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David F. White
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February 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 Stay Proceedings.

Thank you in advance for your assistance.

Sincerely,

David F. White
Associate General Counsel

DFW:jlm

Enclosure

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1931

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.	**PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE TO DEFENDANTS' MOTION TO STAY PROCEEDINGS OR, IN THE ALTERNATIVE, TO EXTEND TIME TO ANSWER THE COMPLAINT UNTIL AFTER RESOLUTION OF A MOTION TO DISMISS**

I. SUMMARY

The Public Utility Commission of Oregon ("Commission") has primary jurisdiction over Portland General Electric Company's ("PGE's") complaint, and the Commission should decide this issue without delay. The Commission has primary jurisdiction in this action for the same reason that it has primary jurisdiction in Docket No. UM 1894, a separate docket concerning another provision of PGE's Standard Power Purchase Agreement ("Standard PPA") with a different group of qualifying facilities ("QFs") (the projects associated with Pacific Northwest Solar, LLC). The Commission's explanation in that docket as to why it has primary jurisdiction to interpret the terms and conditions of a Standard PPA applies equally in this docket.

> 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.[1]

[1] *PGE v. Pac. NW Solar, LLC*, Docket No. UM 1894, Order No. 18-025 at 6 (Jan. 25, 2018).

The Commission's reasoning in that case order is equally apt in this case. In the complaints before the Commission and the federal court, the parties both want the same thing: a decision as to whether a term of PGE's 2016 Standard PPA with defendants requires that PGE pay these ten QFs the fixed avoided-cost prices for fifteen years measured from either (A) contract execution date or (B) the commercial operation date ("COD").

And under Oregon law and federal law it does not matter whether the court case or this Commission complaint was filed first. Instead, this interpretative question benefits from agency expertise and it is therefore within the Commission's primary jurisdiction. Accordingly, there is no reason to issue a stay on this important question.

II. BACKGROUND

The 10 NewSun Solar parties (which will aggregate to 100 MW of nameplate capacity if all 10 QFs are built) contend in federal court that they are entitled to the Standard PPA avoided-cost rates (the "Renewable Fixed-Price Option") for fifteen years beginning "when the relevant NewSun QF is operational and delivering power to PGE."[2] PGE's position is that the 15-year period for the Renewable Fixed-Price Option began at contract execution in 2016 for those 10 Standard PPAs. Those 10 Standard PPAs were signed before the Commission decided in Order 17-256 that it would "require standard contracts, *on a going-forward basis*, to provide for 15 years of fixed prices that commence when the QF transmits power to the utility."[3] To accomplish that newly articulated policy, the Commission ordered: "PGE should promptly file revisions to Schedule 201 which shall include a revised standard contract PPA with language consistent with our requirement that the 15-year period of fixed prices commences when the QF transmits power to the utility."[4]

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[2] Complaint in federal action, paragraph 46, attached as Exhibit A to Defendants' Motion to Stay Proceeding, Docket No. UM 1931 (Feb. 2, 2018).
[3] *NIPPC, CREA, & REC v. PGE.*, Docket No. UM 1805, Order No. 17-256 at 4 (emphasis added).
[4] *Id.*

The NewSun Solar QFs, in asking the Commission to stay this proceeding, are asking that the Commission allow the federal court to determine whether the PGE Standard PPAs in effect during 2016 (before PGE made the revisions ordered in 2017) provided that the 15-year fixed-price period began from actual COD. The Commission, for the same reasons that it has primary jurisdiction in the similar dispute with Pacific Northwest Solar over a Standard PPA, has primary jurisdiction in this matter and should decide when the 15-year period began to run for these 10 Standard PPAs.

III. ARGUMENT

A. The Commission has primary jurisdiction over this dispute.

The Commission should deny the NewSun QFs' motion for a stay because the Commission has primary jurisdiction over the parties' dispute. Primary jurisdiction is a discretionary doctrine "by which courts determine whether and when to defer exercising jurisdiction to permit an administrative agency to first decide a question presented."[5] The doctrine applies "when a court decides that an administrative agency, rather than a court of law, initially should determine the outcome of a dispute or one or more issues within that dispute that fall within the agency's statutory authority."[6]

Oregon's Supreme Court has identified three factors to consider in determining whether an agency has primary jurisdiction: "(1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue; (2) the need for uniform resolution of the issue; and (3) the potential that a judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities."[7] The federal

[5] *Adamson v. Worldcom Communications, Inc.*, 190 Or. App. 215, 223 (2003); *see also United States v. Western Pac. R. Co.*, 352 U.S. 59, 63 (1956) ("The doctrine of primary jurisdiction . . . is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.").
[6] *Dreyer v. Portland General Elec. Co.*, 341 Or 262, 283 (2006) (citing *Boise Cascade Corp. v. Board of Forestry*, 325 Or. 185, 192-93 (1997)).
[7] *Boise Cascade*, 325 Or. at 192.

court may apply the federal primary jurisdiction rule even though it is a diversity case,[8] but in this situation the factors that the federal and Oregon state courts consider overlap significantly, and both indicate that the Commission has primary jurisdiction.[9]

The Commission recently applied these same factors in determining whether it had primary jurisdiction related to a pending court case.[10] Pacific Northwest Solar LLC, the parent company for six QFs, recently filed an action in state court for a declaratory judgment and damages in a dispute about a different provision of the Standard PPA.[11] In that case, the parties disputed whether Pacific Northwest Solar was allowed to change the capacity of four of its QFs before even constructing them.[12] PGE filed a complaint with the Commission against Pacific Northwest Solar asking the Commission to resolve that dispute, and PGE filed a motion in state court to abate that case on the grounds of primary jurisdiction.[13] While that motion was pending in state court, Pacific Northwest Solar moved the Commission to dismiss PGE's complaint on the grounds that the Commission lacked personal jurisdiction over it.[14] The Commission, in an extensive written opinion, affirmed that not only does the Commission have personal jurisdiction, it also has primary jurisdiction to resolve disputes between public utilities and QFs concerning the meaning of PGE's Standard PPA.[15] The Commission reasoned that the Standard PPA's terms "relate directly to the regulated rates

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[8] In the Ninth Circuit, it is an open question of law whether state primary jurisdiction doctrine applies in diversity suits. *See Verizon Nw., Inc. v. Portland Gen. Elec. Co.*, CIV. 03-1286-MO, 2004 WL 97615, at *5, n.2 (D. Or. Jan. 13, 2004).

[9] Federal courts look to four factors when deciding whether the doctrine of primary jurisdiction applies: (1) a need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration. *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002). Because the Oregon Supreme Court's test for primary jurisdiction overlaps with the federal test, the result is the same if the reviewing court applies federal or Oregon primary jurisdiction doctrine. *See Verizon Nw., Inc. v. Portland Gen. Elec. Co.*, CIV. 03-1286-MO, 2004 WL 97615, at *5, n.2 (D. Or. Jan 13, 2004) ("[T]he general primary jurisdiction principles announced by Oregon courts do not materially differ from those found in federal cases . . . .").

[10] *PGE v. Pac. NW Solar, LLC*, Docket No. UM 1894, Order No. 18-025 (Jan. 25, 2018).

[11] *Id.*

[12] *Id.* at 1.

[13] *Id.* at 1-2.

[14] *Id.* at 2.

[15] *Id.* at 6-7.

and services of utilities subject to our oversight" and that uniformity was important because "[a]n interpretation of [the disputed provision] that is inconsistent with our intent would affect not only the complainant here, but a multitude of QFs that have entered into or intend to enter into PURPA contracts with utilities regulated by the Commission."[16] After the Commission issued that order, the plaintiff consented to an unopposed order of abatement of the state court action.[17]

Further, in *Dreyer,* the Oregon Supreme Court issued a writ of mandamus to the circuit court ordering it to abate a case pending resolution of a later-filed Commission proceeding.[18] In *Dreyer*, PGE customers sued PGE in state court seeking a refund of previously collected rates.[19] Later, the Commission began a proceeding concerning "(essentially) the same controversy, the same ratepayers, and the same effort at determining a remedy."[20] Before abating the case, the court addressed each of the three *Boise* factors. First, the court pointed to the Commission's "specialized expertise in the field of ratemaking," which the Commission might employ in crafting a remedy.[21] The court also concluded that the Commission had "special expertise" in interpreting the scope of its own authority.[22] Second, the court noted without discussion that "uniform resolution of the issue is desirable" because "[c]onflicting or inconsistent resolutions . . . would be highly problematic for the resolution of this dispute and for utility regulation generally."[23] Third, the court concluded that proceeding with the case "would interfere with" the Commission's "performance of its

[16] *Id.*
[17] *Pacific Northwest Solar, LLC v. Portland General Electric Co.*, Or. Circ. Court Case No. 17CV38020, Stipulated Order to Abate (Jan. 26, 2018) (copy of stipulated order to abate attached for the convenience of the Commission and the parties as Attachment A).
[18] *Dreyer*, 341 Or at 286-87.
[19] *Id.* at 273.
[20] *Id.* at 283.
[21] *Id.* at 285.
[22] *Id.*
[23] *Id.* at 286.

regulatory functions."[24] The court also commented that "the scope of the court's work" would be "usefully curtailed" by allowing the Commission to conclude its proceeding undisturbed.[25]

Like in *Pacific Northwest Solar* and *Dreyer*, the issue central to the case at hand is "(essentially) the same controversy" as that before the federal court—that is, whether the Standard PPAs' 15-year period for fixed prices begins on the Commercial Operation Date or on the date of contract execution. And the factors considered by state and federal courts similarly all favor this Commission's exercise of primary jurisdiction.

First, resolution of this question deeply involves the Commission's specialized expertise. As the United States Supreme Court has recognized, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."[26] Under PURPA, "the states play the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilit[ies]."[27] Thus, Standard PPA terms are largely creatures of state administrative law.[28]

The Standard PPA provisions at issue were designed to implement the policy goals of Order No. 05-584, which created the 15-year period of fixed prices. The Commission can interpret the meaning of the provision in light of the goals in Order No. 05-584 it sought to achieve when it approved the Standard PPA at issue. The Commission is also in a unique position to ensure that any interpretation of the Standard PPAs does not result in utilities paying more than their avoided costs, which would violate PURPA and ORS 758.535, and

[24] *Id.*
[25] *Id.* at 285.
[26] *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).
[27] *Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 856 (9th Cir. 1994).
[28] *See Snow Mountain Pine Co. v. Maudlin*, 84 Or. App. 590, 599 (1987) (so stating).

that the interpretation results in costs for PGE that provides for "just and reasonable" rates for PGE's customers and that shall be "in the public interest[.]"[29]

Second, uniform resolution of this issue favors the Commission's exercise of primary jurisdiction. "Conflicting or inconsistent resolutions" would be "highly problematic," in that the utilities could face inconsistent direction from the Commission and the court.[30] This decision will impact the interpretation of other standard form power purchase agreements with other QFs operating under similar (if not identical) provisions. Because interpreting PPA terms is a question of state administrative law, the relevant interpretative question is one for this Commission to answer, subject to judicial review in Oregon courts. A decision from the federal court would not be binding on the Commission in a later proceeding between different parties. Therefore, federal court intervention into this question of state law risks creating different results between QFs with identical or very similar Standard PPA terms. The Oregon legislature has specifically cautioned against such disparities.[31]

Third, federal district court action could unnecessarily interfere with the Commission's regulatory function. Standard PPAs reflect the Commission's policy judgments concerning implementation of both federal and state laws. An intervening decision could prevent the Commission from clarifying its own policy goals for these Standard PPAs and how the operative provisions in PGE's 2016 Standard PPA does—or does not—achieve those ends. The Commission has primary jurisdiction over this dispute and should first provide its input on this fundamental question of when the 15-year period starts.

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[29] 16 U.S.C. § 824a-3(b) ("The rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest[.]").

[30] *Dreyer*, 341 Or. at 286 (further noting that inconsistent resolutions are troublesome "for utility regulation generally").

[31] *See* ORS 758.515(3)(b) ("It is . . . the policy of the State of Oregon to . . . [c]reate a settled and uniform institutional climate for the qualifying facilities in Oregon.").

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

As discussed above, 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. The NewSun QFs 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.[32] In *Dreyer*, the Oregon Supreme Court applied the primary jurisdiction doctrine and ordered abatement even though the filing of the court case predated a later-filed Commission proceeding.[33] The cases cited by the NewSun QFs say nothing to the contrary because they all discuss a court deferring to a prior lawsuit in another court.[34] Also, each case has easily distinguishable facts.[35] The first-to-file principle might make sense if two lawsuits are filed in two different courts, but that is not the case here. The Commission has expertise, history, and interests that need to be applied to interpreting PGE's Standard PPA. These interpretative questions raise important issues for utilities, QFs, and utility customers. Primary jurisdiction doctrine adequately accounts for the unique expertise and administrative function of agencies, while the first-filed rule does not.

Further, application of a rigid first-filed rule risks serious disruption to the administrative scheme. The first-filed rule would encourage plaintiffs to race to the courthouse with disputes within the jurisdiction and expertise of the Commission in the hopes of receiving a favorable ruling from a federal or state court. This disruption would not just affect the Commission's oversight function over Standard PPAs, but also its oversight

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[32] *See Boise Cascade*, 325 Or. at 193.
[33] *Dreyer*, 341 Or. at 286-87.
[34] *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).
[35] *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).

over other Commission-regulated agreements such as interconnection agreements, net metering agreements, or any regulated telecommunication agreement.

Indeed, NewSun initially asked the Commission to decide this issue. In Docket No. UM 1805, the Commission interpreted the 15-year term in a separate complaint proceeding filed by three trade associations for QFs, but the NewSun QFs waited until the close of evidence and after the Commission issued an order granting summary judgment before attempting to intervene.[36] By statute, the NewSun QFs could not intervene at that late stage, but in its order denying the petition to intervene, the Commission encouraged the NewSun QFs to "seek[] other relief from the Commission . . . including the filing of a complaint under ORS 756.500."[37] Instead, the NewSun QFs engaged in forum shopping by racing to federal court and seeking a different outcome, where the court might proceed on an issue that is critical to PGE's customers without Commission input or decision. Thus, the first-filed doctrine is particularly ill-suited to these facts, where Docket No. UM 1805 was filed before the federal case, and the NewSun QFs failed to timely participate in that proceeding.

C. The Commission should not stay this docket because there is no reason to do so.

As described above, there is no legal reason to stay this case. There is also no practical reason to stay this case. The procedural posture at this point is not one where there is serious risk of inconsistent results on the merits – motions and briefing at this point go to jurisdictional issues only.

The NewSun QFs speculate that if the federal court determines it has subject matter jurisdiction it will enjoin these proceedings. But the NewSun QFs mistakenly conflate subject matter jurisdiction with primary jurisdiction, which is a prudential doctrine.[38] Federal courts in the Ninth Circuit apply a primary jurisdiction analysis similar to that applied in

[36] *NIPPC, CREA, & REC v. PGE*, Docket No. UM 1805, Order No. 17-418 at 1 (Oct. 16, 2017).
[37] *Id.* at 3.
[38] *See Syntek Semiconductor Co.*, 307 F.3d at 781.

Oregon courts.[39] Accordingly, consistent with the analysis above, it is likely that the federal court will also conclude that the Commission has primary jurisdiction regardless of whether the federal court has subject matter jurisdiction.

Nor is there any reason to base scheduling decisions on speculation as to whether a federal court will enjoin these administrative proceedings instead of allowing the Commission to exercise its jurisdiction (and, of course, the federal court cannot enjoin the Commission itself, because the Commission is not a party to the federal court case). The only cases the NewSun QFs cite in support of their theory that the federal court will enjoin these proceedings after making a jurisdictional decision are federal court decisions enjoining administrative proceedings where that injunction was necessary to enforce federal court judgments.[40] These cases do not suggest that a federal court should or must enjoin state agency proceedings after the federal court has issued a preliminary jurisdictional ruling. Indeed, federal courts with concurrent subject matter jurisdiction will seek guidance from an agency regarding the scope of the agency's primary jurisdiction.[41]

D. The parties have reached a stipulation concerning NewSun's second motion.

PGE and NewSun stipulate that, in the event the stay motion is denied, NewSun can file a motion to dismiss before filing an answer, and will then file its answer, if at all, within 10 days of the Commission's decision on NewSun's motion to dismiss.

IV. CONCLUSION

The beginning date of the 15-year fixed-price period is an important issue and NewSun's motion would frustrate resolution of this issue by delaying the Commission from providing its necessary input and answer to the fundamental question of when the 15-year

[39] *Id.* (listing factors).
[40] *Fidelity & Guaranty Co. v. Lee Investments, LLC*, 641 F.3d 1126, 1135 (9th Cir. 2011); *Freehold Cogeneration Assoc., L.P. v. Bd. of Reg. Com'rs of State of N.J.*, 44 F.3d 1178, 1189 & 1193-94 (3d Cir. 1995).
[41] *See, e.g.*, *Verizon Nw., Inc.*, 2004 WL 97615, at *6-7 (staying action and citing the Commission's jurisdictional decisions as persuasive authority in assessing primary jurisdiction).

period begins. Because this Commission has primary jurisdiction over this interpretative question there is no reason for it to delay in deciding this important issue.

DATED this 9th day of February, 2018.

Respectfully submitted,

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ATTACHMENT A

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

PACIFIC NORTHWEST SOLAR, LLC,

Plaintiff,

vs.

PORTLAND GENERAL ELECTRIC COMPANY,

Defendant.

No. 17CV38020

STIPULATED ORDER TO ABATE

for one year

By stipulation of the parties, through their undersigned attorneys of record, this action is abated pending the result of the proceeding, including exhaustion of appeals, currently pending before the Public Utility Commission of Oregon in a matter denominated as Docket Number UM 1894, *Portland General Electric Company, Complainant, v. Pacific Northwest Solar, LLC, Defendant.* The parties must file in this Court periodic joint status reports in this matter every 90 days or upon any significant development which in the opinion of any party warrants this Court's attention.

JAN 26 2018

Benjamin Saltzde

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Verified Correct Copy of Original 1/29/2018.

IT IS SO STIPULATED:

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/s/ Irion A. Sanger

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