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March 9, 2018

Via Electronic Filing

Public Utility Commission of Oregon
Filing Center
201 High St SE, Suite 100
PO Box 1088
Salem OR 97308-1088

Re: **UM 1931 – Portland General Electric Company vs. Alfalfa Solar I LLC, et al.**

Attention Filing Center:

Enclosed for filing in Docket UM 1931 is Portland General Electric Company's Response to Defendants' Motion to Dismiss.

Thank you in advance for your assistance.

Sincerely,

David F. White
Associate General Counsel

DFW:jlm

Enclosure

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, vs. 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, WASCO SOLAR I LLC, Defendants.	**UM 1931**

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

March 9, 2018

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I. INTRODUCTION

Portland General Electric Company ("PGE") has filed a Complaint asking the Public Utility Commission of Oregon ("Commission") to resolve a dispute that has arisen between PGE and ten qualifying facilities ("Defendants" or the "NewSun QFs").[1] PGE and Defendants entered into 10 standard power purchase agreements ("Standard PPAs") in the first half of 2016.[2] Under those Standard PPAs, the Seller may select a contract term up to a maximum of 20 years;[3] PGE is required to offer fixed prices for 15 years;[4] and Sellers with Standard PPAs exceeding 15 years then receive market prices for all years up to five in excess of the initial 15.[5] The parties' dispute is about when, under the terms of the Standard PPAs, the 15-year fixed-price period begins. PGE believes the terms of the Standard PPAs provide that the 15-year fixed-price period begins when the contract term begins—at contract execution.[6] Defendants believe the 15-year fixed-price period does not begin until the Seller achieves commercial operation[7]—a date that can occur as many as four years after contract execution.[8]

Shortly before PGE filed its Complaint with the Commission, Defendants filed suit against PGE in the United States District Court for the District of Oregon.[9] Defendants assert diversity jurisdiction and ask the federal court to apply Oregon's common law of contract to

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[1] *Portland Gen. Elec, Co. v. Alfalfa Solar I LLC, et al.*, Docket No. UM 1931 Complainant and Request for Dispute Resolution (Jan. 25, 2018) ("PGE's Complaint").
[2] Copies of the 10 Standard PPAs are attached to PGE's Complaint at Exhibits 1 through 10.
[3] PGE's Complaint, Exhibit 1 at 25 and 36 (PGE's Schedule 201 is incorporated by reference into the Standard PPA and attached as Exhibit D; Sheet 201-1 of PGE's Schedule 201 states: "The Agreement will have a term of up to 20 years as selected by the QF."; Sheet 201-24 states: "TERM OF AGREEMENT[:] Not less than one year and not to exceed 20 years.").
[4] PGE's Complaint, Exhibit 1 at 10 (Section 4.2 states: "PGE shall pay the Contract Price for all delivered Net Output.") and 2 (Section 1.6 defines "Contract Price" as "the applicable price … as specified in the Schedule.") and 6 (Section 1.33 defines "Schedule" as "PGE Scheduled 201 … in effect on the Effective Date … and attached here to as Exhibit D, the terms of which are hereby incorporated by reference.") and 30 (Sheet 201-12 of Schedule 201 states: "The Renewable Fixed Price Option is … available for a maximum term of 15 years.").
[5] PGE's Complaint, Exhibit 1 at 30 (Sheet 201-12 states: "Sellers with PPAs exceeding 15 years will receive pricing equal to the Mid-C Index Price … for all years up to five in excess of the initial 15.").
[6] PGE's Complaint ¶¶ 9-11.
[7] *See* Docket No. UM 1931, Defendants' Motion to Stay Proceedings at Exhibit A (NewSun QFs' Complaint in U.S. Dist. Court. Case No. 3:18-cv-00040) at ¶ 7 (Feb. 2, 2018) ("NewSun QFs' Federal Complaint").
[8] PGE's Complaint, Exhibit 1 at 7, 12 and 13 (*see* Sections 2.2.2, 2.2.3, 8.1.6 and 8.2 allowing Seller to select a commercial operation date that is up to three years after the Effective Date and providing for a one-year cure period if that date is missed; Defendants all selected a commercial operation date that is three years after the Effective Date).
[9] *See* NewSun QFs' Federal Complaint.

interpret Defendants' Standard PPAs and resolve the dispute.[10] Defendants argue that the parties' dispute is solely about the meaning of an executed contract and that resolution of the dispute "requires nothing more than application of common law contract principles."[11]

PGE disagrees. The parties did not negotiate the terms and conditions contained in the Standard PPAs. Rather, those terms and conditions were established in response to the Commission's orders implementing state and federal PURPA law and regulations. The Oregon Court of Appeals has held that a Standard PPA "is not governed by common law concepts of contract law; it is created by statutes, regulations and administrative rules."[12] As a result, interpretation of PGE's Standard PPAs is not simply an exercise in applying the common law of contract; it requires an understanding of the "long and evolving history of Commission policies, orders, and rules related to [the Commission's] legal obligation to implement state and federal PURPA policy."[13] As recently as March 5, 2018, the Commission reiterated its central role in resolving such contract interpretation disputes: "as we recently stated in Order No. 18-025, the compliance and interpretation of the terms and conditions in standard contracts that are the result of our policy decisions to implement PURPA are rightfully within our primary jurisdiction."[14]

On February 22, 2018, Defendants filed a motion to dismiss PGE's Complaint. Defendants allege two primary grounds: (1) the case must be dismissed because Defendants filed in federal court before PGE filed at the Commission; and (2) the Commission lacks jurisdiction to interpret the Standard PPAs and resolve this dispute.

Defendants' motion to dismiss is without basis and should be rejected for the following reasons. ***First,*** the Commission has jurisdiction to resolve this dispute under its complaint statute (ORS 756.500) because Defendants are engaged in the sale of electricity to a public utility and because this dispute concerns a matter affecting PGE's rates. Contrary to Defendants' central argument, section 210(e) of PURPA, which prohibits "utility-type" regulation of qualifying facilities, prohibits the Commission from *modifying* the executed contracts but it does not limit

[10] NewSun QFs' Federal Complaint ¶¶ 13 and 53.
[11] Docket No. UM 1931, Defendants' Motion to Dismiss at 2 (Feb. 22, 2018) ("Defendants' MTD").
[12] *Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 598 (1987).
[13] *Portland Gen. Elec. Co. v. Pacific Northwest Solar, LLC*, Docket No. UM 1894, Order No. 18-025 at 7 (Jan. 25, 2018).
[14] *Northwest and Intermountain Power Purchasers Coal., Community Renewable Energy Assoc'n, and Renewable Energy Coal. v. Portland Gen. Elec. Co.*, Docket No. UM 1805, Order No. 18-079 at 4 (Mar. 5, 2018).

the Commission's jurisdiction to *interpret* the executed Standard PPAs. ***Second,*** Oregon's "first-filed" rule is applicable to deference between courts and does not control deference between a court and an administrative agency; in such circumstances the doctrine of primary jurisdiction is the proper analysis for determining whether a state agency should resolve a dispute before a court exercises its jurisdiction, if any, over the dispute. ***Third,*** in addition to the complaint procedures available under ORS 756.500 that provide the Commission with jurisdiction, the Commission has jurisdiction to resolve this dispute pursuant to its authority to issue declaratory rulings, and the Commission may exercise its discretion to treat PGE's Complaint as a petition under ORS 756.450. ***Fourth,*** the Commission's exercise of its jurisdiction does not violate Defendants' constitutional right to a jury trial because this is not a common law contract case that requires jury trial, and the federal district court will decide whether it will defer to the Commission and whether a jury trial is warranted or required. Likewise, the Commission's exercise of jurisdiction will not in any way "take away" the federal court's jurisdiction, as the Defendants allege, and does not offend the Supremacy Clause of the U.S. Constitution; the federal court will decide whether it has jurisdiction, and if so, whether it will defer to the Commission's primary jurisdiction.

Regardless of whether PGE's filing is treated as a complaint, a petition for declaratory ruling, or otherwise, the Commission has the jurisdiction to resolve this dispute. Therefore, the Commission should deny Defendants' motion to dismiss and provide the parties with the prompt direction they require.

II. KEY PRECEDENT

A. The Commission has already determined it has jurisdiction to resolve a complaint filed by a utility seeking interpretation of an executed Standard PPA.

The Commission recently considered its jurisdiction to hear a complaint filed by PGE and seeking interpretation of executed Standard PPAs. In that case—*Portland General Electric Company v. Pacific Northwest Solar LLC* ("*Pacific Northwest Solar*")—the defendant also moved to dismiss for lack of jurisdiction.[15] On January 25, 2018, the Commission denied the motion to dismiss in Order No. 18-025. In that order, the Commission considered and ruled on many of the same issues raised by Defendants in this case. Pacific Northwest Solar ("PNW")

[15] Docket No. UM 1894, Pacific Northwest Solar's Motion to Dismiss (Sep. 19, 2017).

couched its arguments for dismissal primarily in terms of personal jurisdiction, but the Commission ultimately issued a detailed decision that considered both personal jurisdiction and subject matter jurisdiction and concluded that the Commission has both forms of jurisdiction over a dispute to interpret the meaning of an executed Standard PPA.[16] In confirming these conclusions, the Commission also concluded that its subject matter jurisdiction satisfied the test for primary jurisdiction.[17] The Commission stated that test as: "We have primary jurisdiction when (1) an issue benefits from our specialized knowledge, (2) uniform resolution is preferable, and (3) a judicial resolution could adversely impact agency performance of its regulatory responsibilities."[18]

In *Pacific Northwest Solar*, the Commission noted that interpretation of the Standard PPAs called for more than mere application of common law contract principles. The Commission found that the issue would benefit from its expertise, stating:

> … [W]e disagree with PNW's framing of the issue as a common law contract dispute for which we have no expertise. By law, the Commission sets the terms and conditions for contracts between QFs and public utilities. The terms and conditions of those contracts relate directly to the regulated rates and services of utilities subject to our oversight. The complaint raises an issue related to a provision of a standard power purchase agreement, which we reviewed and established consistent with our own orders and rules to implement state and federal PURPA policy. As such, we have the expertise and the authority to review the terms and conditions of the contract developed at the Commission after litigated proceedings.
>
> PURPA is a federal statute that places the states in charge of implementing FERC's regulations pertaining to determining avoided costs and to setting rates paid to QFs. The obligation to enter into a PURPA contract is not governed by common law concepts of contract law, but rather an obligation created by statutes, regulations, and this Commission's administrative rules.[19]

The Commission also found that uniform resolution of the dispute was important because the disputed term that required interpretation "is a standard term in PGE's standard power purchase agreements with other QFs."[20] Finally, the Commission found that judicial resolution

[16] Order No. 18-025.
[17] *Id.* at 6-7.
[18] *Id.* at 6.
[19] *Id.* at 6 (internal citations omitted).
[20] *Id.* (the Commission also noted that interpretation of the Standard PPAs in the case "would affect not only the complainant here, but a multitude of QFs that have entered into or intend to enter into PURPA contracts ….").

could adversely impact the Commission's performance of its regulatory responsibilities. The Commission stated:

> While we agree that state circuit courts are well-suited to resolve common law contract interpretation issues, the issue presented in this particular complaint involves a long and evolving history of Commission policies, orders, and rules related to … our legal obligation to implement state and federal PURPA policy. We believe our role and expertise in state and federal PURPA policy makes this an appropriate issue for primary jurisdiction. We conclude that the ALJ was correct to find that primary jurisdiction was appropriate here. [21]

B. The Commission should reach the same result in this case as it did in the *Pacific Northwest Solar* case.

The same rationale that led the Commission to conclude that it had primary jurisdiction in *Pacific Northwest Solar* applies in this case. The dispute between PGE and the NewSun QFs will benefit from the Commission's specialized knowledge. The dispute involves a long history of Commission orders, beginning with Order No. 05-584, the order in which the Commission required PGE to offer a standard contract with a maximum term of 20 years and fixed prices for 15 years. To correctly interpret the Defendants' Standard PPAs, which are based on contract forms the Commission approved in Order No. 15-289, the Commission will need to consider the Orders it issued between 2005 and 2015, which required PGE to modify its contract forms. In addition, the Commission will need to consider the contract forms submitted in compliance with those orders. And the Commission will need to consider its orders approving those compliance filings. PGE is confident that by reviewing such orders, and compliance filings, the Commission will find that it approved PGE's approach of limiting fixed prices for the first 15 years measured from contract execution as compliant with the series of Commission orders commencing with Order No. 05-584. The Commission will also find that it never required PGE to alter that approach at any time prior to Defendants' executing their Standard PPAs. PGE believes that the Commission's review of its own "long and evolving history of … policies, orders, and rules"[22] will lead it to conclude that the forms used in Defendants' Standard PPAs limit the availability of fixed prices to the first 15 years measured from contract execution. The Commission has the necessary expertise to resolve this question.

[21] Order No. 18-025 at 7 (internal citations omitted).
[22] *Id.* at 7.

In addition, the Commission's resolution of the question has the potential to impact 72 executed Standard PPAs and 25 as yet unexecuted Standard PPAs. Finally, dismissing this complaint and allowing various courts to rule on identical or similar PPAs could adversely impact the Commission's performance of its regulatory responsibilities because different courts may come to different conclusions about the meaning of PGE's Standard PPAs or courts may impose interpretations not informed by the Commission's knowledge of the history of the Commission's policies, orders, and rules implementing state and federal PURPA policy.

III. ARGUMENT

A. The Commission has jurisdiction to resolve this dispute.

Defendants claim the Commission lacks the jurisdiction to resolve this dispute. Defendants argue that ORS 756.500(1), ORS 756.500(3), and ORS 756.500(5) all bar jurisdiction. As discussed below, Defendants are wrong on all counts.

1. The Commission has jurisdiction under ORS 756.500(1) because interpretation of the Defendants' Standard PPAs is not "utility-type regulation" prohibited by PURPA Section 210(e).

The Commission has jurisdiction under ORS 756.500(1) to hear complaints "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."[23] Defendants argue that this grant of jurisdiction does not apply to them because they are QFs and PURPA Section 210(e) exempts QFs from "utility-type regulation" by a state commission.[24] Defendants are wrong. While the prohibition on utility-type regulation prevents the Commission from *modifying* an executed Standard PPA, it does not prevent the Commission from *interpreting* an executed Standard PPA.

In *Pacific Northwest Solar*, the Commission rejected the argument Defendants make here and concluded that ORS 756.500(1) grants the Commission jurisdiction even though QFs are not regulated entities under the Commission's statutes. The Commission reasoned:

> We have personal jurisdiction over PNW under our complaint statutes. PGE's standard power purchase agreement, which we approved, governs a QF's sale of energy to a utility—an activity that we regulate under PURPA and ORS 758.355. We have adopted policies, implemented through the standard purchase power agreements that dictate the terms and conditions for the sale of the QFs' energy

[23] ORS 756.500(1).
[24] Defendants' MTD at 12.

> to PGE. *Even though PNW is not a regulated entity under our statutes, we have jurisdiction over PNW's activities here under ORS 756.500(1) as they relate to state and federal PURPA statutes for which "jurisdiction for enforcement or regulation" is "conferred upon the Commission."*[25]

Clearly, the Commission has concluded that it has jurisdiction over a QF's activities under ORS 756.500(1) because those activities relate to the sale of energy to PGE under a Commission-mandated and approved Standard PPA. But Defendants argue that Section 201(e) of PURPA, which exempts QFs from "utility-type" regulation, prevents the Commission from interpreting an executed Standard PPA.[26]

Section 201(e) of PURPA exempts QFs from "utility-type" regulation by state utility commissions;[27] however, the exemption is inapplicable whenever State laws and regulations implement Subpart C of FERC's regulations, which apply "to the regulation of sales and purchases between qualifying facilities and electric utilities."[28] As a result, while a State cannot engage in "utility-type" regulation of a QF, a State may regulate (and hence, later adjudicated disputes about) the sales and purchases between QFs and regulated utilities.

As a practical matter, the courts have held that the prohibition against "utility-type regulation" means that a state commission cannot order the *modification* of the terms or rates contained in an executed power purchase agreement between a utility and a QF.[29] PGE is not seeking modification of terms or rates. The courts have also held that a state commission can *interpret* the terms of an executed PPA without violating the prohibition on utility-type regulation.[30]

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[25] Order No. 18-025 at 4 (emphasis added).
[26] Defendants' MTD at 12.
[27] *See* 16 U.S.C. § 824a-3(c)(1) and 18 C.F.R. § 292.602(c)(1).
[28] *See* 18 C.F.R. § 292.602(c)(2) ("A qualifying facility may not be exempted from State law and regulations implementing subpart C.") and 18 C.F.R. § 292.301(a) (articulating the scope of subpart C as "the regulation of sales and purchases between qualifying facilities and electric utilities.").
[29] *See e.g.*, *Freehold Cogeneration Assocs., L.P. v. Bd. Of Reg. Comm'rs of State of N.J*, 44 F.3d 1178, 1192 (3d Cir. 1995) (state agency modification of an executed PURPA power purchase agreement violates the PURPA § 210(e) prohibition on "utility-type" regulation of qualifying facilities).
[30] *See e.g., Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Public Utility Control*, 531 F.3d 183, 188-189 (2d Cir. 2008); *see also New Martinsville v. Public Service Com'n*., 729 SE2d 188, 196 (W. Va. 2012) ("Once the state agency has approved the [PURPA] agreement, however, any attempt to modify the agreement would subject the QF to "utility-type" regulation barred by Section 210(e) of PURPA. [citing *Freehold*] Upon review, we find that *Freehold* has no application in this instance. Contrary to the assertions of the [QF] Generators, the [state utility] Commission has not modified the terms of the existing EEPAs but, instead, has only determined ownership of assets – the credits – which were not contemplated and, thus, not provided for in the EEPAs. Other jurisdictions that have considered this same issue agree that an

In *Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Public Utility Control* ("*Wheelabrator*"), the Second Circuit considered the same argument that Defendants are making in this case. In *Wheelabrator*, the state utility commission—the Connecticut Department of Public Utility Control or DPUC—considered a fully executed energy purchase agreement between a qualifying facility—Wheelabrator Lisbon—and a public utility—Connecticut Light and Power Company. The DPUC interpreted the executed energy purchase agreement and concluded that the QF must transfer renewable energy credits to the utility, a point that was ambiguous under the agreement (the "2004 DPUC Decision"). The QF brought an action in federal court and argued that the 2004 DPUC Decision was preempted by Section 210(e) of PURPA because the DPUC's interpretation of an executed energy purchase agreement was alleged to be prohibited "utility-type" regulation.[31]

The court granted summary judgment in favor of the DPUC finding that the 2004 DPUC Decision did not modify the agreement and therefore did not constitute forbidden utility-type regulation.[32] The QF appealed and the Second Circuit upheld the district court. The Second Circuit held that where a state commission *interprets* but does not *modify* an executed power purchase agreement, it does not engage in prohibited utility-type regulation. Specifically, the *Wheelabrator* court stated:

> As the District Court explained, . . . "the DPUC has not ordered the [qualifying facility] to renegotiate the contract purchase price or ordered lower rates. Rather, the DPUC considered the [energy purchase agreement] at issue and concluded that [it] transferred the renewable energy and the associated GIS Certificates to CL & P." We agree that the DPUC did not order the renegotiation of the terms of the Agreement but simply exercised its authority to interpret the Agreement's provisions—as it happens, in a manner that was unfavorable to Wheelabrator. We hold, therefore, that the 2004 DPUC Decision does not modify the terms of the Agreement and, accordingly, does not violate Section 210(e) of PURPA.[33]

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interpretation of a power purchase agreement which is silent on the issue of credit ownership does not violate PURPA."

[31] *Wheelabrator*, 531 F3d at 184-186.

[32] *Id.* at 187.

[33] *Id.* at 188-189.

The cases cited by Defendants do not lead to a contrary conclusion because they hold that a state commission violates the prohibition against utility-type regulation only if the state commission *modifies* the terms of a standard offer contract.[34]

PGE is not asking the Commission to modify Defendants' Standard PPAs. Instead, PGE is asking the Commission to interpret the Standard PPAs and to determine whether, in the context of the Commission orders and mandates, the Standard PPAs limit the availability of fixed prices to the first 15 years following contract execution.

Because the Commission has previously determined that ORS 756.500(1) gives it jurisdiction to interpret an executed Standard PPA, and because Section 210(e) of PURPA does not prohibit the Commission from interpreting Defendants' Standard PPAs, the Commission should reject Defendants' argument that the Commission lacks jurisdiction over this dispute under ORS 756.500(1).

2. PGE has stated a claim under ORS 756.500(3).

The requirements of ORS 756.500(3) do not defeat or limit the Commission's jurisdiction over this dispute. ORS 756.500(3) states:

> 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.

Defendants state that PGE's Complaint does not allege that Defendants' have violated any law.[35] But ORS 756.500(3) is disjunctive; it requires that the complainant either state "all grounds of complaint on which the complainant seeks relief" ***or*** state "the violation of any law claimed to have been committed by the defendant." PGE's Complaint states PGE's grounds of complaint succinctly and clearly. PGE has identified for the Commission that there is a dispute between the parties regarding when the 15-year fixed price period begins to run (the same exact dispute Defendants identified in their request for reconsideration and rehearing in Docket No. UM 1805 when they sought relief from the Commission for an order about when the 15-year

[34] *Independent Energy Producers Assoc., Inc. v. Cal. Public Utilities Comm.*, 36 F3d 848, 857 (9th Cir. 1994) (holding state utility commission had no authority "unilaterally to *modify* the terms of the standard offer contract") (emphasis added); *Oregon Trails Elec. Consumers Coop., Inc. v. Co-Gen Company*, 168 Or App 466, 482 (2000) ("[c]ourts uniformly have held that state regulators cannot intervene in the public interest and *modify the prices fixed by a cogeneration contract* ….").

[35] Defendants' MTD at 16.

period starts).[36] PGE has also indicated that Defendants have filed suit in federal court to obtain a declaration from the federal court regarding this question.[37] PGE has clearly stated that it believes the question implicates the Commission's primary jurisdiction.[38] And PGE has specified the relief requested: "[T]hat the Commission … approve PGE's interpretation of the NewSun Solar PPAs that the 15-year fixed-price period is measured from contract execution."[39] In the alternative, PGE has asked that "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."[40]

PGE's Complaint clearly identifies the grounds of complaint and the relief sought. It therefore satisfies the requirements of ORS 756.500(3). It also satisfies OAR 860-001-0400(2) which lists certain allegations that a complaint must include. There is no infirmity in the Complaint; but if there were, the Commission should grant leave to amend and cure rather than dismiss.[41]

Defendants argue that PGE has not alleged any "grounds of complaint" because PGE has not alleged "any conduct by the NewSun QFs that could form the grounds of a *complaint* against the NewSun QFs."[42] But there is no requirement in ORS 756.500(3) to allege "conduct" on the part of the defendant. Defendants' argument is predicated on inserting a word into the statute – "conduct" – that the legislature did not put there. Defendants' argument thus fails because it violates a basic rule of statutory construction: "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to

[36] Docket No. UM 1805, Joint Petitioner's Motion For Clarification and Application for Rehearing or Reconsideration of Order No. 17-256 at 3 (Sept. 8, 2017).
[37] Defendants' MTD at 16; PGE's Complaint at 1-2 and ¶¶ 19 and 24-25.
[38] PGE's Complaint ¶¶ 4-6.
[39] *Id.* at ¶ 26.
[40] *Id.* at ¶ 27.
[41] ORCP 25A ("When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule 21 is allowed, the court may, upon such terms as may be proper, allow the party to amend the pleading."); see *also*, *Dean v. Guard Pub. Co.*, 73 Or App 656, 660, 699 P2d 1158 (1985) (remarking that "a judge should seldom dismiss a complaint *with prejudice* on a defendant's first pleading motion and remanding so that plaintiff would have an opportunity to re-plead to address ORCP 21 defects).
[42] Defendants' MTD at 16 (emphasis in original).

insert what has been omitted, or to omit what has been inserted[.]"[43] ORS 756.500(3) requires only "grounds of complaint" not "conduct" and PGE has met that pleading requirement.

3. The Commission has jurisdiction under ORS 756.500(5) because this is a dispute affecting PGE's rates or services.

In addition to having jurisdiction under ORS 756.500(1), the Commission also has another independent basis for jurisdiction over this dispute under ORS 756.500(5), which specifically allows a public utility to bring a complaint "as to any matter affecting its own rates or service with like effect as though made by any other person …."[44] Determining whether PGE must pay fixed prices for 15 years measured from contract execution or from commercial operation will have a direct impact on PGE's rates because the cost to purchase power from Defendants' projects will be passed directly to PGE's customer in rates. The ALJ in *Pacific Northwest Solar* recognized this connection in his initial ruling denying PNW's motion to dismiss. The ALJ reasoned:

> ORS 756.500, which governs the Commission's complaint and investigation procedures, authorizes PGE's filing seeking resolution of its dispute with PNW. ORS 756.500(5) provides that "any public utility * * * may make complaint as to *any matter affecting its own rates or service* * * *" without being subject to any interpretation as a possible limitation by any language in ORS 756.500(1). Avoided cost prices paid for QF-supplied electricity, the costs associated with interconnection with a QF and the administrative costs involved in managing the contractual relationship all impact the utility's revenues and expenses, which, in turn, have an impact on recovery of costs through rates charged to customers via power cost annual update tariffs and power cost adjustment mechanisms.[45]

The Commission expressly upheld this ruling in Order No. 18-025.[46]

Avoided cost prices paid by PGE for QF generation flow directly into PGE's rates through the power cost annual update tariff and power cost adjustment mechanism.[47] Indeed, it is difficult to conceive of any activity more closely and substantially affecting a utility's rates for electric sales than the costs and terms of electricity purchases. Defendants' have argued that accepting jurisdiction in this case would lead to "boundless jurisdiction"[48] but this is a strawman

[43] ORS 174.010.
[44] ORS 756.500(5).
[45] Docket No. UM 1894, ALJ Ruling at 3 (Oct. 27, 2017).
[46] Order No. 18-025 at 4-5.
[47] *See In the Matter of PacifiCorp*, Docket No. UE 246, Order No. 12-493, 13-14 (Dec. 20, 2012) (describing the cost recovery process through power cost adjustment mechanisms).
[48] Defendants MTD at 23.

argument; the outer bounds of ORS 756.500(5) are not at issue here because the price of QF power is directly related to PGE's rates.

Defendants further argue that the resolution of the dispute between PGE and themselves is not an issue "affecting" PGE's rates because any impact caused by the results of this dispute will not be felt until 15 years after the Defendants executed their Standard PPAs, "which will be various dates in the year 2031."[49] Nevertheless, the question of when the 15-year period begins will have a substantial impact on PGE's rates.

The dispute between PGE and Defendants' over when the 15-year fixed price period begins is already causing PGE significant administrative costs involved in managing the contractual relationship. And it is Defendants who are pushing for resolution of this contract interpretation question at this time by filing their federal court complaint seeking declaratory relief. PGE's position is that if the contract interpretation is to be addressed now, then it is for the Commission to decide the issue given that it is the Commission, and not the courts, which has primary jurisdiction in this matter.

In addition, Defendants' Standard PPAs represent 100 megawatts of nameplate capacity. This is a significant amount of energy and a significant contractual and financial obligation. In order for PGE to conduct its current planning appropriately, PGE needs to understand whether it is contractually obligated to pay Defendants a specific fixed price for a 15-year period measured from contract execution or measured from scheduled commercial operation. Without that information, PGE is left to guess about the cost of its future power supply. This hampers PGE's present efforts to engage in least cost planning as required by the Commission.[50]

Further, by asking the Commission to interpret a Standard PPA which was not negotiated under principles of contract law but rather developed as a process of implementing statutes, regulations, and the Commission's policy decisions, PGE is effectively asking the Commission to interpret and clarify the detailed terms of the Commission's policies as reflected in PGE's Commission-approved contract forms. Where there is a lack of clarity or consensus about the

[49] Defendants' MTD at 21.
[50] *See e.g., In the Matter of the Investigation into Least-Cost Planning for Resource Acquisitions by Energy Utilities in Oregon*, Docket No. UM 180, Order No. 89-507 (Apr. 20, 2989) (adopting least cost planning for all energy utilities in Oregon).

meaning of one of the Commission's policies, rules, or orders, the Commission should not wait until that uncertainty has caused harm before it clarifies what the rule or order means.

Defendants have pointed to no case law that demonstrates the Commission is subject to the same ripeness doctrine that applies in federal court.[51] Nor have Defendants pointed to any authority showing that the Commission's "affecting rates" authority is limited to rate impacts that will occur immediately. In fact, the Commission's decision in the *Pacific Northwest Solar* case undermines Defendants' position because in that case the rates will not be immediately affected, they will be affected after the projects are constructed and begin delivering power. The authority that Defendants cite holds that disputes with only a tangential impact on rates can fall outside of the scope of a regulators' "affected rates" authority.[52] But here, the Commission is asked to make a decision about how long PGE is contractually bound to offer fixed prices versus market prices, a decision that will directly impact the rates PGE ultimately charges its customers. And as the Commission noted in Order No. 18-025, even PGE's administrative costs in managing the contractual relationship ultimately affect PGE's rates.

4. ORS 758.505 to 758.555 supports Commission jurisdiction.

If it is not clear enough already that the Commission has jurisdiction over this dispute, ORS 758.505 to 758.555 **(**Oregon's mini-PURPA statute) provides an additional basis of jurisdiction. ORS 756.500 gives the Commission adjudicative authority over disputes related to the statutes the Commission implements. Oregon's mini-PURPA is one such statute. Defendants argue that ORS 758.505 to 758.555 provides no basis for Commission jurisdiction.[53] But Defendants acknowledge that these State laws authorize the Commission to regulate the terms and conditions under which PGE and the other public utilities purchase electricity from

[51] The only Commission order that PGE is aware of where the Commission has articulated a ripeness standard is *In the Matter of Portland Gen. Elec. Co.*, Docket No. UM 1271, Order No. 07-421 at 8 (Sep. 26, 2007) (citing *Oregon Newspaper Publishers Assn v. Peterson*, 244 Or 116, 120 (1966) for the proposition: "An issue is ripe for judicial determination when the interests of the plaintiff are in fact subjected to or immediately threatened with substantial injury.").

[52] Defendants' MTD at 23-25 (citing *Cal. Indep. Sys. Operator Corp. v. FERC*, 373 F3d 395, 401 (D.C. Cir. 2004), *American Gas Ass'n v. FERC*, 912 F2d 1496, 1505-07 (D.C. Cir. 1990), and *K.S. v. Quest Corp.*, OPUC Docket No. UCR 98, Order No. 08-112 at 2 (Jan. 31, 2008) for the proposition that impacts to rates that are extremely tangential should not give rise to affecting-rates jurisdiction; the question PGE asks the Commission to resolve in this case is directly related to PGE's rates and these cases are therefore inapposite.

[53] Defendants' MTD at 26.

qualifying facilities.[54] Defendants again argue that the Commission cannot interpret a Standard PPA once it has been executed because Section 2010(e) of PURPA prohibits "utility-type" regulation.[55] As discussed above, Defendants are wrong. The Second Circuit has expressly ruled that PURPA does not preempt a state commission's authority to interpret (as opposed to modify) an executed standard contract.[56] In addition, as part of the *Wheelabrator* litigation, the Supreme Court of Connecticut held that the utility commission had subject matter jurisdiction to interpret an executed PURPA contract because the state legislature had empowered the state commission to establish or approve the terms of such energy sales.[57] And the Commission itself has recognized that it has primary jurisdiction to interpret Standard PPAs and that its jurisdiction rests in part on the fact that Congress and the Oregon legislature have empowered the Commission to establish the terms and conditions governing the purchase of power by a utility form a QF.[58]

5. Prior Commission precedent supports denial of the motion to dismiss.

In *Pacific Northwest Solar*, the Commission rejected the argument that interpreting a Standard PPA presents a contract law question over which it has no expertise.[59] Defendants' attempts to distinguish this case are not persuasive. Defendants argue that in *Pacific Northwest Solar* there was a need to interpret the order underlying the disputed contractual provision. And they say there is no need to do so in the instant case because the Commission has already interpreted Order No. 05-584, and there is no further issue for the Commission to resolve.[60] PGE does not agree. Interpretation of a single Commission order – Order No. 05-584 – does not resolve the issue. The Commission needs to interpret executed contracts in light of a series of Commission orders leading to the standard form contract that the parties executed.

In Order No. 07-065, the Commission first approved a set of PGE standard contract forms as fully compliant with Order No. 05-584 (and as fully compliant with Order No. 06-538,

[54] Defendants' MTD at 26-27.
[55] *Id.* at 2 and 27.
[56] *Wheelabrator*, 531 F3d at 188-189.
[57] *Wheelabrator Lisbon, Inc. v. Dept. of Public Utility Control*, 283 Conn. 672, 931 A2d 159, 169 (2007) ("we are unable to accept the plaintiff's characterization of the issue before us as one of pure contractual intent. *** as with other terms of the 1991 agreement, the meaning of the agreement's pricing provisions … is more a question of legislative intent and public policy than a question of the intent of the parties.").
[58] *See* Order No. 18-025 at 6 (Commission notes that it has subject matter and primary jurisdiction to interpret an executed Standard PPA in part because "[u]nder Oregon law, these contractual terms and conditions are set by the Commission. ORS 758.535(2).")
[59] Order No. 18-025.
[60] Defendants' MTD at 31.

which addressed a number of compliance details arising out of Order No. 05-584). These 2007 contract forms unambiguously limited the availability of fixed prices to the first 15 years following contract execution.[61] Between Order No. 07-065 and Order No. 15-289 (the order approving the contract forms used for Defendants' Standard PPAs), PGE modified its contract forms several times in response to requirements contained in specific Commission orders. None of those orders required PGE to change its Commission-approved approach limiting the availability of fixed prices to the first 15 years following contract execution. In order to resolve the dispute in this case, the Commission will need to interpret Defendants' Standard PPAs in light of this history of Commission orders and PGE compliance filings.

Defendants also argue that the outcome in *Pacific Northwest Solar* will affect future PPA terms but that interpretation of Defendants' Standard PPAs will not because the contract forms used for Defendants' Standard PPAs are no longer available.[62] The Commission's assertion of jurisdiction in *Pacific Northwest Solar* did not rely solely on the fact that the disputed term might affect future contracts; the Commission also noted that interpretation of the disputed term would affect other existing contracts. In Order No. 18-025, the Commission noted that uniform resolution of the dispute in *Pacific Northwest Solar* is important because the disputed term "is a standard term in PGE's standard power purchase agreements with other QFs."[63] And the Commission noted: "An interpretation of the section that is inconsistent with out intent would affect not only the complainant here, but a multitude of QFs *that have entered into* or intend to enter into PURPA contracts …."[64] The provisions in dispute between PGE and Defendants are present in approximately 72 executed Standard PPAs. Additionally, there are approximately 25 cases currently pending before the Commission where QFs claim that they are entitled to an older form of contract, and those older contract forms will be impacted by the Commission's resolution of this dispute about the timing of the 15-year fixed-price period. Accordingly, a ruling by the Commission on this issue will affect approximately 97 QFs that have the same or similar PPA

[61] *See* Docket No. UM 1805, PGE's Motion for Summary Judgment at 18-21 (Apr. 24, 2017) (detailing how the standard contract form approved by Order No. 07-065 limited the availability of fixed prices to the first 15 years measured from contract execution).
[62] Defendants' MTD at 31.
[63] Order No. 18-025 at 6.
[64] *Id.* at 6-7 (emphasis added).

terms or may have such terms under as yet unexecuted contracts. A decision by the Commission will ensure "uniformity in administration," which is a factor in the primary jurisdiction analysis.[65]

Defendants' attempt to distinguish the *PáTu Wind Farm* order is also unpersuasive.[66] In *PáTu*, the Commission interpreted a Standard PPA to decide whether the term "Net Output" in a Standard PPA included power generated by a third-party and delivered to the utility on the QF's behalf.[67] Defendants contend that *PáTu* is distinguishable because the QFs in that case also raised state and federal administrative claims in addition to seeking an interpretation of the PPA.[68] This is a distinction without a difference. The Commission in *PáTu* separately interpreted the PPA's terms after resolving the other legal claims.[69]

B. The first-filed doctrine does not prevent the Commission from deciding this dispute.

Defendants argue that the Commission should dismiss PGE's complaint because ORCP 21 A(3) has codified a first-filed rule that requires a court to dismiss or stay an action if the same dispute has already been filed in another court.[70] This is the same argument that Defendants made in their February 2, 2018 motion for stay, and which PGE responded to in its February 9, 2018 response to Defendants' motion for stay.

The doctrine of primary jurisdiction provides the proper analysis for determining whether a state agency should resolve a dispute before a court exercises its jurisdiction, if any, over the dispute. Defendants mistakenly cite the first-filed rule, a rule applicable to deference between courts, as the controlling test here. First-to-file is not one of the factors in a primary jurisdiction analysis.[71] In *Dreyer v. Portland Gen. Elec. Co.*, the Oregon Supreme Court applied the primary jurisdiction doctrine and ordered abatement even though the court case predated a later-filed Commission proceeding.[72] Similarly, Oregon courts apply the doctrine of exhaustion of administrative remedies and require plaintiffs to proceed at an agency before they can proceed in

[65] *See Syntel Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002).
[66] Defendants' MTD at 32.
[67] Docket No. UM 1566, Order No. 14-287 at 13 (Aug. 13, 2014).
[68] Defendants' MTD at 32.
[69] *PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1566, Order No. 12-316 at 13 (Aug. 21, 2012).
[70] Defendants' MTD at 8-10.
[71] *See Boise Cascade Corp. v. Bd. Of Forestry*, 325 Or. 185, 193 (1997).
[72] *Dreyer v. Portland Gen. Elec. Co.*, 341 Or. 262, 286-87 (2003).

court, even if the court case was filed first.[73] Logically, a court could not order a plaintiff to exhaust administrative remedies if ORCP 21 A(3) applies to administrative proceedings, because the rule would preclude the second-filed agency action from proceeding. Oregon law thus precludes the application of ORCP 21 A(3) to agency proceedings where the doctrines of primary jurisdiction or exhaustion of administrative remedies apply, as they do here. The cases cited by Defendants say nothing to the contrary because they all discuss a court deferring to a prior lawsuit in another court.[74] Also, each case has easily distinguishable facts.[75]

If the Commission decides that the first-filed rule of ORCP 21A(3) should be applied, that rule does not mandate dismissal but allows for a stay in one court pending resolution in the first-filed court. If the Commission decides the first-filed rule controls in this case, it should stay this proceeding and await a decision by the federal court regarding whether the court will dismiss for lack of jurisdiction or stay in deference to the Commission's primary jurisdiction.

C. The Commission has the authority and discretion to treat PGE's Complaint as a petition for declaratory ruling.

Defendants argue that a request to interpret an executed Standard PPA is effectively a request for a declaratory ruling and that the Commission lacks the statutory authority to issue a declaratory ruling interpreting an executed Standard PPA. [76] As explained on pages 9 and 10 above, PGE has adequately pled a complaint under the complaint statute (ORS 756.500). This allows the Commission to interpret these ten executed PPAs through a complaint proceeding, in the same way that the Commission has decided it will interpret the four PPAs in *Pacific Northwest Solar* through a complaint proceeding. The Commission has the authority to resolve this dispute under its complaint statute without invoking the declaratory ruling statute.

However, should it prefer, the Commission has authority to decide this case under its declaratory ruling statute. Pursuant to ORS 756.450, the Commission may issue a declaratory

[73] *See Wallace v. State ex rel. Pub. Employees Ret. Bd.*, 245 Or App 16, 21 (2011) (under exhaustion of remedies doctrine, abating and requiring plaintiff to first raise the issue in an agency proceeding).
[74] *See Landis v. City of Roseburg*, 243 Or 44, 50 (1966) (state court and state court); *State v. Smith*, 101 Or 127, 146-150 (1921) (state court and federal court); *Ex Parte Bowers*, 78 Or 390, 398 (1915) (state court and state court).
[75] *See Landis*, 243 Or at 49-50 (using the first-filed rule as an analogy to decide priority between competing annexation proceedings brought by two municipal corporations); *Smith*, 101 Or at 146-150 (deferring to prior federal criminal prosecution on double jeopardy grounds); *Bowers*, 78 Or at 398 (applying child custody statute that divested subsequent court of subject matter jurisdiction).
[76] Defendants MTD at 17-18.

ruling "with respect to the applicability to any . . . state of facts of any rule or statute enforceable by the commission."[77] The Commission has previously determined that "[a] declaratory ruling proceeding is an appropriate mechanism for declaring rights of a party *when there are disputes about the meaning of orders* the Commission has issued."[78] Because resolution of this case hinges on the Commission's interpretation of its orders, rules and statutes, PGE believes the case is properly the subject of a petition for declaratory ruling.

PGE recognizes that a recent statement by Commission Staff and a recent ALJ ruling have raised questions about whether the Commission may issue a declaratory ruling to interpret a Commission order—as opposed to a statute or rule.[79] Nevertheless, PGE notes that the only Commission statement on this issue affirms its authority to issue declaratory rulings interpreting Commission orders.[80]

Even if the Commission finds that declaratory rulings cannot interpret orders alone, the Commission could still issue a declaratory ruling in this case because federal and state statutes and rules give the Commission responsibility for setting standard contract prices, and ORS 758.535 requires the Commission to establish the terms and conditions for purchases of QF energy "by rule . . . if the purchase is by a public utility."[81] Indeed, the Commission has opened a rulemaking docket to ensure compliance with ORS 758.535(2) and to incorporate its PURPA orders into rules.[82]

Therefore, a declaratory ruling is a legally appropriate vehicle for resolving this dispute because the terms and conditions for purchases of QF energy by a utility involve application of statutes and rules. If the Commission finds that a declaratory ruling is the best procedural vehicle,

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[77] ORS 756.450.
[78] *In re Portland Gen. Elec. Co.*, Docket No. DR 22, Order No. 99-627 at 3 (Oct. 14, 1999) (emphasis added).
[79] *See In the Matter of Cypress Creek Renewables, LLC, Petition for Declaratory Ruling*, Docket No. DR 51, Order No. 16-378 (Oct. 12, 2016) (treating a declaratory ruling filing as a complaint after Staff recommended that the filing could be treated as either a request for declaratory ruling *or* as a complaint); Docket No. UM 1805, ALJ Ruling (Jan. 19, 2017) (finding that issues raised in the case "may not be resolved through a declaratory ruling proceeding under ORS 756.450" and treating the filing as a complaint).
[80] Order No. 99-627 at 3.
[81] ORS 758.535(2)(a).
[82] *In the Matter of Obsidian Renewables, LLC, Petition to Amend OAR 860-029-0040, Relating to Power Purchases by Public Utilities from Small Qualifying Facilities*, Docket No. AR 593, Order No. 16-056, App. A at 5 (Feb. 9. 2016) and Order No. 18-016 (Jan. 17, 2018) (adopting Staff's recommendation to develop draft rules in Docket No. AR 593).

the Commission can exercise its discretion to treat PGE's filing as a petition for declaratory ruling under ORS 756.450.[83]

D. Defendants' concerns about their jury rights and the Supremacy Clause should not prevent the Commission from exercising its jurisdiction.

1. The Commission's exercise of jurisdiction will not violate Defendants' jury trial rights.

Defendants claim without elaboration that an administrative resolution of this dispute would violate their constitutional right to a trial because the state and federal constitutions "protect the common-law right to a jury trial on important aspects of disputes over contractual meaning and intent"[84] This argument is both submitted in the wrong forum and without basis.

Defendants have already filed a complaint requesting a jury trial with the United States District Court for the District of Oregon. If that court determines that Defendants have a right to a jury trial, it is more than competent to provide a trial by jury as it sees fit. For its part, the Commission can and should resolve issues within the scope of its jurisdiction as delegated by the legislature. Whether Defendants are entitled to a jury trial is a question that the courts—not the Commission—will resolve.[85]

If the Commission elects to consider the issue, Defendants' argument is unpersuasive. Defendants' argument appears to be that a preclusive decision from the Commission would deprive Defendants of their right to a jury trial. But the Supreme Court has stated that a juryless administrative decision can still have preclusive effect in a later court proceeding without offending the right to a jury trial.[86]

In any event, Defendants' argument misconstrues the nature of the dispute—which is not a mere contract claim. Because plaintiffs have filed a complaint in federal court, they are entitled to a jury trial in that proceeding "if (1) the nature of [their] claim is analogous to a common law

[83] *See* Order No. 16-378 at 1 (treating filing for declaratory ruling as a complaint).
[84] Defendants' MTD at.
[85] *See* Order No. 18-025 at 6 n 10 ("Because we do not reach the issue of exclusive jurisdiction here, we find no need to resolve PNW's claim that our exercise of jurisdiction violates its constitutional right to a jury.").
[86] *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1304 (2015) ("[T]he Court has already held that the right to a jury trial does not negate the issue-preclusive effect of a judgment, even if that judgment was entered by a juryless tribunal.).

suit and (2) the remedy provided is legal (as opposed to equitable) in nature."[87] The Seventh Amendment to the U.S. Constitution preserves the common law right to a jury as it existed in 1791 when the amendment was adopted.[88]

Here, the central issue is whether, pursuant to PGE's Standard PPA, construed together with the Commission's own orders and policies implementing state and federal PURPA statutes and rules, PGE must offer fixed prices for 15 years measured from contract execution or from commercial operation. This question involves application and interpretation of statutes and rules created well after the 1791 ratification of the Seventh Amendment, and involves entitlements for the sale of energy that did not exist in the 18th century. As a result, this case does not trigger constitutional jury trial protections.

Finally, Defendants have waived any right they had to bring this interpretative question before a jury in court. Each of the PPAs at issue states: "This agreement is subject to the jurisdiction of those governmental agencies and courts having control over either party or this agreement."[89]

2. Commission jurisdiction does not violate the Supremacy Clause because PGE is not asking the Commission to "take" jurisdiction from a federal court.

Defendants argue that PGE has asked the Commission to "'take jurisdiction' from the federal court" and that doing so would violate the Supremacy Clause of the United States Constitution and the federal diversity jurisdiction statute.[90] Defendants are attacking a strawman of their own creation. PGE has not asked the Commission to take jurisdiction from the federal court. The Commission has no power to do so. The federal court will make its own decision as to

[87] *Thomas v. Oregon Fruit Prod. Co.*, 228 F.3d 991, 995 (9th Cir. 2000). *See also, Simler v. Conner*, 372 U.S. 221, 222 (1963) ("[T]he right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions.").

[88] *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted."). *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, (1937) ("[S]tatutory proceeding[s]" before administrative agencies are "unknown to the common law" and therefore not entitled to trial by jury.); *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989) (holding that jury trial right not offended where "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution").

[89] PGE's Complaint, Exhibit 1 at 17 (Section 17 of the Standard PPA).

[90] Defendants' MTD at 6-7.

whether it has jurisdiction and, if so, whether it will defer to the Commission's primary jurisdiction.

In the federal case, PGE has moved to dismiss, or in the alternative to stay, the proceeding on several grounds, including that the case does not meet the applicable ripeness standards of the federal court and on the grounds that the Commission has primary jurisdiction. That motion has been fully briefed and oral argument should be scheduled soon.

A decision by the Commission that it has jurisdiction and will entertain PGE's Complaint will have no effect on the federal court's own jurisdiction, if any. But it will assure the federal court that the Commission believes this issue is important to the Commission's uniform implementation of its regulatory responsibilities and that the Commission is ready to resolve the dispute. Further, by proceeding, the Commission will fulfill its task under the doctrine of primary jurisdiction: applying its expertise first and therefore providing assistance to the federal court and uniformity to the Oregon regulatory environment.[91]

Defendants argue that the primary jurisdiction doctrine is inapplicable because it is applied only by a court when it decides whether to defer to an agency.[92] Although that is accurate, it is irrelevant to PGE's argument, and it ignores that that the Commission has already determined that the interpretation of an executed Standard PPA is an appropriate issue for primary jurisdiction.[93] Defendants' argument is irrelevant because the Commission, in holding that it has subject matter jurisdiction[94] and that the dispute before it is appropriate for resolution through primary jurisdiction, does not deprive the court of any of its authority. The federal court will have to decide for itself whether to defer to the Commission's primary jurisdiction.

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[91] The fourth factor for court's to consider when deciding whether to stay a case in favor of agency adjudication under the doctrine of primary jurisdiction is whether the question presented requires the agency's expertise or uniformity of decision by the agency. *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F3d 775, 781 (9th Cir. 2002). The rule under Oregon law for primary jurisdiction is the same. *Boise Cascade Corp. v. Board of Forestry*, 325 Or 185, 193 (1997).

[92] Defendants' MTD at 32-35.

[93] Order No. 18-025 at 7 ("We believe our role and expertise in state and federal PURPA policy makes this [interpretation of PNW Solar's executed Standard PPAs] an appropriate issue for primary jurisdiction.").

[94] Defendants have not argued that the Commission lacks personal jurisdiction. The Commission has such jurisdiction in this case for the same reasons it did in the *Pacific Northwest Solar* case, including that Defendants have explicitly subjected themselves to Commission jurisdiction by the terms of Section 17 of the Defendants' Standard PPAs which states: "This Agreement is subject to the jurisdiction of those governmental agencies having control over either Party or this Agreement."

Defendants also argue that if the Commission proceeds with this case "any decision the Commission might reach on jurisdiction or substantive issues would not be binding on the federal court." [95] Defendants are wrong. Under Oregon law, courts apply issue preclusion to administrative agency decisions.[96] There is nothing "advisory" about a Commission ruling.

Finally, Defendants speculate that the federal court might enjoin the Commission from proceeding.[97] But it is premature to speculate as to whether the court will enjoin the Commission proceedings given that no party has requested that relief. And the authority Defendants cite is distinguishable because it involved enjoining state administrative proceedings *after* the same claims had been resolved by a federal jury.[98] Defendants cite no authority indicating that the federal court must enjoin parallel proceedings at the Commission during the pendency of proceedings in federal court.

IV. CONCLUSION

The Commission has personal, subject matter, and primary jurisdiction to resolve this dispute. The central issue is a legal question involving application and interpretation of the Commission's own orders and rules, as well as state and federal PURPA policies. The Commission should deny Defendants' motion to dismiss and proceed to resolve this dispute.

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Respectfully submitted,

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[95] Defendants' MTD at 7.
[96] *See, e.g.*, *Nelson v. Emerald People's Util. Dist.*, 862 P2d 1293, 1297 (1993) (applying issue preclusion analysis to agency's resolution of issues relevant to breach of contract claim); *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F3d 754, 760 (9th Cir. 2014) (applying state issue preclusion doctrine to state administrative ruling).
[97] Defendants' MTD at 8.
[98] *See U.S. Fid. & Guar. Co. v. Lee Investments LLC*, 641 F3d 1126, 1135 (9th Cir. 2011).