BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

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

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INTRODUCTION AND SUMMARY

Pursuant to OAR 860-001-0420, defendants Alfalfa Solar I LLC, Dayton Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, Riley Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, and Wasco Solar I LLC (collectively, the "NewSun QFs") hereby reply in support of their motion that the Oregon Public Utility Commission (the "OPUC" or "Commission") dismiss the pleading filed by Portland General Electric Company ("PGE") in this proceeding titled "COMPLAINT AND REQUEST FOR DISPUTE RESOLUTION" (hereafter "Request for Dispute Resolution"). PGE's response does not dispute many of the critical points made in the NewSun QFs' motion to dismiss.

First, PGE agrees this Commission cannot "take jurisdiction" from the federal court, even though that is exactly what PGE asks this Commission to do. PGE further concedes that it is up to the United States District Court for the District of Oregon to determine whether to defer to this Commission on the declaratory judgment action under the doctrine of primary jurisdiction. These concessions resolve this motion to dismiss in the NewSun QFs' favor. PGE fails to explain why the Commission should undertake a parallel declaratory judgment action without giving the federal court an opportunity to rule on PGE's request that the matter be sent to this Commission. Had PGE simply waited and allowed the federal court to rule before instituting this proceeding, this Commission would not be in the awkward position of being asked to rule on an issue that simultaneously is before the federal court and on which PGE concedes the federal court's ruling will control. This Commission should dismiss PGE's Request for Dispute Resolution and put an end to this unnecessary, duplicative litigation.

Second, even if there were not another action pending in federal court, this Commission would still lack jurisdiction. PGE appears to agree that, barring referral of the issues raised in

this matter to this Commission by the federal court, the Commission would need some statutory basis for jurisdiction to issue declaratory judgments in contract disputes. No such statute exists. Instead, the Commission's declaratory ruling statute unambiguously excludes jurisdiction over executed contracts.

PGE's attempt to identify a statutory basis on which this Commission might exercise jurisdiction confuses the concepts of statutory jurisdiction and primary jurisdiction. While primary jurisdiction may provide this Commission with authority to resolve disputes referred to it by a court, it does not expand this Commission's authority to exercise jurisdiction over matters that are not within the statutory bases of jurisdiction and that have not been referred to this Commission by any court.

As stated in the NewSun QFs' motion to dismiss, if this Commission does not dismiss this proceeding, it will result only in delay, duplicative litigation, and unnecessary expense. Accordingly, the Commission should expeditiously issue an order dismissing PGE's Request for Dispute Resolution.

ARGUMENT

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

PGE provides no explanation for why it makes sense to litigate the same issue at the same time in two separate forums. PGE even appears to concede that, given the supremacy of the federal courts, adjudicating the same dispute before this Commission would be futile because the Commission cannot displace the federal court. PGE also appears to agree that ORCP 21A(3) would ordinarily require dismissal if the Commission were in fact the equivalent of a state court with jurisdiction to issue competing declaratory judgments to those issued in federal court.

Indeed, PGE's sole basis for contending that the first-filed rule does not apply here is its assertion that state agencies are not bound by the fundamental rule that the first filed court goes first. PGE, however, cites no authority in support of its view, and its position would lead to absurd results. The Commission should dismiss this case in favor of the first-filed federal court proceeding.

a. The Supremacy Clause Requires Dismissal

The NewSun QFs' motion to dismiss demonstrated that the supremacy of federal law and the federal courts prevent this Commission from granting PGE's request to "take jurisdiction" from the federal court or to entertain a complaint against the NewSun QFs for exercising their constitutional and statutory right to ask the federal court to resolve this contractual dispute regarding their power purchase agreements ("PPA"). Instead of rebutting the NewSun QFs' argument, PGE attempts to recast its Request for Dispute Resolution as something other than a request that this Commission assert jurisdiction over a dispute that already is pending in federal court and before the federal court determines whether it will defer to this Commission to resolve the dispute. PGE's arguments are misplaced.

First, PGE plainly asks the Commission to take jurisdiction from the federal court. In its pleading, PGE states:

> The NewSun Solar Parties chose not to file an action with the Commission, and instead initiated an action in United States District Court for the District of Oregon. *PGE requests the Commission take jurisdiction to resolve this dispute* and confirm that, for the ten PPAs executed with the NewSun Solar Parties, the 15-year period of fixed prices established by Schedule 201 begins from the date each PPA was first fully executed by both parties.

PGE's Request for Dispute Resolution at 2 (emphasis added). The ordinary meaning of the word "take" in PGE's pleading is "to get into one's possession by force, skill, or artiface." *Webster's II New Riverside University Dictionary* (1984). The immediately preceding sentence to the

sentence asking the Commission to "take jurisdiction" is a sentence complaining that the NewSun QFs have invoked the jurisdiction of the federal court.

Because PGE argues that once the Commission issues an order it will be preclusive, PGE in fact asks this Commission to assert jurisdiction over this dispute and issue an order that PGE argues would preclude the federal court from issuing its own declaratory judgment. While PGE attempts to minimize the magnitude of what it is asking the Commission to do, PGE's request cannot be seen as anything other than an attempt to evade federal jurisdiction before the federal court even has determined whether it has jurisdiction and, if so, whether it will defer to this Commission.

Second, PGE's own concession that this Commission cannot take jurisdiction from the federal court undermines any reasonable exercise of whatever jurisdiction the Commission may have. PGE agrees the federal court – and not this Commission – must determine whether the federal court has jurisdiction and whether it will defer to this Commission. Nonetheless PGE asks the Commission to adjudicate the exact same issue at the same time as the federal court.

The most likely explanation for this course of action is that PGE hopes that this Commission will enter an order regarding the meaning of the contracts at issue before the federal court reaches its own decision, so that PGE can argue that the federal court is precluded by such order from reaching its own conclusion regarding the meaning of the contracts. At best, PGE merely seeks a preliminary order regarding primary jurisdiction in the hope that it will influence the federal court's ruling on PGE's currently-pending motion to dismiss the federal court case. In either case, this Commission should not indulge PGE's gamesmanship.

This Commission should decline PGE's invitation to attempt to influence the federal court's resolution of the jurisdictional challenge raised by PGE in that proceeding or, even

worse, to usurp the federal court's authority to resolve the parties' dispute if it declines to refer the matter to this Commission.

b. State Law Mandates Dismissal

In addition to agreeing that the federal court has authority to determine its own jurisdiction, PGE also concedes that ORCP 21A(3) would require dismissal of this action if PGE had brought it in court. While PGE claims this rule is inapplicable to disputes brought before a state agency, its arguments are contradictory.

According to PGE, instead of the first-filed rule, state agencies are governed by exhaustion of administrative remedies and primary jurisdiction. In PGE's view, the state agency can go first because courts often dismiss court actions to defer to a state agency under the exhaustion or primary jurisdiction doctrines. *See PGE's Response to Motion to Dismiss* at 16-17 (arguing, "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"). But PGE concedes elsewhere in its brief that primary jurisdiction is a doctrine that a *court must invoke*. *See id.* at 20-21.

The same is true with exhaustion of administrative remedies, which also *must be invoked by a court* in response to a prematurely filed court action. *Wallace v. State ex rel. Pub. Employees Ret. Bd.*, 245 Or App 16, 26-28, 263 P3d 1020 (2011). Neither doctrine provides any basis for an agency to unilaterally assert jurisdiction when an action already is pending in a court. At most, PGE's argument provides a basis for this Commission to stay – as opposed to dismiss – this proceeding until the federal court addresses the primary jurisdiction and exhaustion arguments PGE raised in that proceeding. Indeed, this is one of the options available under ORCP 21A(3).

PGE provides no basis to exempt the Commission from the first-filed rule. The purpose of the first-filed rule is to prevent the confusion and unnecessary expense that is certain to occur if two tribunals are adjudicating the same dispute at the same time. *See Landis v. City of Roseburg*, 243 Or 44, 50, 411 P2d 282 (1966). The risk of confusion is further demonstrated here by PGE's clarification that it seeks a final order from the Commission that would have preclusive effect on any other court, including the federal district court.

PGE offers no explanation as to why the first-filed rule should not apply to state agencies and cites no Oregon decision supporting its contention. Contrary to PGE's argument, Oregon courts have not held that the first-filed rule is limited to *courts*.

In *Landis*, the Oregon Supreme Court has explained that the doctrine applies where two "*tribunals*" may possess concurrent jurisdiction over a dispute. 243 Or at 50 (internal quotation omitted, emphasis added). A "tribunal" is a "court or other adjudicatory body." Bryan A. Garner, *Black's Law Dictionary* at 1512 (7th ed. 1999). Where PGE asks the Commission to issue a binding declaratory judgment on the meaning of a contract, the Commission must act like any other "tribunal" and must defer to the first-filed tribunal.

The only Oregon decision PGE cites in support of exempting the Commission from the first-filed rule is *Dreyer v. Portland Gen. Elec. Co.*, 341 Or 262, 142 P3d 1010 (2006). PGE argues that in *Dreyer* "the Oregon Supreme Court applied the primary jurisdiction doctrine and ordered abatement even though the court case predated a later-filed Commission proceeding." *PGE's Response to Motion to Dismiss* at 16. Crucially, as PGE itself notes, it was the *court* that invoked the primary jurisdiction doctrine. Additionally, PGE's assertion is factually incorrect because the Commission proceeding to which PGE refers was a remand proceeding from appeals of two preexisting Commission proceedings, which predated the second court case that was

abated by the Supreme Court. *Dreyer*, 341 Or at 272-75, 283-87 (stating "even before plaintiffs filed their actions, the PUC had received two remands from the courts" and "the PUC now is engaged in carrying out those remands in a single proceeding"). Thus, in *Dreyer*, the Commission proceeding was commenced prior to the abated court case. Because the Commission proceeding was in fact the first-filed proceeding, the Supreme Court had no occasion to hold that the first-filed rule is inapplicable to the Commission.

In fact, the Court's reasoning in *Dreyer* supports applying the first-filed rule where there is overlap between the Commission and a court. As the Court explained, "[c]onflicting or inconsistent resolutions of the remedy issue between the PUC and the circuit court would be highly problematic for the resolution of this dispute." *Id.* at 286. Because the "courts have issued remands to the PUC that explicitly or implicitly contemplate some decision about PGE ratepayers' entitlement to a remedy" and "[t]he PUC is performing part of its regulatory functions when it responds to those remands," the court concluded that a "contemporaneous circuit court proceeding directed at the same issue would not, in our view, move that process forward." *Id.* The *Dreyer* decision therefore supports the NewSun QFs' position that the considerations of the first-filed rule are applicable to the Commission.

Because there is another action pending in federal court, there is no need to reach the issue of subject matter jurisdiction. The federal court has not referred the matter to the Commission, and the Commission should dismiss this proceeding.

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

If the Commission reaches the question of subject matter jurisdiction, PGE concedes that its Request for Dispute Resolution must identify some statutory basis for the Commission to exercise jurisdiction over this matter. While PGE contends that there is such a statutory basis for

the Commission to exercise jurisdiction, it fails to identify any legitimate statutory authority for this proceeding. PGE's Request for Dispute Resolution therefore should be dismissed.

a. ORS 756.500(1) Does Not Apply

As the motion to dismiss demonstrated, Subsection 756.500(1) only allows for a complaint filed "against any person whose business or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or regulation of which is conferred upon the commission." ORS 756.500(1). To use this subsection as the Commission's jurisdictional hook, the Commission would first have to conclude that the NewSun QFs' business of attempting to sell energy and capacity to PGE under fully executed, long-term PPAs, is a "business or activity . . . regulated" by the Commission. *Id.* In other words, the Commission would have to rule that it has ongoing regulatory oversight over the QFs and long-term contracts executed by QFs. As the NewSun QFs demonstrated, a holding that the NewSun QFs business or activities are *regulated* by the Commission would conflict with the Public Utility Regulatory Policy Act of 1978's ("PURPA") bar against ongoing regulatory oversight of executed contracts. *See, e.g.*, 18 CFR § 292.602.

In *Oregon Trail Electric Consumers Cooperative, Inc. v. Co-Gen Company*, the Oregon Court of Appeals has already held, in connection with a QF contract dispute, that neither the QF nor the purchasing utility was "presently subject to PUC regulation, at least with respect to the price paid for energy." 168 Or App 466, 474 n 6, 7 P3d 594 (2000).[1] It follows that the NewSun QFs are not persons "whose business or activities are regulated by . . . the commission," and that ORS 756.500(1) therefore cannot confer jurisdiction on the Commission to hear a complaint

[1] Although the court noted that the parties agreed on this point, it was also nevertheless the holding of the court because the court had an "independent responsibility to examine jurisdiction." *Id.* at 473.

brought against the NewSun QFs. PGE ignores the holding of *Oregon Trail Electric Consumers Cooperative* and provides no basis for this Commission to reach a different result.

Instead of responding to the NewSun QFs' arguments regarding the inapplicability of ORS 756.500(1), PGE's contends that "the prohibition on utility-type regulation prevents the Commission from *modifying* an executed Standard PPA," but "it does not prevent the Commission from *interpreting* an executed Standard PPA." *PGE's Response to Motion to Dismiss* at 6 (emphasis in original); *see also id.* (stating, "Defendants argue that Section 210(e) of PURPA . . . prevents the Commission from interpreting an executed Standard PPA"). PGE's contention misses the point.

The NewSun QFs did not argue that it would be unlawful for a state to confer jurisdiction on a state utility commission, instead of courts, to issue declaratory judgments *interpreting* the meaning of a PURPA contract under common law contract principles. Rather, the NewSun QFs argued that ORS 756.500(1) does not provide jurisdiction because it only confers jurisdiction over matters that are within the Commission's ongoing *regulatory* authority, while PURPA bars assertion of such ongoing regulatory authority over the executed PURPA contract. *See NewSun QFs' Motion to Dismiss* at 15.

If ORS 756.450 provided that the Commission may issue binding interpretations of the meaning of contracts between utilities and nonregulated third parties where the Commission was involved in drafting those contracts, then the Commission would have jurisdiction under state law to do so. But neither ORS 756.450 nor any other Oregon statute grants this Commission such jurisdiction. PGE's contention that PURPA does not bar state commissions from interpreting executed PURPA contracts therefore is irrelevant.

Further, PGE overlooks that ORS 756.500(1) does not give the Commission jurisdiction to *interpret* contracts just because the contracts arose from activities that *were* regulated by the Commission, such as setting of avoided cost rates. *See* ORS 756.500(1) (complaint allowed against a person "whose business or activities *are* regulated" by the Commission (emphasis added)). PGE ignores that "under federal law applicable here[,]" once a PURPA-governed agreement receives approval by the relevant state agency, "the rights of the parties . . . are to be determined by applying normal principles of contract interpretation." *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F3d 129, 139 (3d Cir 1998). In other words, once a contract is executed, the Commission's *regulatory* authority ends and contract interpretation rules apply. While the Oregon legislature *could* confer *interpretive* authority on the Commission to exercise jurisdiction over the meaning of executed contracts, it has not.

The Connecticut and West Virginia cases on which PGE attempts to rely do not address the NewSun QFs' arguments, and instead concerned the *regulatory* question of ownership of renewable energy credits ("REC") in legacy PURPA contracts executed before RECs existed. *PGE's Response to Motion to Dismiss* at 7-8 (citing *Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Public Utility Control*, 531 F3d 183 (2d Cir 2008); *New Martinsville v. Public Service Com'n.*, 729 SE2d 188 (W Va 2012)). While PGE contends that these decisions establish that a state commission can exert regulatory authority to *interpret* an executed PURPA contract without violating PURPA's bar against *modifying* the rates or terms of such a contract, the decisions actually demonstrate why PGE's argument is wrong.

The REC-ownership disputes regarded a matter of state *regulatory* law that was not resolved by the terms of the PURPA contract. As the Second Circuit Court of Appeals noted, the Federal Energy Regulatory Commission ("FERC") had determined that the ownership of RECs

is controlled by state law, since state law creates the RECs, and therefore a state determination as to who owns the RECs was wholly apart from PURPA. *Wheelabrator Lisbon*, 531 F3d at 189-90. Indeed, the legacy PURPA contracts at issue did not address the ownership of RECs at all because RECs did not exist at the time those PURPA contracts were signed. *See New Martinsville*, 729 SE2d at 196 (holding that state commission "has only determined ownership of assets – the credits – which were not contemplated and, thus, not provided for in the [long-term PURPA contract]"). RECs were created subsequently by a separate state laws, and resolution of the dispute required interpretation of a state statutes creating those RECs that the state commission had regulatory authority to interpret. *See Wheelabrator Lisbon, Inc. v. Dep't of Pub. Util. Control*, 283 Conn 672, 931 A2d 159, 171-76 (2007); *New Martinsville*, 729 SE2d at 198-99. These disputes were therefore within the state commission's *regulatory* purview under the equivalent of those states' declaratory ruling statutes.

In contrast here, PGE identifies no statutory provision that will resolve the contractual dispute. Furthermore, as the NewSun QFs pointed out and PGE failed to address, this very Commission declined to take up the dispute over who owns RECs in legacy PURPA contracts. *Re Central Irrigation District*, OPUC Docket No. DR 45, Order No. 10-495, at App. A (Dec. 10, 2010). In other words, when presented with the exact same question that prompted the state commissions in Connecticut and West Virginia to interpret a contractual interpretation issue that is tied up with a statutory interpretation question within the commission's regulatory purview, this Commission declined to take up the case under the applicable Oregon statutes. This further undermines PGE's reliance on the REC-ownership decisions from other states.

PGE also fails to point out that the Connecticut Supreme Court later limited the scope of its *Wheelabrator Lisbon* decision and held that Connecticut's utility commission has no inherent

jurisdiction to adjudicate contract disputes. *Kleen Energy Sys., LLC v. Comm'r of Energy & Envtl. Prot.*, 319 Conn 367, 125 A3d 905, 915-16 (2015).[2] The court held to the extent that prior decisions, including *Wheelabrator Lisbon*, suggest "that the department has broad authority to issue declaratory rulings pursuant to § 4-176 whenever it is asked to interpret a contract that it was involved in drafting, even if the contract was not approved in a contested case and the dispute did not require the department to apply a statute to the specific circumstances of the contractual dispute, we reject any such interpretation." *Id.*

Accordingly, PGE is entirely incorrect to argue to this Commission that "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." *PGE's Response to Motion to Dismiss* at 14 (citing *Wheelabrator Lisbon*, 931 A2d at 169). The Connecticut Supreme Court expressly disavowed such an interpretation of *Wheelabrator Lisbon* over two years ago in *Kleen Energy Sys.*, 125 A3d at 915-16. Consistent with the NewSun QFs' position here, therefore, Connecticut caselaw establishes that an agency's regulatory authority to interpret statutes and rules it administers does not also confer jurisdiction to interpret contracts entered into as a consequence of those statutes and rules. *See id.*

Moreover, PGE's assertion that it "is not seeking modification of terms or rates" of the NewSun PPAs cannot be accepted given the other arguments PGE has already made in this proceeding. *See PGE's Response to Motion to Dismiss* at 7. In its opposition to the NewSun QFs' motion to stay this proceeding, PGE openly asks the Commission to apply *ongoing*

[2] The regulatory agency in the *Wheelabrator Lisbon* was the same agency as in *Kleen Energy Systems*. *Id.*, 125 A3d at 906 n 1.

ratemaking standards – rather than common law principles of contract interpretation – to ensure "that the interpretation [of the executed PPAs] results in costs for PGE that provides for 'just and reasonable' rates for PGE's customers and that shall be 'in the public interest[.]'" *PGE's Response to Motion to Stay* at 7 (quoting 16 U.S.C. § 824a-3(b)). PGE contends that the Commission "has expertise, history, and *interests* that need to be applied to interpreting PGE's Standard PPA," and that "[t]hese interpretative questions raise important issues for utilities, QFs, and *utility customers*." *Id.* at 8 (emphasis added). Even though PURPA bars the Commission from retroactively adjusting the fixed prices in the NewSun QFs' PPAs, PGE asserts the Commission should exert jurisdiction here "to ensure that any interpretation of the Standard PPAs does not result in utilities paying more than their avoided costs[.]" *Id.* at 6. In effect, PGE argues the Commission has jurisdiction to do indirectly through contract "interpretation" what PURPA bars it from doing directly.

Additionally, PGE incorrectly cites the terms "just and reasonable" and "public interest" in PURPA, *id.* at 7, suggesting that PURPA directs the Commission to engage in ongoing regulatory authority. But the quoted terms in PURPA merely require that *FERC's rules* implementing PURPA's mandatory purchase provisions result in "just and reasonable" rates in the "public interest." 16 USC § 824a-3(b). The Supreme Court upheld FERC's avoided cost rules under that standard, including the rule that QFs be offered long-term fixed-price contracts under 18 CFR § 292.304(d)(2)(ii). *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 US 402, 413-18 (1983). The "just and reasonable" and "public interest" standards have no continuing relevance to the Commission's authority over executed PURPA contracts with fixed rates, which are to be governed by common law contract principles. PGE's attempted reliance on such ongoing ratemaking standards further underscores that PGE's complaint against the NewSun

QFs under ORS 756.500(1) is necessarily premised on PGE's mistaken belief that the NewSun QFs' are subject to this Commission's ongoing regulatory authority.

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

b. ORS 756.500(3) Does Not Apply

Next, PGE's response confirms that it seeks to ignore the restrictions of ORS 756.500(3), and convert ORS 756.500 into a declaratory judgment statute, even though the immediately preceding statutory section, ORS 756.450, governs declaratory rulings and excludes this action, which does not regard the application of statutes or rules.

PGE fails to address, and therefore concedes, at least two critical points made by the NewSun QFs with regard to ORS 756.500(3). First, PGE fails to dispute that its reading of ORS 756.500(3) would render the declaratory ruling statute superfluous, thus violating the cannon that statutes are to be construed so as not to render superfluous an entire statutory section, like ORS 756.450. *State v. Stamper*, 197 Or App 413, 418, 106 P3d 172, *rev den*, 339 Or 230 (2005). Under PGE's proposed interpretation there will be no need to use the declaratory ruling statute under ORS 756.450 because the complaint statute will now allow for an abstract declaration as to any complainants' rights under statutes and rules, as well as orders, contracts, or other matters. And, unlike under ORS 756.450, such declaratory rulings under ORS 756.500 will not only be binding as to the complainant and the Commission but also as to any other person the complainant names as the "defendant" in its complaint.

Second, PGE fails to distinguish the Oregon Court of Appeals' holding that the identical statutory language in Oregon's Administrative Procedures Act does not confer jurisdiction on the agency to issue declaratory rulings as to the meaning of a collective bargaining agreement, as distinguished from questions based on statutes or rules. *Or. State Employees. Assoc. v. State*, 21 Or App 567, 570, 535 P2d 1385 (1975). PGE does not even cite that case or respond to the precedent. PGE merely identifies a single declaratory ruling issued by the Commission addressing the applicability of prior Commission orders. *PGE's Response to Motion to Dismiss* at 17-18 (citing *In re Portland Gen. Elec. Co.*, OPUC Docket No. DR 22, Order No. 99-627 at 3 (Oct. 14, 1999)). But the 1999 order that PGE cites does not even state the limitations of the declaratory ruling statute, let alone how the statute could be interpreted to allow for declaratory rulings on Commission orders. In any event, this 1999 order does not help PGE here because this dispute does not turn on the meaning of any Commission orders.

The responses PGE does provide to the arguments under ORS 756.500(3) are unpersuasive. The assertion that the declaratory ruling statute grants this Commission authority to interpret "rules" is meritless because PGE fails to identify any rule that must be interpreted to resolve the contractual dispute at issue. *PGE's Response to Motion to Dismiss* at 18. Likewise, PGE's assertion that the Commission may utilize the declaratory ruling statute to issue a declaratory judgment binding on the NewSun QFs overlooks that statute states that "a declaratory ruling is binding between the commission and the petitioner," not the defendant because there is no defendant in a declaratory ruling under ORS 756.450.

Finally, PGE's assertion that it properly alleged "grounds of complaint," as required by ORS 756.500(3), is wrong. *See id.* at 9-10. Nothing PGE alleges comes close to a complaint about anything the NewSun QFs have done. Instead, PGE pleads for a declaratory judgment.

PGE's vague request to amend its pleading should likewise be denied because PGE fails to explain what "grounds of complaint" it could allege if allowed to do so. *See id.*

In summary, PGE has not adequately explained how its request for a declaratory judgment from this Commission on the meaning of executed contracts could fit within the confines of ORS 756.500(3).

c. ORS 756.500(5) Does Not Apply

Subsection 756.500(5) permits a utility to bring a complaint against a nonregulated entity, such as one of its customers, "as to any matter affecting its [i.e., the utility's] own rates or service." ORS 756.500(5). While PGE contends that this provision grants the Commission jurisdiction over this dispute, the provision does not support PGE's overly-broad construction.

First, PGE fails to meaningfully respond to the PURPA preemption problem that also exists with respect to ORS 756.500(1). PGE agrees that the Commission cannot modify the prices or terms of a PURPA contract. Thus, the Commission has no power to exercise its regulatory function to resolve PGE's allegation that the NewSun PPAs are adversely "affecting" PGE's rates. ORS 756.500(5). The jurisdictional hook in ORS 756.500(5) – that the NewSun PPAs are adversely *affecting* PGE's rates – presumes the Commission has some regulatory authority to address that concern when in fact it does not. *See* 18 CFR § 292.602.

Next, PGE appears to inadvertently agree with one of the major points made by the NewSun QFs. Specifically, relying on decisions under the Federal Power Act and the Natural Gas Act, the motion to dismiss demonstrated that affecting-rates jurisdiction should not include jurisdiction over contracts between a utility and its nonregulated suppliers, citing *American Gas Ass'n v. FERC*, 912 F2d 1496, 1505-07 (DC Cir 1990). The point of the *American Gas Ass'n* decision is that affecting-rates jurisdiction cannot reasonably be expanded to include jurisdiction

over contracts between the regulated utility and its nonregulated supplier. PGE characterizes the contracts at issue in *American Gas Ass'n* decision as "extremely tangential" to the utility's regulated rates and thus not within affecting-rates jurisdiction. *PGE's Response to Motion to Dismiss* at 13 n.52. But there is no distinction between effect on regulated rates by the supplier contracts in *American Gas Ass'n* and the corresponding effect on PGE's rates by the supplier contracts at issue here with the NewSun QFs.

The issue in *American Gas Ass'n* was whether FERC had jurisdiction over take-or-pay contracts for the supply of natural gas from nonregulated producers of such gas who sold that gas to a regulated pipeline utility. 912 F.2d at 1505-07. Under the take-or-pay contracts, the regulated pipeline utilities had to pay for the gas produced by the nonregulated supplier even if the utility did not use that gas and even though the costs far exceeded the current market costs. Because the costs in the gas supply contracts were causing severe economic hardship on the regulated pipeline utilities, the regulated pipeline utilities sought to have FERC exert jurisdiction over the non-price terms of the take-or-pay contracts to protect the regulated utility and its customers. However, even "'non-price' jurisdiction over transactions whose prices are beyond [FERC's] jurisdiction itself raises a delicate issue" of "commandeering the price authority that Congress expressly denied." *Id.* at 1506. The D.C. Circuit concluded this stretched FERC's affecting-rates jurisdiction too far and held "jurisdiction over nonjurisdictional contracts" would amount to an "oxymoron." *Id.* at 1506. The proposed "expansive reading" of affecting-rates jurisdiction "had no 'conceptual core' because" it "would reach "pipelines' contracts for every other possible factor of production – even legal services." *Id.* at 1507. In short, "the potential impact of nonjurisdictional contracts prices on the justness and reasonableness of jurisdictional rates provides no license for the Commission to monkey with the former." *Id*

The *American Gas Ass'n* decision is not an outlier but is instead the same rule other federal circuit courts have applied. The Ninth Circuit Court of Appeals has held that regulatory jurisdiction over natural gas companies "and their practices which affect jurisdictional rates" did not include jurisdiction over price manipulation associated with nonjurisdictional sales. *Learjet, Inc. v. Oneok, Inc.*, 715 F3d 716, 731-35 (9th Cir 2013). Even more on point, the Fifth Circuit Court of Appeals has held that affecting-rates jurisdiction does not confer jurisdiction to "interpret contracts concerning gas not within FERC's [Natural Gas Act] jurisdiction" and "[w]hether such a contract authorizes escalation to . . . prices is for state or federal courts to decide." *Pennzoil Co. v. FERC*, 645 F2d 360, 381 (5th Cir 1981).

The principle from *American Gas Ass'n* applies here. As with the nonregulated suppliers in *American Gas Ass'n*, the NewSun QFs are not regulated by the Commission and are instead selling as a supplier to PGE under contracts that may have an eventual *indirect* impact on the jurisdictional rates PGE may be authorized by the Commission to charge its customers. PGE itself states that the supplier contracts in *American Gas Ass'n* were "extremely tangential" to the regulated rates and thus not within affecting-rates jurisdiction. *PGE's Response to Motion to Dismiss* at 13 n.52. The same is true for the NewSun PPAs.

The Oregon Supreme Court has also adopted a similar reasoning, rejecting jurisdiction over all contracts affecting rates in *Pacific Tel. & Tel. Co. v. Flagg***,** 189 Or 370, 220 P2d 522 (1950). There, the Commissioner (the predecessor to the OPUC) issued an order prohibiting the regulated utility company's payments of a percentage of gross revenues to its national affiliate under a licensing agreement. The Oregon Supreme Court rejected indirect jurisdiction over such contracts, even though such contracts might affect the utility's rates. *Id.*, 189 Or at 395-96. Instead, the court quoted at length and adopted the reasoning of the California Supreme Court's

leading decision on jurisdiction over contracts indirectly affecting rates. *Id.* (citing *Pac. Tel. & Tel. Co. v. Pub. Utils. Com.*, 34 Cal 2d 822, 830, 215 P2d 441, 446 (1950)).

In the decision adopted by the Oregon Supreme Court, the California Supreme Court had eloquently explained that "the courts have generally held in interpreting statutes essentially like that of California that the commission's control over contracts *affecting rates and services* is limited to regulation of contracts that *directly affect* the service the rate-payer will receive at a particular rate." *Pac. Tel. & Tel. Co.*, 34 Cal 2d at 830-31, 215 P2d at 446 (emphasis added). "Such contracts and practices affect the relationship of the utility to the consumer, *not its relationship to those who supply it with materials and services*." *Id.* (emphasis added). Thus, the Oregon Supreme Court has already adopted the same limitations on the Commission's jurisdiction over contracts with utilities that the NewSun QFs advocate for in this case, and there is no basis for a different result under ORS 756.500(5).

Finally, PGE provides no limiting principle for its proposal to use ORS 756.500(5) as a basis to adjudicate disputes arising under any contract PGE may have with a supplier of inputs to PGE's regulated electricity service. For example, the reasoning of PGE's affecting-rates argument under ORS 756.500(5) would apply equally to all wholesale electricity purchases PGE makes from other electricity suppliers, and to suppliers from whom PGE purchases natural gas for use in its own power plants. All of PGE's payments to those third-party suppliers ultimately affect PGE's rates because the Commission must allow PGE to include all prudently incurred expenses in its rates. *See* ORS 756.040(1). PGE appears to agree that the ORS 756.500(5) should not be read to confer such "boundless jurisdiction" over nonjurisdictional matters that will affect PGE's rates. *PGE's Response to Motion to Dismiss* at 11.

There is no logical basis to apply jurisdiction under ORS 756.500(5) against the NewSun QFs without also applying that jurisdiction to any other contract between PGE and a nonregulated supplier. Assertion of jurisdiction under ORS 756.500(5) would result in a breadth of jurisdiction that the Oregon legislature never intended.

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

PGE also attempts to rely on Oregon's mini-PURPA statute as the basis for jurisdiction over this dispute, arguing that ORS 758.505 to 758.555 "authorize the Commission to regulate the terms and conditions under which PGE and other public utilities purchase electricity from qualifying facilities." *PGE's Response to Motion to Dismiss* at 13-14. But PGE fails to explain how any of those provisions confer jurisdiction to resolve a dispute over the meaning of executed PURPA contracts.

First, as discussed at length above, PGE is incorrect to assert the Commission can "regulate the terms and conditions under which" PGE purchases electricity from the NewSun QFs, *id.*, because federal law preempts any ongoing *regulation* over those terms and conditions now that the NewSun QFs have executed their PPAs. If the Commission has authority, it must be interpretive authority conferred by a state statute.

Second, the mini-PURPA statute does not provide authority to interpret the meaning of executed PURPA contacts. The statutory provision that comes closest to doing so merely states "[t]he terms and conditions for the purchase of energy or energy and capacity from a qualifying facility shall . . . [b]e established *by rule* by the commission if the purchase is by a public utility." ORS 758.535(2)(a) (emphasis added). The Commission already exercised the authority granted by ORS 758.535(2)(a) by requiring PGE to sign the standard PPAs at issue. This dispute will be resolved by interpreting those binding and enforceable contracts, over which the mini-PURPA

statute provides no ongoing jurisdiction.

The mini-PURPA statute merely reflects the Oregon legislature's intention that the Commission would be the Oregon agency that will implement FERC's mandatory purchase rules under Section 210 of PURPA. *See* 16 USC § 824a-3(f). It confers no jurisdiction beyond that already conferred by PURPA and Subpart C of FERC's regulations, which the Commission must implement. *Id.* But nothing in PURPA or Subpart C of the FERC's regulations grants this Commission ongoing jurisdiction to adjudicate the meaning of contracts entered into under 18 CFR § 292.304(d)(2)(ii), like those at issue here. To the contrary, if adopted by this Commission, PGE's argument that the "Standard PPA" is not actually a contract, governed by contract law, would mean that this Commission has failed implement PURPA's requirement in 18 CFR § 292.304(d)(2)(ii) that the Commission offer long-term *contracts* to QFs – not, as PGE asserts, some sort of non-contract that is governed by ongoing regulation under statutes and administrative rules. It is not this Commission's job, or within its jurisdiction, to retroactively correct every intentional or unintentional ambiguity that PGE inserted in its Standard PPAs through the guise of statutory interpretation. As required by federal law, the NewSun PPAs are governed by contract law.

PGE repeatedly argues that this dispute regards interpretation of statutes, and thus contract interpretation principles do not apply, primarily relying upon an out-of-context quote from *Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 734 P2d 1366 (1987). *See, e.g., PGE's Response to Motion to Dismiss* at 2 (arguing a PURPA PPA is not governed by common law contracts but is "created by statutes, regulations, and administrative rules" (quoting *Snow Mountain Pine*, 84 Or App at 598)). This is a persistent theme in PGE's response. But PGE identifies no statutory provision in Oregon's mini-PURPA statute or anywhere else that controls

this dispute, and it misreads *Snow Mountain Pine* as a holding that contract law does not govern executed PURPA contracts. The *Snow Mountain Pine* court did not address the *interpretation* of an executed PURPA contract. Instead, it addressed a utility's obligation to *enter into* a long-term contract with a QF. *Snow Mountain Pine*, 84 Or App at 598.

In July, 1983, Snow Mountain Pine Company, a QF, presented CP National Corporation, a regulated electric utility, with a proposed contract in which "Snow Mountain agreed to deliver power to CP over a period of years at rates based on" CP's avoided cost calculated as of August, 1982. *Id.* at 597. When CP responded that it would agree only if the Commissioner (the predecessor to the OPUC) "would permit CP to pass the rate on to its customers," negotiations fell through. *Id.* Snow Mountain then sought an order from the Commissioner compelling CP to purchase power from Snow Mountain. *Id.* at 593. "The commissioner ordered CP to purchase power, approved a contract and set the purchase rate at CP's 'avoided cost' on file with the commissioner at the time of the publication of his order, September, 1984." *Id.*

The matter then went to the circuit court, which "affirmed the commissioner's order requiring CP to purchase power from Snow Mountain but held that the Commissioner had used the wrong 'avoided cost,'" and therefore "remanded for the preparation of a contract reflecting a rate based on the 'avoided cost' schedule on file in July, 1983," when Snow Mountain originally presented the contract to CP. *Id.*

On appeal, CP argued that the circuit court erred in holding that CP's July, 1983, avoided cost rate should be the contractual rate that CP was obligated to pay Snow Mountain. CP contended that "an obligation is not incurred by a qualifying facility's unilateral presentation of a contract, the terms of which have not been agreed upon." *Id.* at 598.

In response to CP's contention, the Oregon Court of Appeals stated, in the passage quoted by PGE here, that "CP's obligation [to purchase power from a QF] is not governed by common law concepts of contract law; it is created by statutes, regulations and administrative rules." *Id.* In other words, under PURPA, a contract or otherwise legally enforceable obligation *may be formed by operation of law* when the QF commits to sell even if the utility refuses to execute a contract.

The *Snow Mountain* court never held or even suggested that executed PURPA contracts remain subject to "state administrative law." The decision expressly addressed only the *creation* of a contractual obligation, or in the terms of the regulations a "legally enforceable obligation," and the specific date "when CP became obligated to purchase power," which was important for purposes of calculating the avoided costs as of that date. *Id.* at 599-600. Moreover, PGE ignores the *Oregon Trail* case, which as discussed previously applied standard common law contract interpretation principles to the interpretation of an *executed* PURPA contract. 168 Or App at 473-84.

In fact, the plain terms of the Standard PPAs at issue undercut PGE's argument that the contracts are some type of utility tariff subject to ongoing statutory rules. Section 15 of the NewSun PPAs states that the agreements live on under their terms even if PURPA is repealed, and that the agreements can be amended only if the terms are found to violate a law. The PPAs also contain an integration clause in Section 19 that does not integrate statutory or regulatory provisions to be interpreted in the future by the Commission. These are terms commonly found in binding contracts that are interpreted by applying contract law, not ongoing regulatory oversight.

In summary, PGE has not demonstrated that Oregon's mini-PURPA statute confers jurisdiction over this contractual dispute.

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

PGE relies heavily on *Portland General Elec. Co. v. Pacific Northwest Solar, LLC*, OPUC Docket No. UM 1894, Order No. 18-025 (Jan. 25, 2018), but fails to acknowledge the Commission expressly stated that opinion does not apply in all cases. *See PGE's Response to Motion to Dismiss* at 3-6. As the NewSun QFs pointed out, prior to the *Pacific Northwest Solar* decision, the Commission had a longstanding policy of not intervening in contractual disputes between QFs and utilities, at least where there was no need for an interpretation of a Commission-administered rule or statute. *See NewSun QFs' Motion to Dismiss* at 27-32. Now PGE seeks to drastically expand the limited jurisdictional holding of the *Pacific Northwest Solar* decision to apply to any contractual dispute between a QF and PGE arising from a Standard PPA. But the Commission expressly stated in *Pacific Northwest Solar*, "[W]e do not intend to suggest that the Commission necessarily has primary jurisdiction over every issue involved in standard power purchase agreements." *Pacific Northwest Solar*, Order No. 18-025 at 7 n.15. PGE fails to address this limiting language.

The *Pacific Northwest Solar* decision is distinguishable for the reasons explained in the motion to dismiss, especially that resolution of this dispute does not turn on the meaning of prior Commission orders as was the case in *Pacific Northwest Solar*. *See NewSun QFs' Motion to Dismiss* at 29-31. PGE cannot identify a single order that compels the result PGE seeks. Instead, PGE intends to impute contractual meaning from a series of orders, compliance filings, and contract forms other than those executed by the NewSun QFs. *See PGE's Response to Motion to Dismiss* at 5. It is one thing to impute to a QF signing the Standard

PPA the knowledge of a specific order governing one specific term in the agreement, but it is quite another, and entirely unreasonable, to impose upon the QF the unspoken intent behind a series of orders, compliance filings, and contract forms other than those it signed.

By contrast, in *Pacific Northwest Solar,* PGE identified a specific order that controlled the matter, *Re Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities,* OPUC Docket No. UM 1129, Order No. 06-538 at 37-39 (Sept. 20, 2006). Here, PGE cites no statute, rule or order that compels the result it seeks. The Commission should not assert jurisdiction over this dispute based on PGE's assertion of unspoken intent behind a *series* of orders and compliance filings made over more than a decade ago.

PGE's reliance on *PaTu Wind Farm LLC v. Portland General Elec. Co.*, OPUC Docket No. UM 1566, Order No. 14-287 (April 13, 2014) is also misplaced for the same reasons, as well as other reasons explained in the NewSun QFs' motion to dismiss, which need not be repeated here.

Finally, the NewSun QFs are not bound by any jurisdictional rulings by the Commission in any other proceeding and reserve the right to challenge any such rulings to the extent inconsistent with the arguments in the motion to dismiss and this reply. The Commission should not attempt to expand any prior rulings to apply to the facts of this case.

4. The Primary Jurisdiction Doctrine Is Inapplicable

As noted above, PGE agrees that the primary jurisdiction doctrine is a doctrine that must be invoke by a court, not the Commission. That is because the doctrine of primary jurisdiction is not a separate, extra-statutory, basis for the Commission to itself expand its own jurisdiction. Thus, the rest of PGE's incorrect assertions about primary jurisdiction, and the factors that courts weigh in applying the doctrine, are irrelevant here. PGE raised the same argument in the federal

court proceeding, and the federal court will consider and weigh those factors in determining whether to defer to this Commission. There is no reason for the Commission even to consider the issue.

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

PGE argues that this Commission's assertion of jurisdiction would not impair the right to a jury trial. According to PGE, the federal court "is more than competent to provide a trial by jury as it sees fit." *PGE's Response to Motion to Dismiss* at 19. PGE's assertion is perplexing, given that PGE asks the Commission take jurisdiction from the federal court to issue a preclusive final order before the federal court can reach the merits. PGE further asserts that "[w]hether Defendants are entitled to a jury trial is a question that the courts – not the Commission – will decide." *Id.* The problem of course is that PGE seeks to preemptively keep the courts from ever reaching the question, thus depriving the NewSun QFs of their constitutional right to a jury trial.

PGE goes on to claim that the United States Supreme Court has held that juryless administrative decisions are accorded issue preclusion in a later court proceeding without offending the jury trial right. *Id.* (citing *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S Ct 1293, 1304 (2015)). This assertion only confirms the problem, which is that PGE asks this Commission to undermine the NewSun QFs' access to the federal court and its right to a jury trial. Additionally, where the NewSun QFs have not consented to the Commission's jurisdiction, the *B&B Hardware* decision is inapplicable. *See Wellness Int'l Network, Ltd. v. Sharif,* 135 S Ct 1932, 1944 (2015) (holding that allowing federal administrative agencies "to decide claims submitted to them *by consent* does not offend the separation of powers so long as Article III courts retain supervisory authority over the process" (emphasis added)). Unlike the parties in *B&B Hardware*, the NewSun QFs have not voluntarily consented to the Commission's

adjudication of this dispute or waived any of their rights by doing so.

PGE's assertion that such waiver occurred through section 17 of the NewSun PPAs is mistaken. That section of the PPA states:

> This Agreement is subject to the jurisdiction of those governmental agencies having control over either Party or this Agreement. Seller shall at all times maintain in effect all local, state and federal licenses, permits and other approvals as then may be required by law for the construction, operation and maintenance of the Facility, and shall provide upon request copies of the same to PGE.

There is no waiver of a jury trial in this section under its plain terms.

Although the plain terms control the issue, the Commission's order requiring inclusion of this provision in all Oregon PURPA PPAs further undermines PGE's argument. The Commission explained that this section is merely is intended to "to insure that prior to the date of commercial operation, a qualifying facility can demonstrate that it has complied with all applicable local, state and federal statutes, rules and regulations governing its operations." *In the Matter of the Adoption of a Rule Relating to Approval of Utility Purchases from Qualifying Facilities*, OPUC Docket No. AR 114, Order No. 85-099, at 1 (Feb. 12, 1985). Further, the provision "states the contract is subject to the jurisdiction of all governmental agencies and courts having control over the parties to the proceeding." *Id.* at 2. The Commissioner stated he included "this language with the understanding that if a governmental agency or a court orders the QF to halt generation, the utility is no longer obligated to purchase power under the contract." *Id.* The substance of the applicable administrative rule has remained unchanged since 1985. *See* OAR 860-029-0020(2)(a).

There is no reference in Section 17 of the PPAs, the relevant administrative rule, or the order promulgating it that purports to expand the Commission's jurisdiction to the interpretation

of contracts, let alone that purports to waive jury trials for Oregon QFs. Therefore, PGE's reliance on Section 17 as a waiver of the right to a jury trial is meritless.

In conclusion, the Commission should dismiss PGE's Request for Dispute Resolution for the additional reason that involuntary adjudication of contractual disputes before the Commission impairs the right to a jury trial.

CONCLUSION

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

DATED this 16th day of March, 2018.

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