complaint requests a declaratory judgment under

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[2] The NewSun PPAs containing these terms are attached to PGE's pleading as exhibits.

[3] A copy of the NewSun QFs' complaint in the federal court is contained in the record as Exhibit A to the NewSun QFs' Motion for Stay.

another federal statute, 28 USC § 2201 *et seq*., and asserts a single claim for relief – namely, the NewSun QFs' seek a declaration that the fifteen-year term of the Renewable Fixed Price Option under the executed NewSun PPAs commences when the relevant NewSun QF is operational and delivering power to PGE. The complaint was served on PGE on January 10, 2018, and the case has been assigned to Judge Michael Simon.

Over two weeks after commencement of the federal court action, on January 25, 2018, PGE commenced this proceeding. PGE's Request for Dispute Resolution cites ORS 756.500, which regards complaints, as the apparent statutory basis for jurisdiction, but it does not identify any law or administrative rule administered by the Commission that the NewSun QFs are alleged to have violated. The pleading contains no alleged actions or inactions that the NewSun QFs have taken that constitute the "grounds of complaint" required by ORS 756.500(3). The factual allegations against the NewSun QFs only include that the "NewSun Solar Parties now argue that the NewSun Solar PPAs require PGE pay fixed prices for 15 years measured from the Commercial Operation Date[,]" *PGE's Request for Dispute Resolution* at ¶ 25, and "the NewSun Solar Parties have commenced an action in federal court for the District of Oregon, asking the court to interpret the NewSun Solar PPAs to require PGE to pay fixed prices for 15 years measured from the Commercial Operation Date-not contract execution." *Id.* at ¶ 19.

Based on these allegations – *i.e.*, that the NewSun QFs disagreed with PGE and are seeking a declaratory judgment in federal court – PGE requests that this Commission "take jurisdiction" from the federal court and address the same question that is currently before that court. PGE requests that this Commission "find this Complaint presents issues within its primary jurisdiction and approve PGE's interpretation of the NewSun Solar PPAs that the 15-year fixed-price period is measured from contract execution." *Id.* at ¶ 26. Alternatively, "if the

Commission determines that the 15-year fixed-price period under the NewSun Solar PPAs is measured from the Commercial Operation Date, PGE requests that the Commission find that the fixed price period is measured from the scheduled Commercial Operation Date established in Section 2.2.2 of each of the NewSun Solar PPAs rather than from the date each of the NewSun Solar QFs achieves commercial operation." *Id.* at ¶ 27.

On February 2, 2018, the NewSun QFs' filed a Motion for Stay, which requested, in pertinent part, that the Commission stay this proceeding until after Judge Michael Simon rules on the motion to dismiss that PGE planned to file. Since that time, PGE has filed a motion to dismiss in the federal district court, which is attached as Exhibit A hereto for reference. Administrative Law Judge Michael Grant adopted the parties' agreement that the NewSun QFs may file a motion to dismiss with the Commission, in lieu of an answer, if the Commission declined to stay this proceeding, that the due date for such a motion to dismiss would be February 22, 2018, and that the NewSun QFs may file an answer to PGE's complaint 10 days after the Commission rules on that motion to dismiss if such motion is denied.

As of the time of this filing, the Commission has not ruled on the Motion for Stay, and the NewSun QFs therefore now move for dismissal of this proceeding.

LEGAL STANDARD

The Commission's procedural rules adopt the Oregon Rules of Civil Procedure to the extent not inconsistent with the Commission's procedural rules. OAR 860-001-0000(1). This Motion requests dismissal for two independent bases under the Oregon Rules of Civil Procedure.

First, under ORCP 21A(3), "there is another action pending between the same parties for the same cause." If the court determines another action is pending between the same parties, "the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry

of judgment." ORCP 21A.

Second, under ORCP 21A(1), this Commission lacks subject matter jurisdiction. "If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court *shall* dismiss the action." ORCP 21G(4) (emphasis added).

On a motion to dismiss asserting these defenses, the court may consider matters outside the pleading, including affidavits, declarations and other evidence, to ascertain the facts establishing the existence of another action pending between the same parties for the same cause and the lack of subject matter jurisdiction. ORCP 21A; *Beck v. City of Portland*, 202 Or App 360, 368, 122 P3d 131 (2005).

ARGUMENT

1. The Commission Should Dismiss this Proceeding Because There Is Another Action Pending in Federal Court

The NewSun QFs filed their complaint in federal court more than two weeks before PGE commenced this proceeding. Both proceedings concern exactly the same dispute – namely, the date on which the fifteen-year term of the Renewable Fixed Price Option available under the NewSun PPAs commences. Litigating the same issue at the same time in two separate forums would create the possibility of inconsistent – and, indeed, irreconcilable – results, waste finite judicial and Commission resources, and place an unnecessary burden on the parties. Given the supremacy of the federal courts, adjudicating the same dispute at this Commission would be futile. Moreover, state law mandates dismissal of this action under these circumstances. The Commission should yield to the federal court.

a. The Supremacy Clause Requires Dismissal

The supremacy of federal law and the federal courts prevents this Commission from granting PGE's request to "take jurisdiction" from the federal court or to entertain a complaint

against the NewSun QFs for exercising their constitutional and statutory right to ask the federal court to resolve this contractual dispute. Article III, section 2 of the United States Constitution provides: "The judicial power shall extend to all cases, in law and equity . . . between citizens of different states[.]" In turn, the federal diversity jurisdiction statute provides "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) Citizens of different States[.]" 28 USC § 1332(a)(1). "Only Congress, by repealing section 1332, has the constitutional authority to abolish or limit the district court's jurisdiction to hear all cases and controversies between citizens of different states which involve the requisite amount in controversy." *Begay v. Kerr-McGee Corp.*, 682 F2d 1311, 1316 (9th Cir 1982).

Under the Supremacy Clause, the "Constitution, and the laws of the United States which shall be made in pursuance thereof," including Article III, section 2 of the United States Constitution and 28 USC § 1332(a)(1), are "the supreme Law of the Land." US Const. art. VI, cl. 2. Accordingly, the Ninth Circuit has repeatedly explained that the right to diversity jurisdiction in federal court preempts any state law granting jurisdiction to an agency. *United States Fidelity & Guaranty Co. v. Lee Investments, LLC*, 641 F3d 1126, 1133 (9th Cir 2011). "[S]tate law may not control or limit the diversity jurisdiction of the federal courts." *Begay*, 682 F2d at 1315. Thus, the diversity jurisdiction of the federal district court completely displaces this proceeding regardless of any state law basis for this Commission's jurisdiction, whether that purported jurisdiction is exclusive, primary, or concurrent under state law.

If the Commission allows this proceeding to go forward, any decision the Commission might reach on jurisdictional or substantive issues would not be binding on the federal court. That would be so even if Oregon law did not require the Commission to allow the first-filed

court to go first and even if Oregon law purported to provide the Commission with exclusive jurisdiction over interpretation of the contracts at issue to the exclusion of the federal court. *See United States Fidelity & Guaranty*, 641 F3d at 1133 (holding "even if we were to hold that the [state law] exclusivity provisions applied, they would not operate to divest the federal court of subject matter jurisdiction"). It is up to the federal court to determine based on federal law whether it has jurisdiction to hear this dispute, and if it decides it has jurisdiction, to resolve the dispute by issuing a binding declaratory judgment as the meaning of the NewSun PPAs under 28 USC § 2201 *et seq*.

In fact, federal courts have enjoined ongoing state administrative proceedings that impinge on federal rights, including the right to diversity jurisdiction and the right of a QF to not be subjected to a state utility commission's ongoing regulatory authority over the rates and terms in its long-term PURPA contract. *See, e.g.*, *United States Fidelity & Guaranty*, 641 F3d at 1135 (holding that "district court did not abuse its discretion in enjoining the State Board proceedings after the Insurer's rescission and restitution claims had been resolved by the federal jury"); *Freehold Cogeneration Assoc., L.P v. Bd. of Reg. Com'rs of State of N.J.*, 44 F3d 1178, 1189 & 1193-94 (3rd Cir 1995) (involving federal question jurisdiction and enjoining New Jersey's utility commission against ongoing investigation into executed PURPA contract).

Despite PGE's request, this Commission should not preemptively attempt to "take jurisdiction" back from the federal court. *See PGE's Request for Dispute Resolution* at p. 2. Instead, the Commission should promptly dismiss this proceeding.

b. State Law Mandates Dismissal

Aside from the supremacy of the federal court, state law would require dismissal here even if the NewSun QFs had filed their declaratory judgment action in state court. Oregon

courts have long followed the fundamental rule that, where two tribunals may possess concurrent jurisdiction over a dispute, "as a matter of policy the second court may not interfere with the prior court's action in proceeding to a final conclusion or the rendering of a valid judgment so long as the proceedings are pending in the prior court." *Landis v. City of Roseburg*, 243 Or 44, 50, 411 P2d 282 (1966); *see also State v. Smith*, 101 Or 127, 146-150, 199 P 194 (1921) (applying this rule where federal court obtained jurisdiction before state court). "This rule is so elementary as to require no further citations of authority supporting the legal principle." *Ex Parte Bowers*, 78 Or 390, 398, 153 P 412 (1915) (holding that because the juvenile court had first secured jurisdiction of the subject matter and had never dismissed the proceedings or released the child, the trial court had no authority to intermeddle with the custody of the child and its decree attempting to affect such custody was void). Further, "[t]he court having prior jurisdiction is . . . granted the power to protect its prior jurisdiction by enjoining either the parties or the other court from proceeding further with the cause." *Landis*, 243 Or at 51. Because the NewSun QFs commenced the declaratory judgment action in federal court before PGE commenced this proceeding, the Commission should dismiss this proceeding to avoid interfering with the federal court.

This rule is so well established that Oregon's rules of civil procedure include it as a basis for dismissal. Specifically, "ORCP 21A(3) authorizes the court to dismiss a claim for relief when 'there is another action pending between the same parties for the same cause[.]'" *Lee v. Mitchell*, 152 Or App 159, 163, 953 P2d 414 (1998) (quoting ORCP 23A(3)). For example, in *Dohr v. Marquardt*, 71 Or App 765, 694 P2d 576 (1985), the Oregon Court of Appeals invoked this rule *sua sponte* to affirm dismissal of an action where the plaintiff brought a claim raising essentially the same issues being litigated in another pending action between the same parties. 71 Or App at

768. The Oregon rules of civil procedure "apply in [this] contested case . . . unless inconsistent with [the Commission's] rules, a Commission order, or an Administrative Law Judge (ALJ) ruling," especially where PGE asks the Commission to adopt the role of a trial court and issue a declaratory judgment on the meaning of contracts. OAR 860-001-0000(1). Because there is no inconsistent Commission rule or order, ORCP 23A(3) requires dismissal here.

In summary, the parties are engaged in litigation over the same dispute in the federal court. Accordingly, the Commission should not issue an order intended to interfere with the federal court. There is no need to even proceed to the question of subject matter jurisdiction. The Commission should dismiss this proceeding.

2. PGE's Request for Dispute Resolution Fails to Allege a Statutory Basis for Jurisdiction

Even if the supremacy of federal law and the state's first-filed rule did not apply, PGE's Request for Dispute Resolution fails to identify any valid statutory basis for the Commission to assert jurisdiction. As an administrative agency, the Commission's jurisdiction is strictly limited to the matters delegated to it by state statutes. *Diack v. City of Portland*, 306 Or 287, 293, 759 P2d 1070 (1988). "It is well settled that an agency's jurisdiction cannot be conferred by stipulation of the parties." *Id.* Nor may a party waive a challenge to an agency's jurisdiction. *Id.* Thus, even if the NewSun QFs did not object to the Commission's jurisdiction, the Commission would still have no jurisdiction absent some state statute conferring such jurisdiction. Where no statute confers jurisdiction, the Commission is without any governmental power to act under state law, and all actions taken in such proceeding would be *ultra vires*. An agency decision rendered without jurisdiction is void. *Schurman v. Bureau of Labor*, 36 Or App 841, 844, 585 P2d 758 (1978). Accordingly, where the initiating pleading fails to establish statutory jurisdiction, the Commission must promptly dismiss the proceeding to avoid subjecting the

defendants to unnecessary expense.

To establish jurisdiction, PGE must allege facts that fit within the confines of some statute conferring jurisdiction on the Commission. While the alleged basis for the Commission's statutory jurisdiction over this common law contract dispute is difficult to decipher from PGE's Request for Dispute Resolution, PGE appears to primarily rely upon ORS 756.500. That statute provides, in pertinent part:

> (1) Any person may file a complaint before the Public Utility Commission, or the commission may, on the commission's own initiative, file such complaint. The complaint *shall be against any person whose business or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or regulation of which is conferred upon the commission*. The person filing the complaint shall be known as the complainant and the person against whom the complaint is filed shall be known as the defendant.
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> * * *
>
> (3) The complaint *shall state all grounds of complaint* on which the complainant seeks relief *or the violation of any law claimed to have been committed by the defendant*, and the prayer of the complaint shall pray for the relief to which the complainant claims the complainant is entitled.
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> * * *
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> (5) 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.

ORS 756.500 (emphasis added).

As explained in the following sections, the facts alleged in PGE's Request for Dispute Resolution do not do not confer jurisdiction on the Commission under any of the subsections of this statute. Careful analysis confirms that the Commission must dismiss this case.

a. ORS 756.500(1) Does Not Apply

As noted above, Subsection 756.500(1) only allows for a complaint filed "against any

person whose business or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or regulation of which is conferred upon the commission." As alleged by PGE, the NewSun QFs are in the business of attempting to sell energy and capacity from qualifying facilities to PGE under fully executed, long-term PPAs. But it is well settled that the Commission has no regulatory authority over a qualifying facility and that any attempt to exert utility-type regulatory authority over the rates or terms of executed PURPA contracts is preempted by federal law.

PURPA itself states that FERC "shall, . . . prescribe rules under which . . . qualifying small power production facilities are exempted in whole or part . . . from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if [FERC] determines such exemption is necessary to encourage cogeneration and small power production." 16 USC § 824a-3(e)(1). In turn, FERC has prescribed regulations that provide a broad exemption for renewables QFs up to 30 MW, such as each of the NewSun QFs, from "from State laws or regulations respecting . . . [t]he rates of electric utilities [and] [t]he financial and organizational regulation of electric utilities." 18 CFR § 292.602(c)(1).

These exemptions from utility-type regulatory oversight were in fact one of the primary purposes of PURPA. 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.*

The only FERC regulations identified as being permissibly applied to QFs by this Commission are "[s]tate laws and regulations implementing subpart C" of FERC's regulations. 18 CFR § 292.602(c)(2). The Subpart C regulations are located at 18 CFR §§ 292.301 to 292.314. In this case, the relevant Subpart C regulation is the regulation requiring PGE to *enter into* a long-term fixed-price contract with each NewSun QF under 18 CFR § 292.304(d)(2)(ii), which provides each QF with the "option" to have a "legally enforceable obligation" with "avoided costs calculated at the time the obligation is incurred." The Subpart C regulations further provide that such fixed-price rates will be lawful even if the fixed-price rate turns out, due to changed circumstances, to be different from the utility's actual avoided costs at the time of delivery, 18 CFR § 292.304(b)(5), further undermining the need for ongoing oversight of the rates and terms of the agreement by the state regulatory authority. No other regulations in Subpart C confer ongoing jurisdiction over the executed long-term contract once it is executed.

Thus, FERC's regulations require long-term contracts with fixed-price rates be offered to QFs, and bar the state from subjecting those rates and contract terms to ongoing, utility-type oversight. These regulations, pursuant to which contracts terms and rates are exempt from this Commission's ongoing regulatory authority, are 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." *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).

In light of the purpose of PURPA and FERC's regulations, courts have uniformly held that a state commission's regulatory authority under state law may not extend to ongoing

regulatory oversight of executed PURPA contracts containing long-term fixed-price rates, such as those at issue here. *See Independent Energy Producers Association, Inc. v. California Public Utilities Commission*, 36 F3d 848, 857 (9th Cir. 1994) (state utility commission had no authority "unilaterally to modify the terms of the standard offer contract"). The Oregon Court of Appeals has expressly recognized this limitation on this very Commission's regulatory authority, holding "[c]ourts *uniformly have held that state regulators cannot intervene in the public interest and modify the prices fixed by a cogeneration contract* because PURPA does not provide for such authority . . . , and to imply that authority would *undermine the long-term cogeneration contracts that Congress sought to encourage*." *Oregon Trail Electric Consumers Cooperative, Inc. v. Co-Gen Company*, 168 Or App 466, 482, 7 P3d 594 (2000) (emphasis added).[4]

In *Oregon Trail Electric Consumers Cooperative*, the Oregon Trail Electric Consumers Cooperative (OTECC) appealed a circuit court decision denying OTECC "relief from what it view[ed] as the excessively high energy prices set by [a] contract" between OTECC and Co-Gen Company (Co-Gen). 168 Or App at 472. The Oregon Court of Appeals held that this Commission had no authority "to modify the negotiated contract prices" because PURPA bars such modification. *Id.* at 481-82. Notably, the court also applied normal rules of common law contract construction, and expressly held the trial court had jurisdiction to resolve the contractual dispute. In so holding, the court explained, "the action requires a declaration of the parties' rights under the contract, which is an issue that a circuit court has jurisdiction to

[4] Although the *Oregon Trail Electric Consumers Cooperative* decision regarded a "cogeneration" QF, the very same exemptions from ongoing state regulation that apply to cogeneration plants also apply to solar-powered QFs up to 30 MW in size, such as the each of the NewSun QFs. *See* 16 USC § 824a-3(e); 18 CFR § 292.602(a), (c)(1).

decide[,]" and "the determination of parties' rights under a contract is a common-law issue that falls within a circuit court's general jurisdiction." *Id.* at 473.

The court further held, in deciding the trial court had jurisdiction, that "neither party is presently subject to PUC regulation, at least with respect to the price paid for energy." *Id.* at 474 n.6. If neither the QF nor the utility was subject to regulation by the Commission in that case, it must follow that the NewSun QFs are not persons "whose business or activities are regulated by . . . the commission" here, as required by ORS 756.500(1) to confer jurisdiction on the Commission in a complaint brought against the NewSun QFs.

Thus, it is well settled under PURPA that, "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). The NewSun PPAs are not governed by this Commission's normal ratemaking standards or statutes containing those standards, and any effort to apply those utility-type regulatory standards or statutes to the NewSun PPAs is expressly preempted by federal law. Accordingly, any jurisdiction this Commission may have over this dispute must arise from some source of law other than PURPA, FERC's regulations, or any state statute conferring ongoing regulatory authority over public utilities.

In sum, this Commission has no regulatory authority over the NewSun QFs, their executed agreements, or the price paid by PGE in those agreements during any of years during the term of the agreements. Consequently, ORS 756.500(1) is inapplicable because PGE's Request for Dispute Resolution was not filed against a person "whose business or activities are *regulated* by . . . the commission[.]" ORS 756.500(1) (emphasis added).

b. ORS 756.500(3) Does Not Apply

Even if the NewSun QFs' business or activities were regulated by the Commission (which they are not), Subsection 756.500(3) independently bars jurisdiction because PGE's Request for Dispute Resolution does not properly allege any "*grounds of complaint* on which the complainant seeks relief *or the violation of any law claimed to have been committed* by the defendant[.]" ORS 756.500(3) (emphasis added).

As explained above, PGE has not alleged any violation of any law or any conduct by the NewSun QFs that could form the grounds of a *complaint* against the NewSun QFs. The pleading merely alleges the "NewSun Solar Parties now argue that the NewSun Solar PPAs require PGE pay fixed prices for 15 years measured from the Commercial Operation Date[,]" *PGE's Request for Dispute Resolution* at ¶ 25; and "the NewSun Solar Parties have commenced an action in federal court for the District of Oregon, asking the court to interpret the NewSun Solar PPAs to require PGE to pay fixed prices for 15 years measured from the Commercial Operation Date-not contract execution." *Id.* at ¶ 19. Based on these alleged facts, PGE requests that this Commission "approve PGE's interpretation of the NewSun Solar PPAs that the 15-year fixed-price period is measured from contract execution." *Id.* at ¶ 26. Alternatively, "PGE requests that the Commission find that the fixed price period is measured from the scheduled Commercial Operation Date established in Section 2.2.2 of each of the NewSun Solar PPAs rather than from the date each of the NewSun Solar QFs achieves commercial operation." *Id.* at ¶ 27.

There is no allegation of wrongful conduct by the NewSun QFs. Although PGE cites ORS 756.500, PGE's pleading contains no "grounds of complaint" against the NewSun QFs. ORS 756.500(3). Nor does it allege any "violation of any law claimed to have been committed" by the NewSun QFs. *Id*. PGE has alleged nothing more than a basis for *a court* to enter a

declaratory judgment. But ORS 756.500 is not a declaratory judgment statute. The statutory section is titled "Complaint; persons entitled to file; contents; amendments," and it speaks only to complaints against persons who are alleged to have violated some law that the Commission administers. ORS 756.500. Applying the complaint statute to confer jurisdiction on the Commission to issue declaratory judgments stretches the statute's language far beyond its plain meaning.

This flaw in PGE's jurisdictional theory is further confirmed by the fact that Oregon's legislature created a very limited jurisdictional basis for the Commission to issue declaratory rulings in the statutory section immediately preceding ORS 756.500. PGE does not cite the declaratory ruling statute, and for good reason. The declaratory ruling statute does not confer jurisdiction on the Commission to issue declaratory judgments over the meaning of contracts, which is what PGE asks the Commission to do here. Instead, it merely confers jurisdiction on the Commission to issue a "declaratory ruling *with respect to* the applicability to any person, property, or state of facts of *any rule or statute* enforceable by the commission." ORS 756.450 (emphasis added). Even then, such a declaratory ruling is only "binding between the commission and the petitioner on the state of facts alleged[.]" *Id.*

As Administrative Law Judge Allan Arlow recently ruled, the unambiguous terms of the declaratory ruling statute do not even reach to interpretation of the Commission's own orders. *ALJ Ruling*, Docket No. UM 1805 (Jan. 19, 2017) (stating in its heading, "DISPOSITION: DECLARATORY RULING PROCEDURE REJECTED AS VIOLATION OF STATUTE"). A statute that does not allow declaratory rulings on the meaning of the Commission's own orders could hardly allow declaratory judgements on the meaning of executed contracts. Notably, the Oregon Court of Appeals has held that the declaratory ruling provision of Oregon's

Administrative Procedures Act "does not authorize [the Public Employee Relations Board] to make declaratory rulings on questions based *solely* on a collective bargaining agreement, as distinguished from questions based on statutes or rules" because the statute only provides for rulings as to the applicability of "'any rule or statute.'" *Or. State Employees. Assoc. v. State*, 21 Or App 567, 570, 535 P2d 1385 (1975) (quoting ORS 183.410) (emphasis in original).

By contrast, an Oregon state trial court has jurisdiction to provide a legally binding declaratory judgment construing a contract "either before or after there has been a breach thereof." ORS 28.030. Such a declaratory judgment is binding on both parties to the contract, not just the court and the plaintiff. ORS 28.010 (providing that "such declarations shall have the force and effect of a judgment"). The federal declaratory judgment act – under which the NewSun QFs filed their declaratory judgment action in federal court – confers similar jurisdiction on federal district courts. 28 USC § 2201 *et seq*. No federal or state statute, however, confers any such jurisdiction on this Commission.

Indeed, the express limits placed on the Commission's authority to issue declaratory rulings confirms that the complaint statute, ORS 756.500, cannot be used to issue declaratory judgments. Oregon's legislature created jurisdiction for the Commission to issue declaratory rulings in the abstract, before any violation of law has occurred, but in doing so the legislature placed very circumscribed limits on that authority. It did not create a right for the Commission to issue abstract declaratory judgments as to any matter arguably falling within the subject matter of the Commission's regulatory purview. That limitation makes sense because the Commission's jurisdiction would be drastically expanded if it were authorized to issue binding declaratory judgments against nonregulated third parties as to any matter that might affect a regulated utility's business or rates.

Moreover, if PGE's interpretation of the complaint statute were correct, it would impermissibly render the declaratory ruling statute entirely superfluous. In interpreting statutes, the Oregon Court of Appeals "assume[s] that the legislature did not intend any portion of its enactments to be meaningless surplusage." *State v. Stamper,* 197 Or App 413, 418, 106 P3d 172, *rev den,* 339 Or 230 (2005). There would be no need for the ability to obtain a declaratory ruling under ORS 756.450, if the complaint statute allows a complainant to ask for an abstract declaration as to the complainants' rights under statutes and rules, as well as orders, contracts, or other matters, and to do so in a manner that is not only binding as to the complainant and the Commission but also as to any other person the complainant names as the "defendant."

In short, the Commission should reject PGE's attempt to convert ORS 756.500 into a statute conferring jurisdiction to issue declaratory judgments on any matter related to public utilities.

c. ORS 756.500(5) Does Not Apply

Subsection 756.500(5) does not cure PGE's jurisdictional problems. That subsection provides: "Notwithstanding subsection (1) of this section, any public 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." ORS 756.500(5). Recall that Subsection 756.500(1) requires the defendant to be a person "whose business or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or regulation of which is conferred upon the commission." ORS 756.500(1). Thus, Subsection 756.500(5) allows the utility to bring a complaint against a nonregulated entity, such as one of its customers, "as to any matter affecting its [i.e., the utility's] own rates or service." ORS 756.500(5).

The first problem with PGE's attempt to expand the Commission's jurisdiction through use of this subsection is that it suffers from the same flaw as PGE's attempt to use Subsection 756.500(1) – namely, that PURPA and FERC's regulations preempt any state law granting the Commission ongoing regulatory authority over the NewSun QFs or the terms and prices paid in their executed PPAs. The Commission cannot lawfully "modify the terms of the standard offer contract," *Independent Energy Producers*, 36 F3d at 857, and "cannot intervene in the public interest and modify the prices," *Oregon Trail Elec. Consumers Coop.*, 168 Or App at 482. Thus, the Commission has no power to exercise its regulatory function to resolve PGE's allegation that the contracts are adversely "affecting" PGE's rates. ORS 756.500(5). Any assertion of jurisdiction on this basis would be preempted, and likely subject to an injunction against the proceeding itself. *See Freehold Cogeneration Assoc.*, 44 F3d at 1189 & 1193-94. The premise of the Commission's authority to haul a nonregulated party before the Commission – that the contract is adversely affecting the purchasing utility's rates – defeats any lawful reliance on this subsection.

Setting aside PURPA, Subsection 756.500(5) still leaves the requirements of Subsection 756.500(3) in place. As just discussed, that subsection ensures that there is a concrete allegation that the defendant is violating some law within the Commission's jurisdiction, and thus bars use of the complaint statute as a vehicle for the Commission to issue abstract declaratory judgments requested by utilities beyond the confines of the declaratory ruling statute located at ORS 756.450.

Moreover, even if there were an allegation that some law was violated by defendants, as required by Subsection 756.500(3), the Commission should not attempt to expand its authority under Subsection 756.500(5) beyond its plausible boundaries. Critically, the statutory language

only reaches to a "matter *affecting* [the utility's] own rates or service," with the verb "affecting" being used in the *present tense*. ORS 756.500(5) (emphasis added). The Oregon Supreme Court has held that "use of a particular verb tense in a statute can be a significant indicator of the legislature's intention[;]" and "we do not lightly disregard the legislature's choice of verb tense, because we assume that the legislature's choice is purposeful." *Martin v. City of Albany*, 320 Or 175, 181, 880 P2d 926 (1994); *see also 1000 Friends v. LCDC,* 292 Or 735, 746, 642 P2d 1158 (1982) (relying upon use of present tense); *Gettman v. SAIF,* 289 Or 609, 614, 616 P2d 473 (1980) (same); *Shuler v. Distrib. Trucking Co.*, 164 Or App 615, 620, 994 P2d 167 (1999), *rev den* 330 Or 375 (2000) (same for past tense). Given the present-tense use of the verb "affecting," as opposed the future tense, the statutory language does not reach to any matter that might eventually affect the utility's rates or service someday in the distant future.

As with the other statutory limitations, the requirement that the complaint against a nonregulated entity regard a matter that is currently affecting PGE's rates should not be ignored. The Commission should not begin hauling persons before it to enter binding declaratory judgments through the Commission's contested case procedures simply because PGE or another regulated utility complains that person might someday engage in conduct, or exercise some contractual right, that could adversely affect the utility's rates or service years from now.

In this case, the verb-tense distinction provides yet another reason that PGE's jurisdictional argument fails. As alleged in PGE's pleading, the parties agree as to the correct price to be applied in the NewSun PPAs for all energy delivered for fifteen years after the execution dates in 2016. The outcome of this dispute will have no effect on PGE's rates until fifteen years after the NewSun PPAs were executed, which will be various dates in the year 2031. The matter is not "affecting PGE's rates or terms of service." ORS 756.500(5). Nor will it

be affecting PGE's rates or service for at least thirteen years, if ever.

In fact, PGE has itself argued in the federal district court that this matter is not ripe for adjudication in federal court because it is unknown whether the market prices will be lower than the fixed prices in the NewSun PPAs in the years 2031 and thereafter. *See* Exhibit A (PGE's Motion to Dismiss). According to PGE's arguments to the federal court, "Plaintiffs' claims will not ripen, if at all, until 2031, fifteen years after contract execution" because the declaratory judgment claim "depend[s] on speculative harm that may occur years form now, or may not occur at all." *Id.* at 2, 8 (bold-type removed). The NewSun QFs disagree with PGE's ripeness argument in federal court because it is the very *uncertainty* in the NewSun PPAs' pricing that compromises the NewSun QFs' ability to obtain financing to construct the projects and thus causes harm to the NewSun QFs right now, making a declaratory judgment action ripe. However, PGE's point is well taken in the context of this proceeding, which is not a declaratory judgment action, and which requires as a jurisdictional prerequisite that the matter is "affecting [PGE's] rates and service." ORS 756.500(5). PGE's own argument in federal court demonstrates that this matter is not affecting PGE's rates today and that it may never affect PGE's rates, even in 2031 when the market index prices could ultimately be higher than the fixed prices in the NewSun PPAs. Thus, PGE's allegations are too speculative to conclude that this is a matter *affecting* PGE's rates today, as ORS 756.500(5) requires.

Aside from the technical limitations of the statutory language, the notion of a regulated utility bringing a complaint against a nonregulated entity before the regulatory body is extraordinary and should be exercised with restraint. Such an action might reasonably exist against one of the utility's own customers in a dispute arising from the regulated services provided by the utility to that customer. For example, the Oregon Court of Appeals upheld such

use of Subsection 756.500(5) in *Roats Water Sys., Inc. v. Golfside Inv., LLC*, 225 Or App 618, 202 P3d 199 (2009). There, the regulated water utility, Roats, brought a complaint against its customer that was engaged as a residential developer, alleging that the customer had failed to pay "residential development charges," which were applicable through Commission tariffs and rules for water service to such developments. 225 Or App at 620-21. The court affirmed the Commission's determination that under Subsection 756.500(5), "a request to require payment of a charge set forth in [the utility's] tariffs governing water utility service, is 'clearly within the jurisdiction of the [PUC].'" *Id.* at 622-29 (quoting OPUC's order)). But the decision does not discuss the limitations of Subsection 756.500(3), which makes sense because Roats had alleged a concrete violation of a Commission tariff and rule. At most, the *Roats* decision extends the Commission's complaint jurisdiction to include complaints against customers who are currently refusing to pay retail rates subject to the Commission's ongoing regulatory authority.

However, if Subsection 756.500(5) were applied to any matter the utility can conceive of as potentially having any future indirect effect on rates the utility may eventually charge its customers, the statute would confer boundless jurisdiction on the Commission. While the Oregon courts have never addressed the outer bounds of the Commission's "affecting . . . rates" jurisdiction, decisions interpreting similar provisions of the Federal Power Act ("FPA") are instructive as to how the Oregon appellate courts may view PGE's argument.

> Section 205(a) of the FPA grants the Commission authority to regulate:
>
> > [all] rates and charges made, demanded, or received by any public utility *for or in connection with* the transmission or sale of electricity subject to the jurisdiction of the Commission, and all rules and regulations *affecting or pertaining to* such rates or charges . . . .
>
> 16 USC § 824d(a) (emphasis added).
>
> Similarly, Section 206 of the FPA provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that *any* rule, regulation, *practice, or contract affecting such rate, charge, or classification* is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

16 USC § 824e(a) (emphasis added).

The D.C. Circuit has cautioned that "there is an infinitude of practices affecting rates and service[,]" which could lead a "breathtaking scope" of the agency's jurisdiction if the statute were construed expansively. *Cal. Indep. Sys. Operator Corp. (CAISO) v. FERC*, 372 F3d 395, 401 (D.C. Cir. 2004) (internal quotation omitted). In *CAISO*, the D.C. Circuit held that FERC exceeded its jurisdiction when it replaced the board members of the CAISO on the theory that the composition of the board was a "practice . . . affecting [a] rate" under section 206(a) of the FPA. *Id*. at 399-404. The court explained that "section 206's empowering of the Commission to assess the justness and reasonableness of practices affecting rates of electric utilities is limited to those methods or ways of doing things *on the part of the utility that directly affect* the rate or are closely related to the rate, *not all those remote things beyond the rate structure that might in some sense indirectly or ultimately do so*." *Id*. at 403; *see also Calpine Corp. v. FERC*, 702 F3d 41, 47 (D.C. Cir. 2012) (affirming FERC's determination that it lacked "affecting" jurisdiction over station power, which is a necessary input to energy production, because there was not a "sufficient nexus with wholesale transactions" (internal quotation marks omitted).

In another decision directly relevant here, the D.C. Circuit held, under the analogous affecting-rates language of Natural Gas Act ("NGA"), that FERC does not have jurisdiction over price or non-price terms of "nonjurisdictional" contracts between a regulated gas pipeline and a nonregulated producer of gas. *American Gas Ass'n v. FERC*, 912 F.2d 1496, 1505-07 (D.C. Cir.

1990). The contracts "could certainly influence the utility's ultimate charges." *Id.* But the court held FERC was "absolutely right" in "reading 'contracts affecting such rate' as limited to contracts in which a 'natural gas company' (within the meaning of the NGA) *acts as seller* and which directly governs the rate in a jurisdictional sale – providing for the rate in whole or in part, or specifying or embodying it, or setting forth rules by which it is to be calculated…." *Id.* at 1506 (quoting 15 U.S.C § 717d)) (emphasis added). A contrary determination would be result in "an oxymoron – [FERC] jurisdiction over nonjurisdictional contracts." *Id.* In other words, affecting-rates jurisdiction does not include jurisdiction over contracts between a utility and its nonregulated suppliers.

This Commission has itself recognized that it "does not have jurisdiction over each and every activity of a utility, its employees, or its agents" and that "contract claims properly belong before a court of law." *Re K.S. v. Qwest Corp.*, OPUC Docket No. UCR 98, Order No. 08-112 at 2 (Jan. 31, 2008). In *K.S.*, the Commission dismissed a complaint brought against a public utility, Qwest, alleging claims of trespass and breach of contract against Qwest for its allegedly improper placement of a service drop on the property of K.C.'s neighbor. *Id.* Qwest had a tariff that governed such distribution facilities. But the Commission determined that the alleged contract at issue in the complaint was beyond the Commission's jurisdiction because the contract claim did not arise from a contract between a utility and one of its direct customers regarding a regulated service provided by the utility to that customer. *Id.*

The *K.S.* decision is in accord with *Wah Chang v. PacifiCorp*, OPUC Docket No. UM 1002, Order No. 09-343, at 12 (Sept. 2, 2009). There, the Commission addressed a contractual dispute only because the contract at issue was a contract for sale of energy from an electric utility to its customer, and the dispute was over whether that retail-rate contract should be modified.

The Commission explained, "we acknowledge that the determination of parties' rights under a contract is generally a common law issue that falls within a circuit court's general jurisdiction," but a proposal to modify a retail rate under the just and reasonable standard is "within the exclusive jurisdiction of this Commission." *Id.*

In short, the Commission historically has attempted to place rational limitations on its jurisdiction and leave common law contract disputes to the courts. Only contracts that regard a matter subject to the Commission's ongoing regulatory oversight are within the Commission's jurisdiction. Absent such limitations, the Commission theoretically would have jurisdiction over virtually all contractual disputes with a public utility, as any such dispute arguably could have a connection to, or possible future impact on, the rates the Commission might eventually allow the utility to charge its direct customers. Therefore, the Commission should not attempt to expand ORS 756.500(5)'s reach to the matter in this case, which does not regard a contract for a regulated service by PGE to one of its direct customers and which PGE itself argues in federal court may never have any adverse effect on PGE's rates it charges to its direct customers.

d. ORS 758.505 to 758.555 Provide No Jurisdiction to Issue Declaratory Judgments on the Meaning of Executed Contracts

PGE's Request for Dispute Resolution also points to Oregon's "mini-PURPA" statute, ORS 758.505 to 758.555, but that statute provides no additional basis for jurisdiction. Similar to 18 CFR § 292.304(d)(2)(ii), the statute requires PGE to "*offer* to purchase" a QFs' energy and capacity, and it provides that "[a]t the option of the qualifying facility . . . such prices may be based on . . . [t]he projected avoided costs calculated at the time the legal obligation to purchase energy or capacity is incurred." ORS 758.525(2)(b) (emphasis added). It also states the Commission is the state agency that sets the prices and terms of the contracts the utility must offer. ORS 758.535(2)(a) (stating "[t]he terms and conditions for the purchase of energy or

energy and capacity from a qualifying facility shall . . . [b]e established by rule by the commission if the purchase is by a public utility"). Thus, as with FERC's regulations, the statute requires the Commission to establish the fixed-price rates and the terms of the contract that the utility must offer to enter into with the QF.

But the statute does not grant the Commission jurisdiction to interpret the meaning of such terms and conditions once they are included in an executed contract. That is a function that has historically been served by the courts, as in the *Oregon Trail* case and others. *See PacifiCorp v. Lakeview Power Co*., 131 Or App 301, 884 P.2d 897 (1993) (circuit court rendered a verdict in favor of PacifiCorp on breach of contract and declaratory judgment claims regarding its power purchase agreement with a qualifying facility); *Water Power Co. v. PacifiCorp*, 99 Or App 125, 781 P.2d 860 (1989) (circuit court found that PacifiCorp was not liable for damages for alleged breach of contract with a qualifying facility). In short, the Oregon PURPA statute adds nothing to PGE's jurisdictional arguments.

3. Prior Commission Precedent Supports Dismissal

Consistent with the jurisdictional analysis above, the Commission historically has been reluctant to exercise jurisdiction over breach of contract and declaratory judgment disputes between utilities and QFs.

As early as 1986, before the law became settled that ongoing regulatory oversight of PURPA contracts was preempted, this Commission had independently adopted a policy of not intervening in contract disputes. The Commission explained that its practice is to avoid "interfering in settled contracts," stating, "[c]ontracts determined either through negotiation or order of the Commissioner *should be considered final*." *Re Proposed Rules Relating to Cogeneration and Small Power Production*, OPUC Docket No. AR 116, Order No. 86-488 at

4 (May 12, 1986) (emphasis added). The Commission recognized the need "to rely on the terms of the contract for planning, budgeting, and other business purposes." *Id.* Thus, "unless a party can show a substantia1 adverse effect on the ratepayers, or the contract names the Commissioner as an authority to resolve disputes in a specific area, the Commissioner will avoid intervening in settled contracts." *Id.* The rules themselves spoke only to resolving disputes to "set the terms of the contract," not intervening after execution of the contract. *Id.* at App., p. 1.

As noted above, state and federal courts later determined that the Commission cannot interfere in settled contracts to resolve a substantial adverse impact to rate payers, due for example to fixed prices that turned out to later exceed a utility's actual avoided costs. However, the Commission's practice before the courts established that principle serves to undercut PGE's assertion that state law grants this Commission jurisdiction to hear this declaratory judgment action.

As recently as 2010, the Commission declined to intervene in a contract dispute between a utility and a QF, noting that the Commission "staff's legal counsel advise[d] that the legal significance of a [Commission] order based solely upon the application of contract law to interpret a contract is unclear." *Re Central Irrigation District*, OPUC Docket No. DR 45, Order No. 10-495, at App. A, pp. 4-5 (Dec. 10, 2010). In that case, Central Irrigation District, which operated a QF selling under contract to PacifiCorp, filed a petition for declaratory ruling seeking a ruling under ORS 756.450 from the Commission regarding whether the QF or PacifiCorp owned environmental attributes associated with the energy sold by the QF to PacifiCorp under the contract. The outcome of the dispute would have affected potentially all QFs with legacy PURPA contracts signed before environmental attributes were created by

state laws.

The Commission's staff memorandum adopted by the Commission made several valid points equally applicable in the instant case. First, the "Commission does not have any particular expertise in interpreting contracts." *Id.* Additionally, "the interpretation of contracts is performed in civil proceedings[,]" and taking the matter up at the Commission "could result in the Commission setting a precedent that it will accept other such declaratory rulings[,]" requiring "significant administrative hearing staff and resources to a matter that could just as well be adjudicated by means of civil (court) proceedings." *Id.* Finally, the order acknowledges, "[p]resumably, the party who was dissatisfied with the Commission's decision could still take the matter to court. If so, it is uncertain how a court would view a Commission's order rendered solely upon the application of contract law." *Id.*

In other words, the Commission has acknowledged that any order it issues interpreting an executed PURPA contract may well be nothing more than an advisory opinion, and it has deferred to the courts in matters of contract interpretation even where large number of QFs would be impacted by the outcome. Any attempt to assert jurisdiction here would run counter to the Commission's own precedent.

4. The *Pacific Northwest Solar* and *PaTu Wind Farm* Orders Do Not Establish Jurisdiction in this Case

The NewSun QFs anticipate that PGE will rely on two recent Commission cases for the proposition that the Commission has jurisdiction over this dispute, *Portland General Elec. Co. v. Pacific Northwest Solar, LLC*, OPUC Docket No. UM 1894, Order No. 18-025 (Jan. 25, 2018), and *PaTu Wind Farm LLC v. Portland General Elec. Co.*, OPUC Docket No. UM 1566, Order No. 14-287 (April 13, 2014). Both cases are distinguishable from this case, which regards solely a common law contract interpretation issue.

In *Pacific Northwest Solar*, the Commission found it had jurisdiction to adjudicate disputes over the meaning of PURPA contracts where it did "not agree that the issue presented . . . [was] simply a common law contract interpretation issue." *Pacific Northwest Solar*, Order No. 18-025 at 7 n.15. The Commission's order went out of its way to explain, "we do not intend to suggest that the Commission necessarily has primary jurisdiction over every issue involved in standard power purchase agreements." *Id.*

The disputed contractual issue in *Pacific Northwest Solar* regarded whether the QF was entitled to increase the contractual capacity of its facility after execution of the contract. The issue was intertwined factually with a related complaint that the QFs had filed against PGE under ORS 756.500(1), alleging violation of the Commission's administrative rules regarding interconnections with QFs. *Id.* at 3 & 5. Additionally, the contractual interpretation issue regarded the meaning of a 2006 Commission order. *Id.* at 4 & n.4 (citing *Re Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, OPUC Docket No. UM 1129, Order No. 06-538 at 37-39 (Sept. 20, 2006)); *id.* at 6 (noting the term at issue was "amended at our direction in docket UM 1129" in the 2006 order). The 2006 order addressed the capacity expansion issue, but the Commission had not previously addressed whether that order resolved the specific issue presented by PGE in the *Pacific Northwest Solar* case. The Commission also noted that resolution of the dispute would also affect QFs that "intend to enter into PURPA contracts," presumably because the term in the executed contracts was the same as the term in PGE's standard contract being offered to new QFs. *Id.* at 6-7.

Assuming the decision was correctly decided,[5] the *Pacific Northwest Solar* case is

[5] The NewSun QFs do not concede this decision was correctly decided. But in any case it is distinguishable from the facts here.

distinguishable for a number of different reasons. First, the Commission already has interpreted the only order speaking to the fifteen-year term issue and determined that order, issued in 2005, does not resolve the question of whether the fifteen-year fixed-price period begins on the execution date or the commercial operation date. *Northwest and Intermountain Power Prod. et al. v. Portland Gen. Elec. Co.*, OPUC Docket No. UM 1805, Order No. 17-256 at 3 (July 13, 2017) (discussing *Re Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, OPUC Docket No. UM 1129, Order No. 05-584 (May 13, 2005)). That is why the Commission dismissed the complaint in docket UM 1805. *Id.*

Additionally, unlike in *Pacific Northwest Solar*, PGE's standard contract available to prospective QFs no longer contains the same language as the NewSun PPAs on the points in question. The contracts at issue here are based on PGE's standard contract that was in effect for approximately one year, from September 23, 2015, through October 11, 2016. *See Re Staff's Investigation Into Qualifying Facility Contracting and Pricing*, OPUC Docket No. UM 1610, Order No. 15-289 (Sept. 22, 2015); and *Re Staff's Investigation Into Qualifying Facility Contracting and Pricing*, OPUC Docket No. UM 1610, Order No. 16-377 (Oct. 11, 2016). PGE's standard contract was revised again in an order issued on September 28, 2017, on the very point in dispute here at the conclusion of docket UM 1805. *Northwest and Intermountain Power Prod. et al. v. Portland Gen. Elec. Co.*, OPUC Docket No. UM 1805, Order No. 17-373 at 3 (Sept. 28, 2017). Given that this particular standard contract no longer is in effect, there is no possibility that any ruling in this matter could impact the Commission's ongoing regulatory oversight of the standard terms that PGE is required to offer, on a prospective basis, to QFs today or in the future. Additionally, unlike the Pacific Northwest Solar QFs, the NewSun QFs have not filed a complaint under ORS 756.500 against PGE for any related violations of law.

Likewise, the *PaTu Wind Farm LLC* dispute provides no meaningful precedent here. There, the complaint filed by a QF against PGE under ORS 756.500 included allegations that PGE was in violation of statutes and administrative rules. Specifically, the QF claimed "that PGE's refusal to pay a rate based upon avoided costs for all energy delivered to PGE on behalf of [the QF] violates the executed contract (sixth claim), the Commission's orders implementing the Public Utilities Regulatory Policies Act (PURPA) (seventh claim), state law (eighth claim), and PURPA itself (ninth claim)." *PaTu Wind Farm LLC*, Order No. 14-287 at 2; *see also id.* at 4-5, 9-10, 13-14. Additional alleged violations of statutes, federal regulations, and Commission orders were dismissed earlier in the proceeding. *See PaTu Wind Farm LLC v. Portland General Elec. Co.*, OPUC Docket No. UM 1566, Order No. 12-316 (Aug. 21, 2012). The case was not simply a declaratory judgment action over the common-law meaning of a contract. Instead, it presented complex regulatory issues of first impression as to the meaning of the Commission's orders, FERC orders, state and federal administrative rules, and state and federal statutory provisions. No party challenged the Commission's jurisdiction over the overlapping regulatory and contractual issues in that case. Additionally, none of the Commission's orders in the case contain any explanation for the statutory basis for the Commission's jurisdiction to resolve common law contract disputes, further limiting the case as a useful precedent here.

In sum, neither the *Pacific Northwest Solar* or the *PaTu Wind Farm* disputes establish any precedent to assert jurisdiction over the dispute here, which solely regards the meaning of a contract under common law contract interpretation principles.

5. The Primary Jurisdiction Doctrine Is Inapplicable

PGE's Request for Dispute Resolution also incorrectly attempts to invoke the judge-made

doctrine of primary jurisdiction – asserting "[g]iven the authority vested in the Commission, the Commission has *primary jurisdiction* to resolve disputes between PGE and the NewSun Solar Parties relating to interpretation of the NewSun Solar PPAs." *PGE's Request for Dispute Resolution* at ¶ 5 (emphasis added). As explained above, however, the Commission's jurisdiction must derive from a statute. *Diack*, 306 Or at 293. The doctrine of primary jurisdiction is not a separate, extra-statutory, basis for the Commission to itself expand its own jurisdiction. It would be particularly inappropriate to do so here, where the same exact primary jurisdiction issue has been raised by PGE in the federal court for Judge Michael Simon to decide. *See* Exhibit A (PGE's Motion to Dismiss at pp. 11-17).

Federal law applies here since the NewSun QFs' complaint was filed in federal court, but both federal and Oregon decisions confirm that primary jurisdiction is a judge-made rule that is applied by *courts* when the *court determines* that a case before it should be resolved first by an administrative agency. The Ninth Circuit has explained that "[p]rimary jurisdiction is a prudential doctrine that *permits courts to determine* 'that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch.'" *Astiana v. Hain Celestial Grp., Inc.*, 783 F3d 753, 760 (9th Cir. 2015) (quoting *Clark v. Time Warner Cable*, 523 F3d 1110, 1114 (9th Cir.2008)) (emphasis added). Likewise, the Oregon Supreme Court has explained that the 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 P.2d 411 (1997) (Kenneth Culp Davis and Richard J. Pierce, Jr., II *Administrative Law Treatise* § 14.1 (3d ed

1994) (emphasis added). The doctrine attempts to ensure the "orderly and sensible coordination of the work of agencies and of courts." *Id.* (quoting Pierce, *Administrative Law Treatise* at § 19.01). However, there is obviously nothing orderly about PGE's request that this Commission "take jurisdiction" from the federal court.

Notably, both the federal and state court decisions reject use of the doctrine where it will result in delays. *Astiana*, 783 F3d at 760 (requiring court to consider "whether invoking primary jurisdiction would *needlessly delay* the resolution of claims" (emphasis added)). The doctrine "is not required when a referral to the agency would significantly postpone a ruling that a court is otherwise competent to make." *Id.* at 761; *accord Boise Cascade Corp*, 325 Or at 192 (noting the importance of considering the "likelihood that application of primary jurisdiction *will unduly delay resolution* of the dispute before the court" (quoting Pierce, *Administrative Law Treatise* at § 14.1)) (emphasis added).

As noted above, the Commission has itself acknowledged the advice of its staff's legal counsel that any interpretation the Commission might provide in a purely contractual matter may simply lead to further disputes over the effect of the order purporting to resolve the dispute. *See Re Central Irrigation District*, OPUC Docket No. DR 45, Order No. 10-495, at App. A, pp. 4-5 (Dec. 10, 2010). This concern is borne out by decisions from jurisdictions in which courts have determined that a state utility commission's order addressing the meaning of an executed PURPA contract was not binding on the court, either because it did not effectively address the entire issue or because the state commission lacked jurisdiction to issue a binding decision. *See, e.g., Crossroads Cogeneration*, 159 F3d at 134-39 (concluding state commission order did not address contractual matter in dispute where it only interpreted its order approving the agreement); *Idaho Power Co. v. Cogeneration Inc.*, 129 Idaho 46, 49, 921 P2d 746 (1996)

("While there is no dispute concerning IPUC's authority to approve PURPA contracts, the subsequent interpretation and enforcement of contracts does not generally fall within its powers. . . . Accordingly, IPUC's attempted enforcement of the agreement is of no consequence.").

At a minimum, any effort by this Commission to assert "primary jurisdiction" over this matter is likely to lead to further litigation regarding the effect and meaning of a decision the Commission issues, and such action will delay resolution of this matter by several months or more. In turn, the NewSun QFs' ability to rely on their executed PPAs for purposes of financing and the beginning of construction will be delayed. While delay may serve PGE's interests, it is an additional reason this Commission should not attempt to assert jurisdiction.

In sum, therefore, because the Commission has no statutory jurisdiction, the doctrine of primary jurisdiction could only apply if the federal court first refers the matter to the Commission to obtain the Commission's views. Therefore, PGE's primary jurisdiction argument fails.

6. The Commission's Exercise of Jurisdiction Would Violate the Jury Trial Right

Finally, any assertion of jurisdiction by the Commission would violate the constitutional right to a jury trial. The Seventh Amendment of the United States Constitution, Federal Rule of Civil Procedure 38, and Article VII, Section 3 of the Oregon Constitution each protect the common-law right to a jury trial on important aspects of disputes over contractual meaning and intent. *Markman v. Westview Instruments, Inc.*, 517 US 370, 376 (1996); *IBEW v. Southern Cal. Edison Co.*, 880 F2d 104, 107 (9th Cir. 1989) (to the extent a contract might be ambiguous, and "contrary inferences about the underlying intent are possible, an issue of material fact exists for the trier of fact to resolve"); *McDowell Welding & Pipefitting, Inc. v. US*

Gypsum Co., 345 Or 272, 279, 193 P3d 9 (2008).

Therefore, in addition to violating the more general right to have this contract dispute between residents of diverse states resolved in federal court, this proceeding to adjudicate the meaning of the contract, before a state agency in a hearing before an Administrative Law Judge, violates the constitutional right to a jury trial. The Commission should dismiss PGE's Request for Dispute Resolution for that additional reason.

CONCLUSION

For the reasons explained above, the Commission should expeditiously issue an order dismissing PGE's Request for Dispute Resolution.

DATED this 22nd day of February, 2018.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

ALFALFA SOLAR I LLC, a Delaware limited liability company, **DAYTON SOLAR I LLC,** a Delaware limited liability company, **FORT ROCK SOLAR I LLC,** a Delaware limited liability company, **FORT ROCK SOLAR II LLC,** a Delaware limited liability company, **FORT ROCK SOLAR IV LLC,** a Delaware limited liability company, **HARNEY SOLAR I LLC,** a Delaware limited liability company, **RILEY SOLAR I LLC,** a Delaware limited liability company, **STARVATION SOLAR I LLC,** a Delaware limited liability company, **TYGH VALLEY SOLAR I, LLC,** a Delaware limited liability company, and **WASCO SOLAR I LLC**, a Delaware limited liability company,

Plaintiffs,

vs.

Case No. 3:18-cv-00040-SI

DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY

Pursuant to Fed. R. Civ. P. 12 (b)(1) and 12(b)(6)

Request for Oral Argument

PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation,

Defendant.

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LR 7-1 CERTIFICATION

In compliance with Local Rule 7-1, counsel for defendant Portland General Electric Company ("PGE") certify that they conferred in good faith by telephone conference on February 7, 2018, with counsel for the Plaintiffs, but that the parties were unable to resolve this dispute.

MOTION

PGE, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), hereby moves to dismiss Plaintiffs' Complaint because plaintiffs have failed to allege a ripe claim or controversy. Alternatively, PGE, pursuant to Federal Rule of Civil Procedure 12(b)(6), hereby moves to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted under the doctrines of primary jurisdiction, exhaustion of administrative remedies, judicial discretion, and *Burford* abstention. In support of this motion, PGE relies on the Memorandum of Points and Authorities that follows, the Declaration of Anit K. Jindal submitted herewith, and any further evidence and argument the Court may permit.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

Under the Public Utility Regulatory Policies Act of 1978 ("PURPA") and rules promulgated by the Federal Energy Regulatory Commission ("FERC"), utilities must offer to purchase power from certain qualifying energy producers ("qualifying facilities" or "QFs") at fixed prices for a specified term. Congress left it to the states to calculate the prices and specify terms for these agreements. For the period of time relevant to the Complaint, the Public Utility Commission of Oregon (the "Commission") has elected to require utilities to offer standard power purchase agreements ("Standard PPAs") to all QFs with a nameplate capacity of 10 megawatts or less. In 2005 and 2006, after conducting extensive hearings, the Commission ordered utilities, among other changes, to offer fixed prices for fifteen years in their Standard PPAs, an increase from the previous term of five years. The Commission then reviewed and approved PGE's Standard PPA terms effectuating that ruling. Plaintiffs now seek a federal

declaratory judgment interpreting their recently-executed Standard PPAs with PGE to mean that the fifteen-year term begins on the date of commercial operation, not contract execution. Plaintiffs' claims will not ripen, if at all, until 2031, fifteen years after contract execution. Further, this complicated question of state administrative law should be left to the state administrative processes under the doctrines of primary jurisdiction, exhaustion of administrative remedies, and *Burford* abstention, or under the discretionary factors identified in *Brillhart* and its progeny.

II. Regulatory framework and procedural background.

A. The Commission reviews and approves Standard PPAs as part of its regulatory mandate under PURPA and state law.

PURPA and the FERC implementing regulations require electric utilities to offer to purchase energy from qualifying facilities. 16 U.S.C. § 824a-3(a)(2). Under the Commission's implementation of PURPA and FERC regulations, electric utilities must offer to pay for QF generation at fixed prices that are calculated in accordance with rules adopted by the FERC. 16 U.S.C. § 824a-3(b). The utilities pay the QF based upon the amount of electricity actually generated by the QF multiplied by prices established by the Commission consistent with FERC rules.

Relevant here, FERC rules require that prices for QF generation be set at no higher than the utility's "avoided cost"—the cost that the utility would otherwise pay to produce the power itself. 18 C.F.R. § 292.304; *see* ORS 758.505(1) (defining "avoided cost"). Further, FERC rules require that utilities offer QFs the option of selling power over a "specified term" with fixed avoided costs calculated "at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2); *see also* Or. Admin R. 860-029-0040(3).

States are tasked with implementing FERC's rules. 16 U.S.C. § 824a-3(f) ("[E]ach State regulatory authority shall, after notice and opportunity for public hearing, implement such [FERC] rule (or revised rule) for each electric utility for which it has ratemaking authority."). In Oregon, the legislature vested the Commission with "the broadest grant of authority—'commensurate with that of the legislature itself'—to carry out ratemaking and other regulatory

functions." *Gearhart v. PUC of Or.*, 255 Or. App. 58, 61 (2013) (quoting *Pacific N.W. Bell v. Sabin*, 21 Or. App. 200, 214 (1975)). Accordingly, the Commission has authority to adopt rules establishing "the terms and conditions for the purchase of energy" by utilities from QFs. ORS 758.535(2)(a). Further, the Commission has "power and jurisdiction to supervise and regulate every public utility" in Oregon. ORS 756.040(2).

Pursuant to this authority, the Commission reviews and approves Standard PPAs that PGE and other utilities offer to QFs for compliance with state and federal statutes, regulations, and policies. *See, e.g.*, Decl. of Anit K. Jindal ("Jindal Decl."), Ex. 1, Commission Docket No. UM 1610, Order No. 15-289 (approving standard contract at issue in this case) (Sept. 22, 2015).[1] The prices and terms that the utilities include in their Standard PPAs are approved by the Commission with the understanding that each Standard PPA reflects the Commission's implementation of PURPA, "related federal and state law, and our orders[.]" Jindal Decl. Ex. 2, Commission Docket No. UM 1566, Order No. 14-287 at 13 (Aug. 13, 2014). QFs under 10 MW have the options of either making no substantive changes to the Standard PPA or negotiating a non-Standard PPA (a.k.a a negotiated PPA). *See* Or. Admin R. 860-029-0005(3)(b) ("Any contract offered by the public utility is subject to negotiation."). Thus, Standard PPA terms approved by the Commission are largely creatures of state administrative law and not common law. *See Snow Mountain Pine Co. v. Maudlin*, 84 Or. App. 590, 599 (1987) (so stating). Given the regulatory structure created by PURPA, FERC, and the state commissions, the Ninth Circuit has observed, "the states play the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilit[ies]." *Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 856 (9th Cir. 1994).

[1] The Commission Orders are publicly available administrative rulings. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) ("On a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings."); *see also Bryant v. Carleson*, 444 F.2d 353, 358 (9th Cir. 1971) (taking judicial notice of administrative ruling); *PNG Telecommunications, Inc. v. Pac-W. Telecomm, Inc.*, S-10-1164 FCD/EFB, 2010 WL 3186195, at *3 (E.D. Cal. Aug 11, 2010) (taking judicial notice of administrative records in proceedings before state public utility commission). The orders cited in this brief are attached to the Jindal Declaration for the convenience of the Court and the parties.

As noted above, prior to 2005, by Commission order, utilities in Oregon were required to offer Standard PPAs to QFs for a term of only five years. On May 13, 2005, the Commission extended the term to twenty years, and required that utilities offer fixed prices for the first fifteen years of the term (now called the "Renewable Fixed Price Option"). Jindal Decl. Ex. 3, Commission Docket No. UM 1129, Order No. 05-584 at 23 (May 13, 2005). The Commission considered terms of five to thirty years, and it balanced the competing concerns of the QFs' ability to obtain financing with "the likelihood that fixed avoided cost rates would diverge over time from actual avoided costs" over "a contract term longer than 15 years." *Id.* at 17-18. The Commission then permitted each utility to draft its own Standard PPA terms implementing that order, subject to approval by the Commission. *Id.* at 59. PGE sought and obtained approval for its Standard PPA form complying with the Commission's order. Jindal Decl. Ex. 4, Commission Docket No. UM 1129, Order No. 07-065 (Feb. 27, 2007). Plaintiffs chose to execute Standard PPAs, and by doing so they thereby adopted contract terms that the Commission approved as compliant with state and federal policies under the Commission's regulatory scheme. Those are the terms at issue in this action.

B. The plaintiffs signed Standard PPAs and seek to avoid Commission oversight of their dispute, despite the Commission's invitation to plaintiffs to file at the Commission.

In 2016, each of the ten plaintiffs entered into Standard PPAs with PGE. Compl. ¶ 28, & Compl. Exs. 1-10. Each Standard PPA includes tables of fixed "Renewable Avoided Costs" projected until 2040. Compl. ¶ 30; *also, e.g.* Compl. Ex. 1 at 26-33 (tables in contract). In relevant part, each Standard PPA included the following additional provisions regarding price:

- "The power purchase prices are based on . . . [PGE's] Renewable Avoided Costs in effect at the time the agreement is executed."
- "The Renewable Fixed Price Option . . . is available for a maximum term of 15 years."
- "Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index price [*i.e.* the market price] . . . for all years up to five in excess of the initial 15."

Compl. Ex. 1 at 25, 29.

In their Complaint, Plaintiffs seek a declaration that, according to these Standard PPA provisions, the Renewable Fixed Price Option's fifteen-year term begins to run on the date of commercial operation. Compl. ¶ 53. In proceedings before the Commission, PGE has taken the position that the Renewable Fixed Price Option's term begins to run on the date the PPA is executed. *See* Jindal Decl., Ex. 5, Commission Docket No. UM 1805, Order No. 17-256 at 3 (July 13, 2017) (stating PGE's position). The PPAs anticipate that each QF will become operational approximately three years after the PPA execution date. Compl. Ex. 1 at 7. Accordingly, the parties agree that for the first twelve years of commercial operation, the QFs are entitled to the PPAs' fixed prices per megawatt hour of energy they produce and that, for the period during the term of the PPA but after the expiration of the 15-year period, QFs are paid at market-index prices. The parties dispute only whether each QF is paid for the energy it produces at the fixed price in the Standard PPA or at a market index price for the three-year period, during the years 2031, 2032, 2033, and part of 2034.

In September 2017, plaintiffs belatedly attempted to intervene in a pending Commission proceeding regarding when the fifteen-year term in PGE's Standard PPAs begins. In that proceeding, three trade associations representing the interests of QFs filed a complaint against PGE asking the Commission to decide whether PGE's Standard PPA violated prior Commission orders by measuring the fifteen years of fixed pricing from the Commercial Operation Date instead of the execution date, and asking the Commission to order PGE to re-write its Standard PPAs to measure the fixed-price term from the Commercial Operation Date. Jindal Decl., Ex. 6, Commission Docket No. UM 1805, Compl. at 16 (Dec. 6, 2016). The Commission ruled that in future Standard PPAs, PGE should measure the fifteen-year period from the Commercial Operation Date, and the Commission ordered PGE to re-write its Standard PPA to comply with that new policy. Jindal Decl., Ex. 5, Commission Docket No. UM 1805, Order No. 17-256 at 4-5. The Commission also ruled that PGE's Standard PPAs did not violate any Commission order, including the original 2005 order setting the fifteen-year term. *Id.* at 3. The Commission reasoned that because the Commission itself had reviewed and approved the Standard PPA terms, those terms could not violate Commission orders. *Id.* In its initial order, the Commission

also stated that PGE's Standard PPAs "limited the availability of fixed prices to the first fifteen years measured from contract execution." *Id.*

After the Commission issued that order, plaintiffs in this case belatedly sought to intervene in that pending Commission proceeding. Plaintiffs contended that the order was erroneous and that PGE's Standard PPAs provided fifteen years of fixed prices starting on the Commercial Operation Date. In its order denying the petition to intervene, the Commission ruled that it was barred by statute from granting a petition to intervene after the close of evidence but encouraged plaintiffs to "seek[] other relief from the Commission . . . including the filing of a complaint under ORS 756.500." Jindal Decl., Ex. 7, Commission Docket No. UM 1805, Order No. 17-418 at 3 (Oct. 16, 2017). Plaintiffs did not file a complaint before the Commission, but instead awaited the Commission's decision on a similar Application for Rehearing or Reconsideration filed by the claimants in that proceeding. In response to that Application, the Commission ultimately amended its earlier order to read that PGE's Standard PPAs "*may have* limited the availability of fixed prices to the first fifteen years measured from contract execution."[2] Jindal Decl., Ex. 9, Commission Docket No. UM 1805, Order No. 17-465 at 4 (Nov. 13, 2017). Ostensibly unsatisfied with proceedings before the Commission, plaintiffs filed this suit, ignoring the Commission's invitation to file a proceeding before it.

On January 25, 2018, PGE filed a complaint with the Commission against plaintiffs asking the Commission to determine whether the fifteen-year term in plaintiffs' PPAs runs from the Commercial Operation Date or the date of contract execution. Jindal Decl., Ex. 10, Commission Docket No. UM 1931, Compl. ¶¶ 26-27 (Jan. 25, 2018). Plaintiffs, who are defendants in that Commission proceeding, on February 2, 2018, filed an application to stay the

[2] Although by adding the words "may have" the Amended Order did not rule when the 15-year period began in PGE's prior Standard PPAs, the Commission still required PGE to change its Standard PPA so that the new Standard PPA will start the 15-year period from the Commercial Operation Date. PGE filed an Application for Rehearing or Reconsideration with the Commission, asking that the Commission explicitly rule that, in the Standard PPAs that the Commission approved before the new policy in Order No. 17-256, the 15-year period of fixed prices began to run on PPA execution. Jindal Decl., Ex. 8, Commission Docket No. UM 1805, Application for Rehearing or Reconsideration and Application to Amend Order No. 17-465 (Jan. 12, 2018).

Commission proceeding pending the outcome of this motion to dismiss in federal court. Jindal Decl., Ex. 11, Commission Docket No. UM 1931, Motion to Stay Proceeding or, in the Alternative, to Extend Time to Answer the Complaint Until After Resolution of a Motion to Dismiss (Feb. 2, 2017). Plaintiffs contend in that motion that because they filed this action in federal court before PGE filed at the Commission, Oregon case law requires the Commission to stay that proceeding. *Id.* at 3-6. Plaintiffs moved in the alternative to be allowed to move to dismiss in lieu of answering PGE's complaint before the Commission. *Id.* at 1-2. In short, plaintiffs are trying to avoid having the Commission rule on this dispute.

III. Legal Standards.

Federal Rule of Civil Procedure 12(b)(1) provides that a court must grant a motion to dismiss if it lacks subject-matter jurisdiction. *Moore v. Maricopa Cnty. Sheriff's Office*, 657 F.3d 890, 894 (9th Cir. 2011). As an element of jurisdiction, Article III standing is required for federal court subject matter jurisdiction, and "lack of Article III standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (emphasis omitted). For motions to dismiss under Rule 12(b)(1), the proponent of the Court's exercise of jurisdiction bears the burden of proof. *Ass'n of Am. Med. Coll. v. U.S.*, 217 F.3d 770, 778 (9th Cir. 2000). In deciding a Rule 12(b)(1) motion, the Court may consider evidentiary materials outside of the pleadings. *Id.*

A complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(6) if it lacks sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint must contain "enough [factual allegations] to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court must assume the truth of facts alleged in the complaint, but need not accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

IV. Argument.

Plaintiffs each assert a single claim: declaratory judgment. But plaintiffs' claims are unripe and will not ripen, if ever, until 2031. Further, plaintiffs seek a federal court's declaration regarding a complicated issue of state administrative law that is currently being resolved in proceedings before the appropriate state administrative body. Because these claims are non-justiciable, and, in any event, are better-suited for a state administrative forum, this Court should dismiss the Complaint without prejudice.

A. Plaintiffs' claims do not present a ripe controversy because plaintiffs' claims depend on speculative harm that may occur years from now, or may not occur at all.

A claim for a declaratory judgment between two private parties is ripe if "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 671 (9th Cir. 2005) (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941)). This standard is identical to the case or controversy requirement of Article III. *Id.* A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 793 (9th Cir. 2012) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). As a separate and alternative test, courts look to two prudential factors in determining whether a claim is ripe: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dept. of*

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Interior, 538 U.S. 803, 808 (2003).[3] Under both tests, plaintiffs' claims are unripe because they depend on "contingent future events" and there is only minimal hardship, if any, of withholding decision.

Plaintiffs' claims rely upon the assumption that each facility will become operational and will continue operations from the fifteenth year through the eighteenth year after contract execution. Further, plaintiffs' theory of liability relies on speculation that the market index prices of energy in 2031, 2032, 2033, and 2034 will be less than the fixed avoided cost prices in their Standard PPAs. There is no immediacy to these claims nor are they certain to occur, and therefore they are unripe.

In *California Energy Resources Conservation & Development Commission v. Johnson*, the Bonneville Power Administration ("BPA") executed energy sales agreements that included rate ceilings for its sale of energy to particular customers. 807 F.2d 1456, 1461 (9th Cir. 1986). The BPA had never relied on the rate ceilings in setting rates, and averred that due to abundant supply of energy in the Pacific Northwest, it may never have to rely on a rate ceiling. *Id.* at 1463. Nonetheless, petitioner challenged the existence of the rate ceiling as a violation of a statute requiring certain rate-setting procedures for BPA. *Id.*

The Ninth Circuit dismissed the challenge on ripeness grounds, stating:

> [Petitioner] challenges a contract provision, entirely dormant to date, that seems to set limits within which rates will perhaps someday be established. . . . A decision at this juncture would

[3] In *Principal Life Ins. Co. v. Robinson*, the Ninth Circuit held that prudential ripeness doctrine does not apply to "private party contract disputes," because such disputes do not involve "entanglement in administrative agency actions" with "consequences for many members of the general public." 394 F.3d 665, 670-671 (9th Cir. 2005). Subsequent decisions have clarified that *Principal*'s rationale for limiting ripeness doctrine applies only to "ordinary" private contract disputes. *See, e.g.*, *Golden v. California Emergency Physicians Med. Grp.*, 782 F.3d 1083, 1087 (9th Cir. 2015). Accordingly, courts in the Ninth Circuit still apply prudential ripeness doctrine to private party disputes, such as this one, that do not arise from the common law of contracts. *See, e.g.*, *In re Coleman*, 560 F.3d 1000, 1007 (9th Cir. 2009) (bankruptcy code); *Kelly v. Univ. Press of Mississippi*, CV 16-2960 PA (GJSX), 2016 WL 4445986, at *3 (C.D. Cal. Aug 16, 2016) (copyright infringement); *Allstate Ins. Co. v. Am. Reliable Ins. Co.*, 16-CV-00871-TLN-KJN, 2017 WL 1153041, at *3 (E.D. Cal. Mar. 28, 2017) (insurer's equitable contribution). Prudential standing doctrine is particularly well-suited to this case because it does involve entanglement in administrative proceedings and issues of policy that may implicate third-party QFs that have the same or similar terms in their PPAs, and that implicates the PURPA policies that the Commission implemented when it approved the Standard PPAs at issue.

> resolve a dispute about hypothetical rates. Courts have no business adjudicating the legality of non-events.

Id. (internal citation and quotation marks omitted); *see also Alcoa,* 698 F.3d at 793-794 (holding that a statutory challenge to the rate offered in second of two rate periods in energy sales contract was unripe where the alleged injury depended on "chain of speculative contingencies").

In other contexts, courts have also refused to decide controversies that depended on speculation about whether an agreement would be breached in the future. In *Clinton v. Acequia, Inc.*, the Ninth Circuit held that a contract breach claim was unripe where performance was not due for over a year, and it was unclear if any breach would occur then. 94 F.3d 568, 572 (9th Cir. 1996). Similarly, in *Stewart v. M.M. & P. Pension Plan*, the Ninth Circuit held that a retirement-eligible employee could not seek a declaratory judgment regarding the terms of his pension plan because it was too remote and hypothetical that he would choose to retire before dying and that the plan's terms may be amended before any such retirement. 608 F.2d 776, 784 (9th Cir. 1979); *see also Bova v. City of Medford*, 564 F.3d 1093, 1097 (9th Cir. 2009) (holding that unretired employees' challenge to the employer's decision not to offer healthcare coverage to retirees was unripe because employees may not retire with employer and employer may change policy in the intervening time).

Here, plaintiffs' declaratory judgment claim is unripe because it depends on contingent future events that may not occur as anticipated or may not occur at all. As noted above, plaintiffs' complaint assumes that (1) each plaintiff's facility reaches commercial operability; (2) each facility operates until fifteen years after PPA execution, *i.e.* over thirteen years from now, and continues to operate for up to three more years; and (3) market index rates for power will be lower than the Standard PPA's fixed prices in the years 2031, 2032, 2033, and 2034. Indeed, the Complaint allegations explicitly condition potential recovery on speculation as to future energy market index prices. The Complaint states that market prices "cannot be known in advance" but "*estimates* indicate that, through at least 2040, the [market prices] will be substantially lower than the fixed prices." Compl. ¶ 38 (emphasis added). Plaintiffs' claims, based on "hypothetical rates," are admittedly speculative and therefore unripe.

Plaintiffs' claims also fail because there is no hardship in awaiting a decision. In the ripeness context, hardship "does not mean just anything that makes life harder; it means hardship of a legal kind, or something that imposes a significant practical harm upon the plaintiff." *Nat. Res. Def. Council v. Abraham*, 388 F.3d 701, 706 (9th Cir. 2004). Conclusory and speculative claims of hardship are insufficient to satisfy the plaintiff's burden of establishing ripeness. *United States v. Lazarenko*, 476 F.3d 642, 653 (9th Cir. 2007) (rejecting "conclusory claims of hardship"); *Colwell v. Dept. of Health & Human Servs.*, 558 F.3d 1112, 1129 (9th Cir. 2009) (rejecting as "entirely speculative" claim of hardship the plaintiff "*could* be" subjected to liability (emphasis added)); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 567 (1992) (rejecting on standing grounds claim of injury based on "pure speculation"). Plaintiffs' only explanation for why their claims require immediate decision is speculation that their projects may not obtain financing without a decision. Compl. ¶ 50. None of the ten plaintiffs in this case alleges that any potential financier has in fact expressed concern about the alleged uncertainty about the contract rates in 2031 through 2034 (or that, regardless of the outcome of this case, financing would still be available even with the recent imposition of 30 percent tariffs on imported solar cells). Under both the Constitutional test and the prudential test, plaintiffs' single speculative allegation about financing is insufficient to meet plaintiffs' burden of establishing ripeness.

B. Alternatively, this Court should dismiss this suit under the doctrine of primary jurisdiction.

Primary jurisdiction applies when "protection of the integrity of the regulatory scheme dictates preliminary resort to the agency which administers the scheme." *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) (quoting *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987)). Primary jurisdiction is properly invoked when a claim is cognizable in federal court but requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency. *Id.* at 780 (quoting *Brown v. MCI Worldcom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002)). The implementation of PURPA rules and statutes concerning QFs, which

includes Standard PPAs approved under those rules, is an area of agency expertise and policy judgment that Congress committed to state public utility commissions. 16 U.S.C. § 824a-3(f)(1). Accordingly, this Court should dismiss, or alternatively stay, this case to give the Commission an opportunity to resolve this regulatory question.

Federal courts look to four factors when deciding whether the doctrine of primary jurisdiction applies: (1) a need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration. *Syntek*, 307 F.3d at 781.[4] Each factor points in favor of the Commission's primary jurisdiction.

First, each plaintiff's only claim is for a declaratory judgment interpreting the Standard PPA term. Addressing this Commission-approved term is necessary for any decision.

Second, under PURPA, state commissions are to oversee the contractual relationship between the QFs and the utilities. PURPA states that FERC "shall prescribe . . . such rules as it determines necessary to encourage cogeneration and small power production" and "each State regulatory authority shall . . . implement such rule[s] . . . for each electric utility for which it has ratemaking authority." 16 U.S.C. § 824a-3(e)1, (f)(1). Thus, state regulatory agencies are tasked with implementing federal PURPA statutes and rules. As the Ninth Circuit has stated, "the states play the primary role . . . in overseeing the contractual relationship between QFs and utilities operating under the regulations promulgated by the Commission." *Indep. Energy Producers Ass'n, Inc.*, 36 F.3d at 856.

[4] Oregon's Supreme Court has identified three factors that state courts should consider in determining whether an agency has primary jurisdiction: "(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 a judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities." *Boise Cascade Corp. v. Board of Forestry*, 325 Or. 185, 193 (1997). In the Ninth Circuit, it is an open question of law whether state primary jurisdiction doctrine applies in diversity suits. *See Verizon Nw., Inc. v. Portland Gen. Elec. Co.*, CIV. 03-1286-MO, 2004 WL 97615, at *5, n.2 (D. Or. Jan 13, 2004). Because the Oregon Supreme Court's test for primary jurisdiction overlaps with the federal test, the result is the same if this Court applies federal or Oregon primary jurisdiction doctrine. *See id.* ("[T]he general primary jurisdiction principles announced by Oregon courts do not materially differ from those found in federal cases . . . .").

Here, plaintiffs seek an interpretation of a Standard PPA term that was drafted to comply with a Commission order and that the Commission subsequently approved as compliant with its order. By its express terms, that Commission order effectuated its authority to implement PURPA. *See* Jindal Decl., Ex. 3, Commission Docket No. UM 1129, Order 05-584 at 4 ("In this order, we evaluate specific policies and procedures to determine whether Commission goals relating to the Public Utility Regulatory Policies Act (PURPA) could be more effectively implemented and achieved."). In implementing PURPA, the "Commission's goal has been to encourage the economically efficient development of these qualifying facilities (QFs), while protecting ratepayers by ensuring that utilities pay rates equal to that which they would have incurred in lieu of purchasing QF power." *Id.* at 1. In setting the fifteen-year term for fixed prices, the Commission balanced the competing concerns of the QFs' ability to obtain financing with "the likelihood that fixed avoided cost rates would diverge over time from actual avoided costs" over "a contract term longer than 15 years." *Id.* at 17-18. Thus, interpreting the Standard PPA requires deciding how the Commission decided this policy issue in its orders in 2005, 2006 and 2007, a policy that Congress entrusted to the state commissions to decide.

Third, state laws subject public utilities and their agreements with QFs to a comprehensive regulatory authority. Oregon statutes give the Commission the "power and jurisdiction to supervise and regulate every public utility . . . , and to do all things necessary and convenient in the exercise of such power and jurisdiction." ORS 756.040(2). The statutes provide that the Commission shall set "[t]he terms and conditions for the purchase of energy or energy and capacity from a qualifying facility" by public utilities. ORS 758.535(2). The Commission reviews and approves the terms to ensure that each conforms to the Commission's directions and all state and federal regulatory requirements. Or. Admin. R. 860-029-0020(1) (requiring Standard PPAs be submitted to the Commission); *see also* Jindal Decl., Ex. 2, Commission Docket No. UM 1566, Order No. 14-287 at 13 (describing approval process). Accordingly, Oregon courts have observed that a Standard PPA "is not governed by common law concepts of contract law; it is created by statutes, regulations and administrative rules." *Snow Mountain Pine Co.*, 84 Or. App. at 598.

In addition to creating formalized procedures for the creation of Standard PPAs, the state regulatory scheme gives QFs a comprehensive means of challenging a given Standard PPA's terms. "On petition of any interested person, the [Oregon] Public Utility Commission may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission." ORS 756.450. Similarly, "[a]ny person may file a complaint before the Public Utility Commission . . . against any person whose business or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or regulation of which is conferred upon the commission." ORS 756.500(1); *see also Wallace v. State ex rel. Pub. Employees Ret. Bd.*, 245 Or. App. 16, 27 (2011) (holding that complainant could seek declaration of legal rights in a state administrative complaint).

It has been Commission policy for over three decades to encourage utilities and qualifying facilities to raise their disagreements regarding a Standard PPA's statutory and regulatory compliance in proceedings before the Commission. Jindal Decl. Ex. 12, Commission Docket No. AR 102, Order No. 84-742 at 4 (Sept. 24, 1984) ("[T]he legislature intended the Commission[] to act as an arbitrator in ruling on the terms to be included in specific contracts."). In such proceedings, the Commission will, as needed, order the utilities to include certain terms in their Standard PPAs in order to comply with the statutes and regulations. Jindal Decl. Ex. 3, Commission Docket No. UM 1129, Order No. 05-584. Where the Commission ordered a particular term be included in a Standard PPA, the Commission can exercise its jurisdiction to interpret the term in a later proceeding. *See, e.g.*, Jindal Decl. Ex. 2, Commission Docket No. UM 1566, Order No. 14-287 (interpreting terms of PGE's Standard PPA); Jindal Decl., Ex. 13, Commission Docket No. UM 1894, Order No. 18-025 (Jan. 25, 2018) (holding Commission has primary jurisdiction to interpret Standard PPAs). A decision on the merits by this Court before the Commission has addressed the dispute risks disrupting the federally-mandated administrative scheme.

In an analogous case, this Court held that the Commission had primary jurisdiction over a pole attachment agreement, because a federal statute gave the Commission authority to regulate the rates and terms of such agreements. *Verizon Nw., Inc. v. Portland Gen. Elec. Co.*, CIV. 03-

1286-MO, 2004 WL 97615, at *1 (D. Or. Jan 13, 2004). This Court correctly rejected the argument that the case was simply one of contract interpretation, holding that the Commission's regulatory oversight over the agreement meant that interpreting the agreement was within the Commission's primary jurisdiction. *Id.* at *7; *see also Pac. Bell Tel. Co. v. Glob. Naps Cal., Inc.*, CV 05-7734 ODW(PJWX), 2009 WL 10675997, at *2 (C.D. Cal. Feb 23, 2009) (state public utility commission had primary jurisdiction to interpret interconnection agreement regulated by commission). Similarly, here, the Commission's regulatory oversight over the PPA means that interpretative questions are within the Commission's primary jurisdiction.

Fourth, setting a Standard PPA's term is an issue within the Commission's specialized expertise. In enacting PURPA, Congress meant to "defer to state prerogatives—and expertise" in the field of energy sales. *F.E.R.C. v. Mississippi*, 456 U.S. 742, 765, n.29 (1982). PURPA advances the goals of "local experimentation and self-determination" by "giv[ing] full force to States' ultimate policy choices" regarding the terms of energy sales. *Id*. In setting the fifteen-year term, the Commission explicitly relied on the policy goals of encouraging QF creation in Oregon, while also ensuring fixed contract prices did not greatly diverge from actual avoided costs. Jindal Decl. Ex. 3, Commission Docket No. 1129, Order No. 05-584. The Commission is in the best position to interpret its own order and cohere the policy goals stated in that order with the Standard PPA executed by plaintiffs and PGE.

Further, the Oregon legislature has expressed a particular interest in uniformity of decisions in the field of energy sales, which militates in favor of referring this dispute to the primary jurisdiction of the Commission. *See* ORS 758.515(3)(b) ("It is . . . the policy of the State of Oregon to . . . [c]reate a settled and uniform institutional climate for the qualifying facilities in Oregon."). Because PGE executed similar, if not identical, PPA terms with other QFs, inconsistent decisions in different state and federal courts risk disrupting Oregon's uniform regulatory scheme. As described above, plaintiffs attempted to belatedly intervene in a Commission proceeding raising this issue, after the close of evidence. Jindal Decl., Ex. 7, Commission Docket No. UM 1805, Order No. 17-418. The Commission ruled that it was barred by statute from granting a petition to intervene after the close of evidence but encouraged

plaintiffs to "seek[] other relief from the Commission . . . including the filing of a complaint under ORS 756.500." *Id.* Plaintiffs ignored the Commission's invitation, and instead plaintiffs filed this suit. And, as described above, plaintiffs are trying to avoid having the Commission address this dispute: they are moving to stay or dismiss PGE's complaint filed at the Commission against plaintiffs on the same issue that is before the Court. Jindal Decl., Ex. 11, Commission Docket No. UM 1931, Application for a Stay.

Dismissal in favor of primary jurisdiction is particularly appropriate because the Commission itself has ruled that it has primary jurisdiction to decide disputes about Standard PPAs. *See Verizon Nw., Inc.*, 2004 WL 97615, at *6-7 (citing the Commission's own jurisdictional decisions as persuasive authority in assessing primary jurisdiction). Pacific Northwest Solar LLC, the parent company for six QFs, recently filed an action in state court for a declaratory judgment and damages over a dispute about a different provision of the Standard PPA. Jindal Decl., Ex. 14, *Pacific Northwest Solar, LLC v. Portland General Electric Co.,* Or. Circ. Court Case No. 17CV38020, Stipulated Order to Abate (Jan. 26, 2018); *see also* Jindal Decl., Ex. 13, Commission Docket No. UM 1894, Order No. 18-025 (Jan. 25, 2018). In that case, PGE and Pacific Northwest Solar disputed whether Pacific Northwest Solar was allowed to change the capacity of four of its qualified facilities before even constructing them. Jindal Decl., Ex. 13, Order No. 18-025 at 1. PGE filed a complaint with the Commission against Pacific Northwest Solar asking the Commission to resolve that dispute, and PGE filed a motion in state court to abate that case on the grounds of primary jurisdiction. *Id.* at 1-2. While that motion was pending in state court, Pacific Northwest Solar moved the Commission to dismiss PGE's complaint on the ground that the Commission lacked personal jurisdiction over Pacific Northwest Solar. *Id.* at 2.

The Commission, in an extensive written opinion, affirmed that not only does the Commission have personal jurisdiction, it also has primary jurisdiction to resolve disputes between public utilities and QFs concerning the meaning of PGE's Standard PPA. *Id.* at 6-7 (ruling that the Standard PPA's terms "relate directly to the regulated rates and services of utilities subject to our oversight" and that uniformity was important because "[a]n interpretation

of [the disputed provision] that is inconsistent with our intent would affect not only the complainant here, but a multitude of QFs that have entered into or intend to enter into PURPA contracts with utilities regulated by the Commission."). After the Commission issued that order, the plaintiff consented to an unopposed order of abatement of the state court breach of contract action. Jindal Decl., Ex. 14.

Here, like in that case, the plaintiffs are trying to avoid the Commission's jurisdiction and have a court determine what the Commission originally intended in its own 2005 and 2006 orders. Those Commission orders stated policies regarding Standard PPA terms between utilities and all QFs in Oregon. This Court should dismiss, or in the alternative stay, the Complaint to give the Commission the first opportunity to interpret the disputed provisions of PGE's Standard PPA, just like the Commission is doing in the Pacific Northwest Solar dispute with PGE while that case is abated in Circuit Court. *See Syntek*, 307 F.3d at 782 (holding that dismissal or stay on primary jurisdiction grounds is appropriate).

C. Alternatively, this Court should dismiss this suit because plaintiffs have failed to exhaust administrative remedies.

Federal courts should dismiss a suit for failure to exhaust administrative remedies where (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to preclude the need for judicial review. *Gonzales v. Dept. of Homeland Sec.*, 508 F.3d 1227, 1234 (9th Cir. 2007) (citing factors); *Kealia Water Co. Holdings, LLC v. Plantation Partners Kauai*, LLC, 665 F. Supp. 2d 1189, 1200 (D. Haw. 2009) (applying *Gonzales* in dismissing a private-party dispute that should have been brought before a state public utility commission).

First, as discussed above, the Commission has particular expertise in overseeing the contractual relationship between QFs and utilities and setting Standard PPA terms. As the Ninth Circuit has stated, "the states play the primary role . . . in overseeing the contractual relationship between QFs and utilities operating under the regulations promulgated by the Commission." *Indep. Energy Producers Ass'n, Inc.*, 36 F.3d at 856. Further, the parties in the Commission

proceeding can generate the record necessary to resolve this issue because the parties are entitled to the same discovery procedures that exist under the Oregon Rules of Civil Procedure (plus a form of interrogatory not found in the Oregon Rules).

Second, relaxation of the requirement would encourage other QFs to deliberately by-pass the administrative scheme. In this case, as discussed above, plaintiffs filed their federal lawsuit only after the Commission denied their tardy attempt to join a related Commission proceeding. Jindal Decl., Ex. 7, Commission Docket No. UM 1805, Order No. 17-418. Plaintiffs flouted the Commission's suggestion that they file their own complaint and seek a decision from the Commission. The Commission order in that proceeding did not interpret any specific PGE Standard PPAs, but indicated that PGE's Standard PPA "*may have* limited the availability of fixed prices to the first fifteen years measured from contract execution." Jindal Decl., Ex. 9, Commission Docket No. UM 1805, Order No. 17-465 at 4. After receiving that ruling, plaintiffs chose to file a complaint in this Court, apparently concerned about this dictum from the Commission's ruling. This Court should not encourage litigants to engage in that type of forum-shopping.

Third, administrative review is likely to preclude the need for a decision by this Court. Each plaintiff's only claim is for declaratory relief. The Commission has statutory authority to decide this dispute, and therefore its decision could obviate the need for this federal court proceeding entirely. *Kealia Water Co. Holdings*, 665 F. Supp. 2d at 1201 (holding that exhaustion before state public utility commission required before bringing declaratory judgment claim where state commission had authority to interpret disputed provisions). Accordingly, this Court should dismiss, or alternatively stay, this suit on exhaustion grounds.

D. Alternatively, this Court should exercise it discretion and decline to issue a declaratory ruling.

"[D]istrict courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). There is no presumption in favor of exercising jurisdiction where a federal court is asked to issue a

declaratory judgment on an issue of state law. *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800, 803-804 (9th Cir. 2002). Indeed, when a parallel state proceeding is pending between the same parties, the district court would be "indulging in gratuitous interference" if it issued its own declaratory ruling. *Wilton*, 515 U.S. at 283. When deciding whether to decline jurisdiction courts look to the *Brillhart* factors, which state that "[a] district court should avoid needless determination of state law issues; it should discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation." *Huth*, 298 F.3d at 803 (citing *Brillhart v. Excess Ins. Co. of Am.,* 316 U.S. 491 (1942)).

All of these factors militate in favor of this Court declining jurisdiction. First, as discussed above, interpreting the PPA is a state law issue. The issue is already the subject of a state administrative complaint between these same parties raising this exact issue. Jindal Decl., Ex. 10, Commission Docket No. UM 1931, Compl. ¶¶ 21-27. There is no need for this Court to weigh in on this question of state administrative law and policy. Second, as discussed above, plaintiffs previously attempted to raise this issue of PPA interpretation before the Commission by submitting a tardy application to intervene in a different administrative proceeding. Jindal Decl., Ex. 7, Commission Docket No. UM 1805, Order No. 17-418. After their application was denied, instead of filing their own administrative complaint, plaintiffs waited until after the Commission issued an arguably unfavorable decision and then filed this declaratory action in federal court. This conduct is prototypical forum shopping, and should not be encouraged. Resolving plaintiffs' declaratory judgment claims will also require duplicative litigation. PGE's Standard PPAs with other QFs have identical or similar provisions. The Commission should be the adjudicatory body that decides the effect of those provisions in a uniform manner.

The *Brillhart* factors are non-exhaustive, and the Ninth Circuit has also suggested other considerations in the inquiry: "whether the declaratory action will settle all aspects of the controversy; whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; . . . whether the use of a declaratory action will result in entanglement between the federal and state court systems; . . . and the availability and relative convenience of other remedies." *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 n.5 (9th Cir. 1998). These

additional factors also militate against exercising jurisdiction. The federal declaratory judgment action will not settle all aspects of the controversy nor will it serve a useful clarifying purpose. Because PPA interpretation is a question of state law, and other QFs have PPAs raising this same issue, eventually this issue will need to be resolved in Oregon's administrative system subject to Oregon judicial review. Parallel litigation risks entangling the federal and state court systems as the prevailing litigant in this suit races to reduce the federal claims to judgment before the Commission issues a definitive, and potentially contrary, statement of Oregon law. Thus, a federal declaratory judgment action seeking declaration of state law rights is ill-suited for this Court's exercise of discretionary jurisdiction.

E. Alternatively, this Court should abstain from deciding this dispute under the rule from *Burford v. Sun Oil Co.*

Burford abstention applies when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 296 (9th Cir. 1996) (citing *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943)). The Ninth Circuit has directed federal district courts to look to three additional factors in determining if *Burford* abstention applies: (1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy. *Id.*

All of these factors militate in favor of abstention here. As the Supreme Court has recognized, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Each plaintiff seeks a declaration interpreting the Standard PPA. Interpreting PPA terms is a question of state administrative law, not common law. *See Snow Mountain Pine Co.*, 84 Or. App. at 599 (so stating). Here, the interpretative

question is a complicated question of state law because the provision at issue is a Standard PPA drafted by PGE to comply with a Commission order where the Commission was implementing PURPA. Jindal Decl., Ex. 13, Commission Docket No. 1894, Order 18-025 at 6-7 ("The interpretation of PURPA contracts is critical to the discharge of our regulatory responsibilities."). This interpretative question also transcends the case at bar because PGE has identical or similar terms in numerous other Standard PPAs with other QFs. Because different QFs with identical PPA terms could potentially receive conflicting interpretations of their PPAs' terms from other courts, federal and state, and from the Commission itself, conflicting state and federal decisions would disrupt state efforts to have a coherent policy. *See* ORS 758.515(3)(b) (stating it is Oregon policy to "[c]reate a settled and uniform institutional climate for the qualifying facilities in Oregon."). Further, *Burford* abstention is appropriate because the Oregon legislature has concentrated review of administrative complaints, such as the one currently pending between the parties, in the Oregon Court of Appeals. *See* ORS 183.482(1), ORS 756.610. Accordingly, this Court should abstain from deciding this dispute.

In a similar case, the Sixth Circuit held that *Burford* abstention applied to protect a state public utility commission's decision regarding PPA interpretation from collateral attack through a federal lawsuit. *Adrian Energy Assocs. v. Mich. Pub. Serv. Comm'n*, 481 F.3d 414, 425 (6th Cir. 2007). In *Adrian Energy*, QFs and a utility disagreed about whether the avoided costs calculations in their negotiated, *i.e.* non-standard, PPAs permitted the utility to pay the QFs less if the utility's actual avoided costs decreased due to increased efficiency of its own power plants. *Id.* at 418. After the utility asked the state public utility commission to address the issue, the QFs filed a state lawsuit raising the same issue. *Id.* at 417. The state court dismissed on primary jurisdiction grounds. *Id.* When the QFs then received an unfavorable decision before the state commission, the QFs pursued the administrative appeals process but also filed an original action in federal court. *Id.* at 418. The federal district court declined to exercise its jurisdiction given the pending administrative appeal. *Id.* at 420. The Sixth Circuit affirmed on *Burford* abstention grounds.

The court reasoned that *Burford* abstention applied because the state "enacted its own state laws and provided a scheme for administrative and judicial review;" "state law governs the acquisition and sale of electricity to consumers;" the state commission had itself approved the PPAs; federal court intervention would disrupt administrative efforts "to ensure that utility customers are charged appropriate and accurate rates;" an administrative appeal to the state Court of Appeals provided an adequate means of judicial review; and "the Michigan Public Service Commission and state courts have or are reviewing the precise issue raised by the plaintiffs under a legislatively-approved scheme." *Id.* at 424. Each of these reasons applies with equal force to plaintiffs' complaint against PGE. Indeed, plaintiffs' suit in this action is even more disruptive to the administrative scheme because it involves Standard PPA terms drafted to comply with a specific Commission order implementing PURPA policy, as opposed to the negotiated PPA terms at issue in *Adrian Energy*. Accordingly, this Court should dismiss, or alternatively stay, this suit on *Burford* abstention grounds. *Quackenbush*, 517 U.S. at 721 (holding that federal courts have the power to dismiss or stay suit on abstention grounds when the relief sought is "equitable in nature or otherwise discretionary").

CONCLUSION

Because this case will not be ripe until 2031, if ever, the Complaint should be dismissed without prejudice. Alternatively, this Court should decline to exercise its discretion under the rule of *Brillhart* and its progeny, or dismiss (or stay) under the doctrines of primary jurisdiction, exhaustion of administrative remedies, or *Burford* abstention.

DATED this 7th day of February, 2018.

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