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 REPLY TO PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE TO MOTION TO DISMISS

I. INTRODUCTION

This dispute primarily concerns the interpretation and construction of a contract term in a Power Purchase Agreement ("PPA") between Pacific Northwest Solar, LLC ("PNW Solar"), which is a qualifying facility ("QF") under the Public Utility Regulatory Policy Act ("PURPA"), and Portland General Electric Company ("PGE"), which is a regulated utility. PNW Solar is challenging whether the Public Utility Commission of Oregon (the "Commission") has personal jurisdiction over it in its Motion to Dismiss.[1] There is no personal jurisdiction over PNW Solar because it has not (and cannot) stipulate to confer jurisdiction on the Commission by the terms of its PPA, it is exempted from the Commission's utility-type rate regulations, and modification of its PPA by the Commission after execution would be pre-empted by its PURPA-guaranteed

[1] See ORCP 21(G) (defense for lack of jurisdiction over the subject matter is not waived if not made by motion under rule 21 or included in a responsive pleading and "[i]f it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action."). At this time, PNW Solar is not seeking dismissal based on, and requests that the Commission not resolve issues related to, subject matter jurisdiction; however, the Commission may dismiss if it finds on its own that it does not have subject matter jurisdiction. If the Commission concludes that it has personal jurisdiction over PNW Solar, then PNW Solar will raise the defense of lack of subject matter jurisdiction in separate pleadings.

rights to sell its output under the terms of its executed PPA. In addition, the contractual dispute at issue cannot be resolved through a declaratory ruling, nor can personal jurisdiction be forced on a private party simply by calling a complaint a declaratory ruling. Finally, PGE's failure to separately identify any factual allegations makes it impossible for PNW Solar to file a proper answer.

II. ARGUMENT

A. PNW Solar Has Not Subjected Itself to the Public Utility Commission's Jurisdiction

PGE argues that PNW Solar has agreed to the Commission exercising personal jurisdiction over it because of a provision that is included in the standard power purchase agreement, including PNW Solar's PPAs.[2] PNW Solar has not "explicitly subjected" itself to the Commission's jurisdiction as PGE claims because Section 17 of the PPA does not explicitly state that the Commission has personal jurisdiction over PNW Solar, and (even if it did) personal jurisdiction cannot be conferred by agreement of the parties or by requiring PNW Solar to acquiesce to Commission jurisdiction to obtain a standard PPA and standard rates.

Section 17 of the PPA does not "explicitly" state that future contract disputes shall be decided by the Commission. The PPA merely states that: "This Agreement is subject to the jurisdiction of those governmental agencies having control over either Party or this Agreement."[3] It does not specifically call out this Commission as the forum to resolve any disputes that might arise. Nor does it waive objections to personal jurisdiction by its express terms or by implication. There are of course numerous "governmental agencies" that have some measure of

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2 PGE's Response to PNW Solar's Motion to Dismiss at 3 (Oct. 4, 2017) [hereinafter PGE's Response].

3 PGE's Complaint at Exhibit B at Section 17 [hereinafter PNW Solar's PPA].

control over the parties to the agreement. For example, the Federal Energy Regulatory Commission ("FERC") has jurisdiction over PNW Solar's status as a QF entitled to sell to PGE under PURPA.[4] FERC also has jurisdiction over PGE's activities as a regulated public utility under the Federal Power Act.[5] PGE's argument would also therefore provide FERC, as well as numerous other governmental agencies, with jurisdiction to adjudicate a dispute over the PPA. This reading of Section 17 cannot stand because it would make the clause so broad as to make it unworkable.

In addition, Section 17 of the PPA also refers to PNW Solar's obligation to maintain licenses and approvals required for construction, operation and maintenance.[6] Section 17 is simply not focused on identifying any form of dispute resolution, arbitration, or mediation. Read in proper context, this section was not meant to explicitly designate the Commission, or any other administrative agency, as decider of future contract disputes. If PGE, wished to insert a forum selection clause into the PPA that identified the Commission as arbiter of certain disputes, then PGE should have included such a clause in the PPA. Having failed to do so, it cannot now expand the plain terms of Section 17 to its liking.

PGE's argument also fails because Oregon law does not allow PNW Solar to "explicitly subject[]" itself to the Commission's jurisdiction under its PPA. Under Oregon law, an agency's jurisdiction may not be conferred by stipulation of the parties.[7] Agency jurisdiction instead

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

5 16 USC § 824(b).

6 PNW Solar's PPA at Section 17.

7 Diack v. City of Portland, 759 P.2d, 1070, 1073, 306 Or. 287 (1988).

depends on whether the legislature has authorized the agency to decide the matter.[8] Agencies must have jurisdiction over both the person and the subject matter.[9]

As with all agencies in Oregon, the Commission's jurisdiction must be found in its statutory grant of authority and the parties cannot confer jurisdiction on the Commission by agreement or stipulation. Even if the PPA explicitly stated that contract disputes would be decided by the Commission, that provision would be an invalid grant of jurisdictional authority to the Commission by stipulation. As indicated above, parties simply cannot expand an agency's authority by stipulation. Therefore, PGE's argument that PNW Solar "explicitly subjected" itself to the Commission's jurisdiction fails.

The Commission should consider the practical ramifications of PGE's assertion that PNW Solar and PGE can agree to grant the Commission jurisdiction over a dispute. Under PGE's view, any party could attempt to require the Commission to exercise jurisdiction over their activities and resolve their disputes, simply by entering into a bi-lateral contract stating that they want the Commission to resolve their dispute. The fact that one of the party's (PGE) is subject to the Commission's personal jurisdiction over certain regulatory matters does not resolve the fundamental problem associated with private parties agreeing to litigate their disputes before the Commission. For example, the Commission will never have personal jurisdiction over ambassadors, even if they enter into contracts with PGE and agree to have their disputes adjudicated by the Commission. PGE and private parties cannot expand the Commission's limited jurisdiction over specific individuals and subject matter through private agreements.

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8 Id.

9 See ORCP 4; ORCP 21.

Finally, requiring a QF to agree to the Commission's jurisdiction as a pre-condition to obtaining a standard PPA would run counter to the purpose of standard contracts. The Commission has adopted standard contracts and rate schedules to facilitate and direct the process by which a QF and an Oregon electric utility enter into a contract.[10] The purpose of the Commission approving standard contacts and schedules for each utility is to pre-establish "rates, terms and conditions that an eligible QF can elect without any negotiation with the purchasing utility" and to "eliminate negotiations . . ."[11] It would be inappropriate and a violation of PURPA for the Commission to require a QF to agree to the Commission's ongoing jurisdiction simply to obtain the benefits of a standard contract and the avoided cost rates that should be broadly applicable to all similarly situated QFs. Finally, if the Commission intended to adopt standard contract provisions to ensure that the Commission will have personal jurisdiction over QFs, then such a radical and onerous provision should have been discussed in the proceedings that lead to the adoption of the standard contract. PNW Solar is unaware of any discussion, testimony or briefing regarding Section 17 in the Commission's PURPA regulatory proceedings, and PGE cites none.

B. Because PNW Solar Is Not Subject to Utility-Type and Rate Regulations, PNW Solar Cannot Be Subject to the Commission's Jurisdiction Under ORS 756.500(1) or (5)

PGE makes two arguments as to why the Commission's enabling statutes governing retail rates and services grant it jurisdiction over PNW Solar, both of which fail because PNW Solar is exempt from utility-type rate regulations. PGE first argues that the Commission has jurisdiction

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

11 Id. at 12, 16.

because PNW Solar's business or activities are "regulated by the Commission" under the Commission's PURPA regulatory authority.[12] Second, PGE argues that the Commission has jurisdiction over PNW Solar because the PPA affects PGE's rates.[13] As discussed below, both of these arguments fail because this dispute concerns an executed QF contract with a private party that is not regulated by the Commission. In fact, contrary to PGE's suggestion, federal law would preempt any effort by the Commission to assert ongoing regulatory authority of any sort over an executed PURPA contract.

PGE argues that because PNW Solar is "selling electric power to a public utility—an activity that is closely regulated through PURPA and ORS 758.535" that its business or activities are sufficiently "regulated by" the Commission to bring PNW Solar within the Commission's jurisdiction under Oregon statute.[14] The necessary extension of that argument in the context of this case is that PNW Solar's activities are so regulated by the Commission such that PNW Solar can be ordered to appear before the Commission without its consent and be required to comply with any orders changing or modifying the terms of its already executed contract for the sale of electric power.

PGE's argument ignores that, as a QF, PNW Solar is not subject to the Commission's utility-type or rate-making jurisdiction. As explained in detail below, QFs are exempt from state laws or regulations respecting the rates of electric utilities, and the financial and organizational

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12 PGE's Response at 2.
13 Id.
14 Id. at 4.

regulation of electric utilities.[15] Congress intended to exempt QFs from state and federal utility rate regulations.[16]

The law is in fact very well settled on this point – QFs contracts and rates are not subject to the same utility-type regulation that applies to retail electric contracts. FERC explained that 18 CFR § 292.304(b)(5) of its regulation is intended to provide "certainty with regard to return on investment in new technologies."[17] "The import of [Section 292.304(b)(5)] is to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances."[18] Additionally, in affirming FERC's full avoided cost rule, the U.S. Supreme Court cited at length from the legislative history of Section 210(b) of PURPA, regarding the rate to be paid to QFs, and concluded: "Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities to utilities."[19]

The Ninth Circuit's decision in *Independent Energy Producers Association, Inc.,* is directly on point here, and controlling in Oregon.[20] In that case, the California Public Utilities Commission ("CPUC") sought to reopen long-term PURPA contracts with fixed rates and change the terms of payment set forth in the agreements under the guise of regulating the QFs' operating characteristics.[21] The Ninth Circuit Court of Appeals explained:

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15 16 USC § 824a; 18 CFR 292.602(c).

16 Freehold Cogeneration Assocs., v. Bd. of Regulatory Comm'rs of the State of N.J., 44 F.3d 1178, 1190-92 (3rd Cir. 1995).

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

18 Id.

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

20 36 F.3d 848.

21 Id. at 849.

> The underlying motivation behind the CPUC program is to lower the rates set in appellees' standard offer contracts because they are higher than the Utilities' current avoided costs. As noted above, this differential exists because the standard offer contracts lock the Utilities into paying rates that were calculated on incorrect assumptions about the future cost of fossil fuels, the primary fuel source used by the utility to generate electric energy. However, the fact that the prices for fuel, and therefore the Utilities' avoided costs, are lower than estimated, does not give the state and the Utilities the right unilaterally to modify the terms of the standard offer contract. Federal regulations provide that QFs are entitled to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed.[22]

FERC has itself explained, interpreting its own regulation, as follows: "If we were to . . . allow the reopening of QF contracts that had not been challenged at the time of their execution, financeability of such projects would be severely hampered. Such a result is not, in our opinion, consistent with Congress's directive that we encourage the development of QFs."[23] Likewise, in *Freehold Cogeneration Association*, the Third Circuit held "once the [state utility commission] approved the power purchase agreement between Freehold and [the utility] on the ground that the rates were consistent with avoided cost, any action or order by the [state commission] to reconsider its approval or to deny the passage of those rates to [utility's] consumers under purported state authority was preempted by federal law."[24] The Oregon Court of Appeals has likewise reached the same result, relying on these authorities in *Or. Trail Elec. Consumers Co-op, Inc. v. Co-Gen Co.*[25]

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

23 New York State Electric & Gas Corporation, 71 FERC ¶ 61,027, at 61,117-18 (1995).

24 44 F.3d at 1194; accord In Re Petition of Atlantic City Elec. Co., 708 A.2d 775, 778-79 (N.J. Super. 1998); West Penn Power Co. v. Penn. Pub. Util. Comm'n, 659 A.2d 1055, 1066 (Pa. Cmmw. Ct. 1995).

25 7 P.3d 594, 605-06 (Or. Ct. App. 2000).

Thus, PGE's reliance on cases where the Commission has addressed the rates or terms of an agreement between a utility and one of its retail customers are inapplicable. Reliance on such cases is in fact preempted by federal law. The entire premise of PGE's arguments – that the rates and terms of the sale under an executed PURPA PPA "are plainly regulated by the Commission"[26] – could not be more incorrect. Recall that the dispute regards PGE's assertion that the terms of the PPA should be ignored because those terms plainly state PNW Solar may sell energy at the rates in the contract for output of a capacity expansion of up to 10 MW. Any attempt to assert any form of ongoing regulatory jurisdiction over a PURPA PPA is preempted; that includes assertion of personal jurisdiction premised on the ability to exert ongoing regulatory authority over the PPA or the rates that would apply to the additional capacity allowed to be constructed under the terms of the executed PPA. In fact, this rule is so well established that in *Freehold*, the Third Circuit enjoined a state commission's re-examination of a fixed-price PURPA contract well before the process was complete.[27] In light of these well-established legal principles, PGE's citations to authority all fail.

PGE cites to the *Caithness* case to support its argument that any entity that sells electricity is within the Commission's 756.500 jurisdiction.[28] The *Caithness* defendants were private wind generators that did not qualify as QFs and the case was brought under Oregon's Territory Allocation Law.[29] The Commission did not state, as PGE alleges, that it was exercising

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26 PGE's Response at 2.

27 Freehold, 44 F.3d at 1189.

28 PGE's Response at 4 ("Because Columbia Basin challenged *Caithness'* provision of electric services—an activity subject to the Commission's regulation—the Commission had 'jurisdiction to determine whether the actions of the *Caithness* defendants are consistent' with the Commission's statutory oversight").

29 Columbia Basin Electric Cooperative, Inc. v. PacifiCorp, Docket No. UM 1670, Order No. 15-110 at 1 (Apr. 10, 2015).

jurisdiction over the *Caithness* defendants because their provision of electricity service is an activity regulated by the Commission.[30] Instead, the Commission found its jurisdiction under its authority to administer the Territory Allocation Law and actions that may violate that law.[31] The Commission also found jurisdiction because the defendants were *receiving electricity supplied by PacifiCorp*.[32] In other words, the Commission had jurisdiction over the defendants *retail purchases* from PacifiCorp, which was ultimately found to be a retail sale that violated Oregon's Territory Allocation Law. Here, the only possible means of determining personal jurisdiction over a QF would be found under the Commission's authority to implement PURPA, but as previously indicated, under PURPA, QFs have a special status exempt from utility-type rate making by a state commission after they execute a long-term, fixed-price PURPA contract.

PGE also cites to the *Wah Chang* case to support its two positions that: 1) the Commission has jurisdiction over executed contracts concerning the sale of electricity; and 2) that the Commission's authority to set the terms of a contract prospectively also gives the Commission authority to resolves disputes over the executed contract.[33] PGE is wrong again. The *Wah Chang* case concerned PacifiCorp's (a regulated utility) *retail sale* of electricity to a customer subject to the Commission's ratemaking authority.[34] Unlike a long-term PURPA sale, the Commission has ongoing rate-making authority to change the rates or terms of a long-term retail service agreement between a customer and regulated electric utility in Oregon.[35]

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30 Id. at 9.

31 Id.

32 Id.

33 PGE's Response at 5, 12.

34 Wah Chang v. PacifiCorp, Docket No. UM 1002, Order No. 09-341 at 1 (Sept. 1, 2009).

35 See American Can Co. v. Davis, 559 P.2d 898, 909, 28 Or. Ct. App. 207 (1977) (holding the Commission has duty to review and if necessary revise rates in special contract for *retail* electric services).

Wah Chang is inapplicable because the Commission's jurisdictional authority in *Wah Chang* was based on the Commission's jurisdiction over the setting of retail rates, which does not apply here because PNW Solar is exempt from utility-type rate regulations. The rates or prices PNW Solar charges to PGE are only subject to regulation prior to contract execution, and cannot be altered by the Commission after contract execution. This means that PNW Solar's PPA for the sale of electricity to PGE is not subject to the same ongoing Commission oversight as a contract entered into by PGE to sell electricity to an end-use consumer. Merely because PNW Solar sells electricity, does not mean that PNW Solar has become subject to the Commission's utility-type rate-making jurisdiction. To hold otherwise would be in direct conflict with the express terms of PURPA exempting QFs from utility-type regulations and rate regulation. Therefore, the Commission does not have personal jurisdiction to hail PNW Solar, as a QF exempt from utility-type rate regulations, into the Commission without its consent, in order to change or modify the terms of its contract to sell electric power.

PGE further notes that the PPA affects PGE's rates because the price at which PGE acquires electricity has a "direct and material" impact on the rate at which it sells electricity.[36] The Commission does not have the type of control over other contracts with "direct and material" impacts on rates that PGE requests here. The Commission recently concluded that it lacks "the authority to adopt rules that prohibit utility ownership of generating resources."[37] The Commission has also stated that it does not intend to "usurp the role of the Utility decision-

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36 PGE's Response at 8.

37 Re Northwest and Intermountain Power Producers Coalition Petition for Temporary Rulemaking and Investigations into PacifiCorp's 2016 Requests for Proposal, Docket Nos. AR 598, UM 1771, Order No. 16-188 at 2 (May 19, 2016).

maker."[38] Even though the Commission has broad authority, the Commission found that its authority does not extend to directing the utility to make specific resource decisions.

In the end, PGE requests that the Commission adjudicate a dispute with its service provider and to change or modify the terms of its contract with its service provider. This alleged authority of the Commission would be unprecedented and sweeping. It would displace any other governmental authority or court's ability to adjudicate any dispute where an Oregon utility were a party to the case.

Some examples demonstrate the flaws in PGE's "affects-rates" argument. After PGE enters into a decision to purchase power or build a new power plant, the Commission cannot alter or adjudicate disputes over those contract terms; the Commission's authority is merely to adjust PGE's retail rates it may charge its captive customers for regulated services. The Commission does not tell PGE what resource decisions to make or exercise jurisdiction to resolve disputes between PGE and its business partners, but only decides whether to pass on the costs of those contracts to end-use customers. For example, PGE has elected to build and own its new Carty generation station, which is $150 million over budget. Despite the fact that charging the customers an extra $150 million could significantly "affect" rates, PGE cannot haul any of the parties to those contracts into the Commission and ask the Commission to decide whether PGE, the construction companies, or the insurance companies are responsible for paying the cost overruns. Instead, if a court decides under the terms of those contracts that PGE is responsible for the $150 million, then the Commission has the legal authority to decide whether

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[38] Re PGE 2016 Integrated Resource Plan, Docket No. LC 66, Order 17-386 at 2, n.1 (Oct. 9, 2017) (citing Re Investigation into Least-Cost Planning for Resource Acquisitions by Energy Utilities in Oregon, Docket No. UM 180, Order No. 89-507 at 6 (Apr. 20, 1989)).

or not PGE can pass those costs on to its retail customers. Nor can the Commission save PGE from an ill-advised natural gas supply agreements or coal supply agreements that PGE would like to ask the Commission to revise to keep its retail rates lower. Those contracts, as well as the executed PNW Solar PPA contract, are beyond the control of the Commission, and the Commission would have no personal jurisdiction over those parties or PNW Solar.

Last, to be clear, PNW Solar does not argue that the Commission never has jurisdiction over an executed contract. The Commission may have subject matter jurisdiction over an executed contract, but as stated above, PNW Solar has not raised the defense of lack of subject matter jurisdiction at this time. The issue before the Commission now is whether it has personal jurisdiction over PNW Solar. In a case such as the *PáTu* case cited by PGE, personal jurisdiction was not an issue because the Commission heard a complaint brought *by a QF* against a public utility.[39] The Commission will always have personal jurisdiction over the complainant, and the defendant was a regulated utility (PGE) over whom the Commission indisputably has personal jurisdiction. Additionally, personal jurisdiction was not raised by either party or the Commission in that case, which was notably a complaint that alleged not only that the utility violated a contract but also that the utility violated the Commission's administrative rules.

Here, where a regulated utility has brought a complaint against the defendant, PNW Solar, the Commission must have personal jurisdiction over that defendant. PGE has not cited a single case in which the Commission has personal jurisdiction over a private company outside of the context of a retail rate dispute, and PGE fails to consider the special (exempt from utility-type regulation) status of QFs under PURPA. As indicated above, PNW Solar, as a QF under

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[39] PáTu Wind Farm, LLC v. PGE, Docket No. UM 1566, Order No. 12-316 at 1 (Aug. 21, 2012).

PURPA is exempt from having its executed contracts changed in a utility-type regulation, and thus cannot be hailed into the Commission's forum without its consent.

C. The Crux of the Dispute Here Is One of Contract Construction and Interpretation Which Is Best Suited for the Courts to Decide

The only thing at issue here is the construction and interpretation of the language in Section 4.3 of in an executed QF PPA.[40] PGE argues that the Commission has primary or exclusive jurisdiction because this dispute concerns PURPA and an interpretation of the Commission's prior orders.[41] Specifically, PGE notes that "[n]othing in Order No. 06-538 suggests that the Commission intended to allow a QF to simply change its mind about project size after executing a PPA."[42] PGE appears to take the position that the plain language of the contract could be read to allow additions to the size of the project, but that the Commission should retroactively change the executed contract to comport with PGE's current view of the better policy. This argument ignores that it is the plain meaning of the specific contract at issue that governs, not whatever result may be just and reasonable under utility law if the QF or the PPA were in fact subject to ongoing regulation.[43] PNW Solar simply wants to perform under the PPA by its unambiguous terms – a matter that the courts are well suited to resolve.

The law on contract construction and interpretation is based in Oregon common law.[44] In Oregon, courts first look to the text of the disputed provision in the context of the document as a whole to determine whether an ambiguity exists, then if the provision is ambiguous, courts look

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40 PGE's Complaint at 2-3.

41 Id. at 12.

42 Id. at 5.

43 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 (July 13, 2017).

44 Yogman v. Parrott, 937 P.2d 1019, 1021-23, 325 Or. 358 (1997).

to extrinsic evidence regarding the intended meaning, and finally, if that still does not resolve the ambiguity the courts look to appropriate "maxims of construction."[45] Specifically in regards to QF PPA contracts, PURPA "bars reconsideration of the prior approval of the PPA at least absent some basis in the law of contracts for setting aside the PPA."[46] An attempt by a State commission to "either modify the PPA or revoke [State commission] approval has been considered 'utility-type' regulation--exactly the type of regulation from which [the QF] is immune under section 210(e)."[47]

Additionally, claims for breach of contract and entitlement to treble damages for gross negligence or willful misconduct under ORS 756.185 are within the jurisdiction of the Circuit Court.[48] In the *Perla* case, the utility made a contract permitted by Commission rule with a residential developer to waive connection fees, but a later Commission order brought the validity of that contract into question.[49] While the case does not concern a QF PPA, the case was brought before the Circuit Court which found that it had jurisdiction to decide the breach of contract and treble damages issues.[50] Like in *Perla*, the Commission cannot provide complete relief to PNW Solar because it cannot order damages, let alone treble damages.[51] A Circuit Court's primary responsibility is to analyze the basis in contract law for declaration of the parties' rights under the contract, reformation of the contract, or setting aside the PPA. As such, the Commission should dismiss this case and allow it to be heard in Circuit Court.

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45 Id.

46 Freehold, 44 F.3d at 1192.

47 Id. (citing Independent Energy Producers, 36 F.3d 848).

48 Perla Dev. Co. v. PacifiCorp, 727 P.2d 149, 151, 82 Or. Ct. App. 50 (1986).

49 Id. at 149.

50 Id. at 151.

51 Columbia Basin Electric Cooperative, Inc. v. PacifiCorp, Docket No. UM 1670, Ruling at 1, 5-6 (Apr. 28, 2014).

Furthermore, barring some statutory basis for jurisdiction, the primary jurisdiction doctrine is a judge-made law. The Oregon Supreme Court has explained the use of the doctrine "is appropriate 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."[52] It does not expand the Commission's statutory jurisdiction to assert jurisdiction over a matter in the first instance. Instead, the Commission obtains jurisdiction under the primary jurisdiction doctrine if a court refers the matter to the Commission because the court determines the matter is better resolved by the Commission. There being no court order referring this matter to the Commission, the Commission simply lacks personal jurisdiction over the PNW Solar.

D. PGE's "Complaint" Fails to Comply with the Commission's Requirements for Filing Complaints, including Sufficiency of Process and Stating Facts Sufficient to Constitute a Claim

PNW Solar sought to dismiss PGE's Complaint and Request for Dispute Resolution because there is no statutory provision for dispute resolution, and if PGE's filing is intended to be a "Complaint," PGE has failed to specifically delineate its factual allegations in a way that would enable PNW Solar to effectively respond to those allegations.[53] PGE argues that PNW Solar "elevates form over function" because neither of these issues impair the substance of PGE's Complaint.[54] Here, PNW Solar reiterates that PGE's failure to use the proper form (while it may not impair the function of PGE's arguments), it does impair PNW Solar's substantial right to know and respond to the claims against it.

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52 Boise Cascade Corp. v. Bd. of Forestry, 935 P.2d 411, 416, 325 Or. 185 (1997) (emph. added).

53 PNW Solar's Motion to Dismiss at 7.

54 PGE's Response at 10.

Under the Oregon Rules of Civil Procedure ("ORCP"), defects in a pleading will only be disregarded so long as it does not affect the substantial rights of a party.[55] PNW Solar urges the Commission to find that its rules are consistent with the ORCP in this respect and dismiss PGE's complaint because it affects PNW Solar's substantial rights.[56] Where PGE does not delineate factual allegations in separately numbered paragraphs, PNW Solar would be forced to either: 1) simply deny all or the majority of PGE's facts because they are not separately identified; or 2) write out each of PGE's allegations in its response in orders to clearly show the Commission which facts are denied or admitted. PGE has sufficient resources to draft a complaint that clearly identifies its alleged facts, and should not be allowed to impose these added burdens on PNW Solar.

E. The Commission Does Not Have Jurisdiction to Resolve this Proceeding as a Declaratory Ruling

PGE argues that the Commission may treat this proceeding as a petition for declaratory judgment because it has the authority to do so and because the outcome hinges on the interpretation of Commission "orders, rules and statutes."[57] First, as indicated above, the outcome of this case does not hinge on interpretation of Commission "orders, rules and statutes" but on interpretation of the plain language of the PPA.

Second, even if any extrinsic evidence is admissible as to the meaning of the PPA, the Commission would be required to issue a declaratory ruling on its own Order No. 06-538 in UM

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55 ORCP 12.

56 PNW Solar notes that, unlike a dismissal for lack of personal jurisdiction, dismissing PGE's complaint on the grounds that PGE's complaint fails to follow the Commission's processes and does not state facts sufficient to constitute a claim does not harm PGE's substantive rights. There are no statutes of limitation at issue, and PGE can simply re-file a complaint that does not harm the substantial rights of PNW Solar.

57 PGE's Response at 10.

1129, but ORS 756.450 merely states the Commission may issue such rulings regarding "rule or statute enforceable by the commission."[58] PGE cites to DR 22, Order No. 99-627, from 1999 to establish that the Commission has authority to declare the rights of parties when there are disputes about the meaning of its orders.[59] However, the Commission more recently and more persuasively concluded that the declaratory ruling statute does not allow for declaratory rulings over the meaning of order or contracts.[60] In doing so, the Commission correctly interpreted the Commission's declaratory ruling statute, which unlike the declaratory judgment statute applicable to courts, does not give the Commission jurisdiction issue declaratory judgments as the meaning of contracts.[61]

Therefore, because this matter turns on the interpretation of contract language, the Commission does not have authority to issue a declaratory ruling.

III. CONCLUSION

In conclusion, the Commission does not have personal jurisdiction over PNW Solar because PNW Solar has not conferred jurisdiction on the Commission by stipulation, it is exempted from the Commission's utility-type rate regulations, and any modification of its PPA by the Commission after execution would be pre-empted by its PURPA-guaranteed rights to sell its output under the terms of its executed PPA. Therefore, this case should be dismissed for lack of personal jurisdiction.

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58 PGE's Complaint at 5 ("Commission clearly intended the policy it set out in Order No. 06-538.").

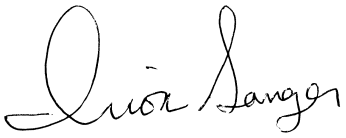
59 PGE's Response at 10.

60 Northwest Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition v. PGE, Docket UM 1805, Ruling (Jan. 19, 2017).

61 ORS 28.030 (court has jurisdiction to provide a legally binding declaratory judgment construing a contract "either before or after there has been a breach thereof").

Dated this 11th day of October, 2017.

Respectfully submitted,



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