BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1894

Portland General Electric Company, Complainant, v. Pacific Northwest Solar, LLC, Defendant.	PACIFIC NORTHWEST SOLAR LLC'S ANSWER AND RESPONSE TO COMPLAINT AND REQUEST FOR DISPUTE RESOLUTION

Defendant, Pacific Northwest Solar, LLC (PNW Solar), answers Portland General Electric's ("PGE") Complaint and Request for Dispute Resolution as follows:

PNW Solar denies all allegations in the Complaint and Request for Dispute Resolution unless specifically admitted herein.

I. INTRODUCTION

This dispute, at its core, is a dispute over contract interpretation. PNW Solar entered into four Power Purchase Agreements ("PPAs") with PGE during the first half of 2016. The parties dispute the meaning of the PPA's section 4.3, which is common to all relevant PPAs executed by the parties. That provision reads as follows:

> Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built. Seller shall not increase the Nameplate Capacity Rating above that specified in Exhibit A or increase the ability of the Facility to deliver Net Output in quantities in excess of the Net Dependable Capacity, or the Maximum Net Output as described in Section 3.1.11 above, through any means including, but not limited to, replacement, modification, or addition of existing equipment, except with prior written notice to PGE. In the event Seller increases the Nameplate Capacity Rating of the Facility to no more than 10,000 kW pursuant to this section, PGE shall pay the Contract Price for the additional delivered Net Output. In the event Seller increases the Nameplate Capacity Rating to greater than 10,000 kW, then Seller shall be required to enter

into a new power purchase agreement for all delivered Net Output proportionally related to the increase of Nameplate Capacity above 10,000 kW.

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

PGE rejected PNW Solar's notices and gave PNW Solar the options to either refrain from increasing or decreasing the nameplate capacity, or terminate the contracts and negotiate new contracts at lower prices.[1] PGE reads section 4.3 as only allowing "minor changes" during the construction process or a limited type of "upgrades to an already operational facility."[2] PGE cites to no specific language in the PPA that supports these interpretations. Instead, PGE cites to the administrative record in UM 1129 and the Commission's orders in that proceeding essentially arguing that the Commission ignore the plain terms of the contract in favor of PGE's preferred policy objective.[3]

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1 See Complaint and Request for Dispute Resolution, Exhibit C.
2 Complaint and Request for Dispute Resolution at 4 & 7 n.25.
3 Id. at 5.

II. RESPONSE

Section 4.3 is not ambiguous and should be interpreted according to its plain meaning. In Oregon contract interpretation, courts first look to the text of the disputed provision in the context of the document as a whole, and if the meaning is clear, the court interprets the terms as a matter of law.[4] If the provision is ambiguous, courts look to extrinsic evidence regarding the intended meaning, and finally, if that still does not resolve the ambiguity, then the courts look to appropriate "maxims of construction."[5] A term is ambiguous if it has is more than one possible meaning.[6]

Here, PGE has offered extrinsic evidence regarding section 4.3's intended meaning without first establishing that the term is ambiguous. The first sentence in section 4.3 contemplates that the facility as-built may be different from the facility initially contracted for because it mandates that "[PNW Solar] shall provide an As-built Supplement to specify the actual Facility as built." Nothing in that sentence limits the "as-built" facility to only "minor changes" as PGE asserts.

Next, the language states that PNW Solar may not increase the nameplate capacity rating "through any means including but not limited to, replacement, modification, or *addition* of existing equipment" unless PNW Solar provides "prior written notice to PGE." The plain meaning of the term "addition" is the process of joining something to something else, or putting two or more things together. This definition of "addition" supports the act of joining one or more solar panels with other solar panels, which is generally what happens when a solar

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4 Yogman v. Parrott, 325 Or 358, 361 (1997).
5 Id. at 363-64.
6 Id.

facility's nameplate capacity rating increases. PGE's position that this provision should somehow be read to only apply to "upgrades" to an already operational facility is not supported by the plain meaning. There is no language in this provision that limits it to increases only after the facility is built and operational, and PGE points to no language in the rest of the contract that supports that view. Instead, the language specifically contemplates that the as built size may differ from original contemplated size.

PGE only offers extrinsic evidence of testimony and Commission Orders from Docket No. UM 1129 to support its reading of the contract. There is also additional evidence in that administrative record that supports PNW Solar's reading of section 4.3, or at the very least would prove that the situation the parties now find themselves in was not considered in Docket No. UM 1129. However, none of this evidence is relevant unless the meaning of the term is first found to be ambiguous. Therefore, because the terms in section 4.3 are not ambiguous, the Commission should not consider PGE's extrinsic evidence and the contract terms should be interpreted according to their plain meaning.

If the Commission does find that the provision is ambiguous, it may consider extrinsic evidence to determine the meaning, but the Commission is without authority to reform the terms of the executed PURPA contracts. PGE asks the Commission, in essence, to ignore the plain terms of the PPAs and reform the terms to achieve PGE's preferred policy objective. Numerous courts have confirmed that PURPA preempts any action by state utility commissions that reforms or modifies an executed PURPA contract.[7] Therefore, the relief PGE seeks in the form

[7] Ind. Energy Prod. Ass'n, Inc. v. Cal. Pub. Util. Comm'n, 36 F3d 848, 858 (9th Cir. 1994); Freehold Cogeneration Associates, L.P., v. Board of Regulatory Comm'rs of the State of N.J., 44 F3d 1178, 1192 (3rd Cir. 1995).

of PPA reformation is not available, and the Commission should not reform the PPAs but simply interpret the terms as they exist.

Further, if a term in a Commission-approved standard PPA does not achieve the Commission's policy goals, the contract should be interpreted according to its terms, and, on a going-forward basis, the policy should be clarified and the standard PPA revised accordingly.[8] In Order No. 17-256, the Commission considered whether it was appropriate to require PGE to give 15 years of fixed prices from commercial operation where the Commission interpreted the Commission-approved standard PPA to provide for 15 years from contract execution and the other two Oregon utilities contracts provided for 15 years from commercial operation. The Commission concluded that PGE's standard contract was inconsistent with its policy. However, the Commission also concluded that because the standard PPA was Commission-approved, the Commission could not find the standard PPA in violation of Commission policies. Therefore, the Commission refused to revise existing executed contracts, but clarified that its policy requires 15 years of fixed prices from commercial operation and ordered PGE to submit a revised standard PPA that complies with that policy.

While PNW Solar disagrees with PGE's interpretation of Commission policy or its relevance when reviewing the plain meaning of the PPAs, if the Commission finds that section 4.3 is inconsistent with its policy goals, then the remedy is not to revise the executed contract but to clarify its policy and order PGE to submit a revised standard PPA going forward.

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[8] See Northwest Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition v. PGE, Docket UM 1805, Order No. 17-256, at 3-4 (Jul. 13, 2017).

PNW Solar denies that this dispute raises an issue within the Commission's primary jurisdiction.[9] The doctrine of primary jurisdiction is generally invoked by a court when the 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."[10] In this case, PGE cites to no court precedent giving the Commission primary jurisdiction to interpret the terms of an executed PURPA contract in a complaint brought by the utility against a qualifying facility.[11] Additionally, PGE cites to no precedent indicating that PURPA contracts affect PGE's rates. In fact, under PURPA, qualifying facilities are exempt from state laws or regulations affecting the rates of electric utilities and the financial or organizational regulation by utilities.[12] Therefore, even if a PURPA contract has an effect on PGE's rates, PNW Solar, as a qualifying facility, would be exempt from the Commission's rate-making jurisdictional hook, so the Commission would not have primary jurisdiction.

Finally, and most important, Oregon courts are well-suited to resolve this dispute because it is a matter of contract interpretation and a declaration of the parties' rights under the contract. Contract interpretation, in general, is a matter of common law.[13] As it pertains to a contract dispute between a utility and a qualifying facility, Oregon courts have found that they have jurisdiction to hear the dispute because it "is a common-law issue that falls within a circuit

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9 The issue of primary jurisdiction is being addressed in separate motions before this Commission.

10 Boise Cascade Corp. v. Board of Forestry, 325 Or 185, 192 (1997).

11 The Snow Mountain Pine Co. v. Maudlin case cited by PGE was a situation prior to contract execution in which the Commission was asked to set the terms of a PURPA contract by establishing a legally enforceable obligation. 84 Or App 590 (1987).

12 16 USC 824a-3(e); 18 CFR 292.602(c).

13 See supra note 4, at 3.

court's general jurisdiction."[14] Therefore, because the courts have general jurisdiction over common law contract interpretation and declaration of parties' rights under contracts, the courts are best-suited to resolve this dispute.

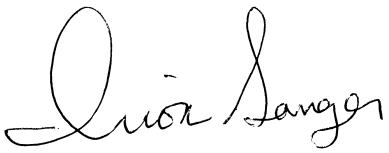
III. CONCLUSION

This dispute is a simple matter of contract interpretation. Neither a court nor the Commission needs to revisit the administrative record in Docket No. UM 1129 if it recognizes that the contract language is unambiguous. It can simply interpret that contract language by applying the plain meaning of the terms. PGE asks the Commission to ignore the plain meaning and reform the terms to achieve PGE's favored policy interpretation; however, the Commission is preempted by PURPA from changing any contract terms. At most PGE's policy arguments would be considered extrinsic evidence of the provision's meaning should the Commission find that there is an ambiguity. If such an ambiguity is found, PNW Solar is prepared to submit other extrinsic evidence to support its reading of the terms. In sum, the provision is not ambiguous and the Commission should not consider PGE's extrinsic evidence but interpret the plain meaning of the terms. Finally, this Commission does not have personal, subject matter or primary jurisdiction over the issues in PGE's complaint, which should be resolved by a court of competent jurisdiction.

[14] Oregon Trail Elec. Consumers Co-op, Inc. v. Co-Gen Co., 168 Or App 466, 473 (2000).

Dated this 6th day of November, 2017.

Respectfully submitted,



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