BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1894

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. PACIFIC NORTHWEST SOLAR, LLC, Defendant.	PACIFIC NORTHWEST SOLAR'S APPLICATION FOR RECONSIDERATION AND REHEARING

I. INTRODUCTION

Pursuant to OAR 860-001-0720, Pacific Northwest Solar, LLC ("PNW Solar") files this application for rehearing and/or reconsideration of the Oregon Public Utility Commission's ("Commission's") final Order No. 18-284 in this case granting summary judgment in favor of Portland General Electric Company ("PGE") and denying PNW Solar's Cross-Motion for Summary Judgment.

PNW Solar first respectfully requests that the Commission rehear, reconsider and/or clarify a few points in Order No. 18-284 so that PNW Solar can understand the practical effect of its decision and make informed business decisions. PNW Solar understands Order No. 18-284 to stand for the simple principle that PNW Solar is not entitled to change the nameplate capacity of its facilities prior to commercial operation and maintain the existing power purchase agreement's ("PPA's") contract price; however, what is not clear is:

- What rate applies if PNW Solar moves forward with its plans to construct the Butler Solar at 10 MW (rather than 4 MW) nameplate capacity or Starlight and

Stringtown Solar facilities at lower capacities. First, the Commission must decide whether these facilities will be paid the avoided cost rates in effect at the time that they provided notice (and when they could have entered into new PPAs), or if they will be required to negotiate new PPAs at current rates (and be penalized for attempting to litigate and gain clarity regarding the terms of their contracts). Second, the Commission must decide whether Butler Solar may keep its existing 4 MW PPA and establish a LEO with new prices for the additional 6 MW of nameplate capacity, or if Butler Solar needs to enter into an entirely new PPA for all 10 MW.

- Whether the limitations listed in the order operate to further limit the plain language of the PPA for when increases are allowed, or whether that is dicta; and
- What qualifies as a non-material change, material change, or an upgrade?

The fundamental dispute between PGE and PNW Solar is not whether PNW Solar can change the nameplate capacities designated in its PPAs, but under what circumstances can PNW Solar make changes and still be entitled to the avoided cost rates listed in the PPAs. The core of the dispute was what the relevant rates would be under the stipulated and agreed upon facts. The Commission has not completely answered that question and leaves PNW Solar in the untenable position of not knowing what the practical consequences will be if takes certain actions. PNW Solar and PGE may be before the Commission again soon litigating the exact same issues simply because the Commission's order has not clearly answered all the questions presented. PNW Solar prefers that the Commission at least issue a clearly articulated decision, even if it is contrary to PNW Solar's position.

When deciding the issues before it, the Commission should be mindful of the procedural history. Over the strong objection of PNW Solar, the Commission has claimed jurisdiction over PNW Solar and its individual projects. Not only has the Commission ruled against PNW Solar, but it has not resolved all the disputed issues or provided clear and understandable answers to the questions presented. This is not a generic policy docket in which the Commission has the freedom to ignore the issues the parties raised or answer questions in vague or non-dispositive language. This is a case that directly impacts the litigants and has significant economic consequences upon the parties, which requires the Commission to resolve all disputed issues.

Second, PNW Solar requests that the Commission rehear and/or reconsider this case.

II. DISCUSSION

A. Legal Standard

The Commission may grant rehearing or reconsideration if there is new evidence, a change in law or policy, an error of law or fact, or good cause for further examination of an issue essential to the decision.[1] Clarification of a Commission order is appropriate where the scope and effect of the order is unclear.[2] As detailed further below, rehearing and/or reconsideration is requested because the Commission made an error of law essential to the decision, and good cause for further examination is necessary because the order is incomplete and requires some clarification to fully understand and implement.

---

1 OAR 860-001-0720(3).

2 See Re Investigation into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Order No. 16-337 at 6 (Sept. 8, 2017).

B. What Avoided Cost Prices Apply?

The Commission should rehear, reconsider and/or clarify its Order No. 18-284 to specify the avoided cost rates that PNW Solar will be paid if it changes the size of its facilities. Order No. 18-284 found that PNW Solar may not increase or decrease the nameplate capacities of its facilities prior to the commencement of commercial operation and still receive the contract price; however, the Commission has not resolved the issue regarding what price applies if PNW Solar still wishes to proceed with the nameplate capacity changes before commencing construction. First, the Commission should clarify whether the new avoided cost prices will be the ones in effect at the time the facility provided its notice of intent to construct a facility at a different nameplate capacity, the currently effective prices, or something else. Second, for Butler Solar, the Commission should clarify whether Butler Solar: 1) may keep its original 4 MW PPA at the contract price and only the additional 6 MW paid a new price; or 2) if the entire 10 MW will be subject to a new and lower price. The parties asked the Commission to decide these issues in their respective motions for summary judgment.[3]

Butler Solar provided notice to PGE no later than May 2017 and Starlight and Stringtown provided notice no later than January and February 2017 respectively.[4] They all could have entered into a new PPA at that time at the avoided cost prices then in effect, if they had been aware that the Commission would rule in PGE's favor. PNW Solar should not be penalized for

---

[3] PNW Solar's Cross-Motion for Summary Judgment at 22 ("[i]f the Commission finds that these projects are not entitled to the contract price, then it should receive the avoided cost prices in effect on the day it notified PGE of the change"); PGE's Motion for Summary Judgment at 14 ("the Commission should require PNW Solar to . . . terminate its existing PPAs and begin the process of executing new PPAs—with updated nameplate capacities—at the avoided cost prices applicable when a new LEO is established").

[4] Stipulated Facts at ¶¶ 6 & 7; Order No. 18-284 at 3.

attempting to obtain judicial resolution of the appropriate rates that would apply if PNW Solar changed its facilities' nameplate capacities.

PGE argues that the avoided cost prices that each of the qualifying facilities ("QFs") are entitled to are the ones currently in effect because PNW Solar did not sign new PPAs at the time PNW Solar provided notice. If the Commission adopts PGE's position, then a QF will be presented with Hobson's choice of: 1) seeking resolution of the disputed contract term with the hope that it will win its litigation and remain eligible for the contract prices in its PPA; or 2) abandoning its PPA, renegotiating a new PPA, and essentially giving up any realistic opportunity to obtain Commission resolution of the disputed issue.

PNW Solar's position is that established new LEOs and eligibility for the then-current prices at least by the time it formally notified PGE of its requested changes and therefore is entitled to the avoided cost prices in effect at that time. To establish a LEO, the Commission generally requires that a QF sign an executable PPA, but that a LEO may be established under certain circumstances.[5] Here, a number of things obstructed progress towards an executable PPA including PGE's disputed contract language, PGE's assertion that the existing PPA must be terminated prior to entering a new PPA, and PGE filing this suit against PNW Solar.

PNW Solar notified PGE of its intent to increase the capacity of Butler Solar on May 8, 2017, and on June 23, 2017 further notified PGE of the change to Butler Solar and the decreases to Starlight and Stringtown.[6] If the parties' dispute had not obstructed and delayed progress towards a new executable PPA, new ones could have been entered at the time these notices were

---

5 Re Investigation into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 27 (May 13, 2016).

6 Stipulated Facts at ¶¶ 7 & 10.

sent on May 8 and June 23, 2017 and therefore PNW Solar is entitled to new PPAs with avoided cost prices in effect at that time.

PNW Solar could have obtained new executable PPAs on Starlight and Stringtown even before the time those notices were sent and therefore could have established a new LEO even earlier. This is because PNW Solar informed PGE in January and February of 2017 that it would be decreasing the nameplate capacities of Starlight and Stringtown.[7] Based on its reading of PPA, PNW Solar understood that decreases were allowed. However, if PNW Solar had known that it would be required to terminated and enter new PPAs at the new lower capacities, then it could have requested new PPAs in January and February or earlier and have those executed long before May and June 2017.

Further, the Commission should not find that PNW Solar must now start afresh with PGE's contracting process to establish new LEOs. Generally, the Commission tries to place parties in the position they would have been in if they did not need the Commission's assistance in resolving their dispute.[8] PGE's avoided cost rates have been lowered multiple times since this action commenced.[9] If this dispute was resolved without the need for Commission assistance, then PNW Solar would have been able to enter into new PPAs long ago before all or many of these avoided cost price decreases. If the Commission clarifies that PNW Solar must start afresh with PGE's contracting process, then the Commission will encourage PGE to file more suits like

---

7 Order No. 18-284 at 3.

8 See Kootenai Electric Cooperative, Inc. v. Idaho Power Co., Docket No. UM 1572, Order No. 14-027 (Jan. 27, 2014) (granting a QF's claim for the prices in effect on the date the complaint was filed over the utility's assertion that it should be the prices in effect on the date of the final order).

9 Stipulated Facts at ¶ 12.

this one. This will result in even more litigation that will further delay PPA negotiation and allow PGE to file multiple avoided cost decreases in the meantime. Therefore, as articulated in PNW Solar's motion for summary judgment, the Commission should find that these projects are entitled to the prices at the time the notices were sent and at the standard contract terms and avoided cost prices in effect at that time.

The Commission should also rehear, reconsider and/or clarify its Order No. 18-284 to specify that PNW Solar may keep its existing 4 MW Butler Solar PPA and that a new LEO for the additional 6 MWs for Butler Solar was established at the standard terms and avoided cost prices in effect on the date PNW Solar notified PGE of the changed capacities.

PNW Solar already established a LEO to deliver power under its 4 MW Butler Solar PPA before it provided notice of increasing, and PGE should not require PNW Solar to terminate that project in order to also deliver an additional 6 MWs of power. As detailed in is motion for summary judgment, PNW Solar has the right to provide energy or capacity over a specified term at the avoided costs calculated at the time the obligation is incurred.[10] Therefore, it is inappropriate to require that its existing 4 MW PPA be terminated and a new LEO established at different avoided cost prices calculated at a time different from when that initial 4 MW obligation was incurred. Additionally, as articulated in PNW Solar's motion for summary judgment, the PPA expressly provides that increases above 10 MW receive new rates for only the portion that is above that 10 MW threshold.[11] As such, the Commission should reconsider and/or clarify that its Order No. 18-284 does not grant PGE's request to require that PNW Solar

---

[10] PNW Solar's Cross-Motion for Summary Judgment at 21 (citing 18 CFR 292.304(d)).

[11] See PNW Solar's Cross-Motion for Summary Judgment at 23.

terminate its existing PPAs, but that PNW Solar may maintain its existing PPAs and establish a new LEO for only the additional capacity.

C. What Limitations Apply to Increases?

The Commission should rehear, reconsider and/or clarify whether the limitations articulated in Order No. 18-284 to increases to nameplate capacity should now be read to further limit the express terms of the PPA or whether that language is merely dicta. The Commission stated in Order No. 18-284 that allowing a QF to increase output was limited to situation where the following three elements were present "(1) the QF was already operational, i.e., producing and transmitting power under the existing contract; (2) all changes were upgrades to existing operations; and (3) any such upgrades would increase the nameplate capacity or delivered power or both."[12] This language is not in the PPA.

The Commission first appeared to base its conclusion on the plain language of the PPA articulating that

> *the clear intention of the standard PPA, as a legal document as reflected in its text and context*, is that PNW may neither purposefully increase the nameplate capacity of its Butler facility, nor decrease the nameplate capacities of the Starlight and Stringtown facilities prior to the commencement of commercial operation unilaterally, if such changes would result in breaching the warranties of Section 3.1.8.[13]

However, the Commission then went on to "look beyond the terms and conditions of the standard PPA" even while noting that doing so "is not necessary," concluding that the

---

12 Order No. 18-284 at 8.

13 Id. at 7 (emphasis added).

Commission's Order No. 06-538 allowed increases only when the above three limitations were present.[14]

As such, the Commission's Order No. 18-284 in this case is ambiguous as to whether those limitations should be read to further limit the PPA's language or whether that language was merely dicta. It appears that the Commission recognizes that Section 4.3 was written broader than the Commission's interpretation of the policy rationale for allowing changes in the nameplate capacity of the project. The Commission suggests that changes outside the three distinct and limited parameters in the Commission's interpretation of the policy intent of the UM 1129 order are allowed and that the broader "existing contract provisions then in effect would otherwise control."[15] Essentially, it appears that the Commission's order may have acknowledged that PGE's contract was written more broadly than the three policy justifications, and the more broadly drafted Section 4.3 would govern because it is the currently existing contract language.

The Commission should clarify whether it is adding those limitations into the PPA. Specifically, the Commission should clarify if it is adding three limitations to the ability to increase nameplate capacity that are not included in the language of the PPA but the Commission concluded were a basis for adopting the policy allowing increases in certain circumstances. Such a distinction will provide much needed clarity for both QFs and PGE, clearly explain what PNW Solar's legal rights are so that it can make reasoned business decisions, and ensure that there is a well-developed and clear record in the event of any appeal. In terms of ongoing

---

14 Id.

15 Id. at 8.

PURPA contract enforcement, this issue is critically important because the QF community needs to know if they can rely upon the language included PPAs, or if they need to review the Commission's precedent and add new words into contracts.

Specifically, PNW asks the Commission to clarify if the Commission essentially reads Section 4.3 as follows:

> Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built. Seller shall not increase the Nameplate Capacity Rating above that specified in Exhibit A or increase the ability of the Facility to deliver Net Output in quantities in excess of the Net Dependable Capacity, or the Maximum Net Output as described in Section 3.1.11 above, **except (1) when the Seller is already operational, i.e., producing and transmitting power under the Agreement; (2) all changes were upgrades to existing operations; (3) any such upgrades would increase the nameplate capacity or delivered power or both;** ~~through any means including, but not limited to, replacement, modification, or addition of existing equipment~~, ~~except~~ **and (4)** with prior written notice to PGE. In the event Seller increases the Nameplate Capacity Rating of the Facility to no more than 10,000 kW pursuant to this section, PGE shall pay the Contract Price for the additional delivered Net Output. In the event Seller increases the Nameplate Capacity Rating to greater than 10,000 kW, then Seller shall be required to enter into a new power purchase agreement for all delivered Net Output proportionally related to the increase of Nameplate Capacity above 10,000 kW.

D. What Qualifies as Non-Material, Material, or an Upgrade?

The Commission should rehear, reconsider and/or clarify what qualifies as a "non-material" change, a "material" change or an "upgrade." Order No. 18-284 states that "[i]t is not unexpected that, during the construction phase, there may be non-material changes to the facility from its original plans" and notes that increases to nameplate capacity were contemplated to only cover situation where the QF was already operational, all changes were "upgrades" to existing operations; and any such upgrades would increase the nameplate capacity or delivered power or both. In order to fully resolve the parties dispute, it then follows that direction is needed on what

qualifies as an "upgrade."[16] The parties asked the Commission to decide this issue in their respective motions for summary judgment.[17] Presumably the Commission's order in this case deems the changes requested by PNW Solar to be "material," but the Commission offers no standard by which to distinguish a material or non-material change or to determine what qualifies as a permissible "upgrade" to an operational facility.

Under the Commission's order, PNW Solar could initially construct the Butler Solar project under its current PPA with a nameplate capacity of 4 MW but at a later point in time upgrading or replacing the panels or inverters. The upgraded or replaced facilities could result in an increase to the nameplate capacity and delivered power. Would such an upgrade to the inverters qualify as a permissible "upgrade" to entitle PNW Solar to the contract price for its entire net output? Because the Commission limited the permissible increases to only post-operational "upgrades" it is necessary to rehear, reconsider and/or clarify what qualifies as an "upgrade" so that the parties do not have to re-litigate this issue at some future date after PNW Solar constructs its facility then notifies PGE of its increase and PGE rejects that request.

E. The Commission Should Rehear and/or Reconsider This Case

The Commission should rehear and/or reconsider this case in its entirety because it erroneously interpreted a provision of law and a correct interpretation compels a different action, it acted outside the range of discretion delegated to the Commission, it acted inconsistent with an

---

16 Id. at 7-8.

17 PNW Solar's Cross-Motion for Summary Judgment at 23 ("if the Commission agrees with PGE, then it should provide clarity regarding what a material change is"); PGE's Motion for Summary Judgment at 1 ("The central question in this case is whether PGE's Standard [PPA] permits [PNW Solar] to *materially* alter the nameplate capacities of its [QFs] prior to construction") (emphasis added).

agency rule or officially stated position, it acted in violation of a constitutional or statutory provision, and its decision is not supported by substantial evidence in the record.

First, the Commission asserted jurisdiction over PNW Solar in violation of its statutory grant of authority and PNW Solar's constitutional right to a jury trial.

Second, the Commission asserted jurisdiction over the subject matter of this contract dispute, which is a declaratory ruling as to the meaning of a contract expressly reserved to the courts under ORS 28.030 and expressly not within the Commission's statutory grant of authority to issue declaratory rulings only on any rule or statute enforceable by the Commission under ORS 756.450.

Third, the Commission erroneously interpreted the plain contract language at issue in this case to bar the pre-construction nameplate capacity changes requested by PNW Solar, even though the language does not plainly state so.

Fourth, the Commission impermissibly relied upon external evidence in construing the plain language of the contract.

Fifth, the Commission's decision is not supported by substantial evidence in the record because the basis upon which the Commission substantially relied upon in its Order (section 3.1.8 regarding "Net Dependable Capacity") was not briefed by the parties, only asked about in oral argument, and the parties were not given the opportunity to submit factual evidence regarding how and why the particular value was inserted into that provision.

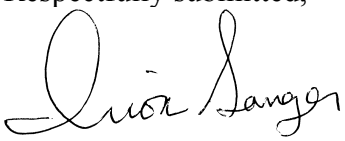
As such, the Commission should rehear and/or reconsider this case to conclude that it does not have jurisdiction over this matter, or alternately that it does have jurisdiction but that the plain meaning of the PPAs allow PNW Solar's requested changes to nameplate capacity.

III. CONCLUSION

For the reasons stated above, the Commission should reconsider, clarify and/or rehear Order No. 18-284.

Dated this 13th day of August 2018.

Respectfully submitted,



Irion A. Sanger
Marie P. Barlow
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: 503-756-7533
Fax: 503-334-2235
irion@sanger-law.com

Of Attorneys for Pacific Northwest Solar, LLC