

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1894

Portland General Electric Company,
Complainant,

v.

Pacific Northwest Solar, LLC,
Defendant.

PACIFIC NORTHWEST SOLAR,
LLC'S MOTION TO DISMISS

I. MOTION TO DISMISS

Pursuant to ORCP Rule 21 and OAR 860-001-0390 Defendant Pacific Northwest Solar, LLC ("PNW Solar") hereby moves the Oregon Public Utility Commission ("Commission") for an Order as follows:

1. Dismissing Portland General Electric Company's ("PGE") Complaint and Request for Dispute Resolution ("Complaint") for lack of personal jurisdiction;
2. In the alternative, and without waiving Motion 1, dismissing PGE's Complaint and Request for Dispute Resolution for insufficiency of process;
3. In the alternative, and without waiving Motion 1 or 2, dismissing PGE's Complaint and Request for Dispute Resolution for failure to state ultimate facts sufficient to constitute a claim;
4. In the interim and while considering this Motion to Dismiss, declaring that, if the Complaint is not dismissed, PNW Solar's deadline to file an answer is deferred either: (a) until 10 days after PNW Solar receives notice that its motion to dismiss has been denied;

or (b) until 20 days after service of PGE's amended complaint. PNW Solar has conferred with PGE regarding the postponement of PNW Solar's answer, assuming one is required. PGE would like one week to review the Motion to Dismiss, and decide whether it will oppose PNW Solar's specific proposed timelines for filing an answer. If PGE opposes PNW Solar's request, then PGE and PNW Solar will confer and propose a schedule to resolve PGE's objection, and a briefing schedule to address the Motion to Dismiss.

II. BACKGROUND

This dispute concerns a simple contract dispute regarding four power purchase agreements ("PPA") between PNW Solar and PGE. These existing PPAs were entered into between PGE and PNW Solar for the sale of electricity generated by PNW Solar's qualifying facilities under the Public Utility Regulatory Policies Act ("PURPA"). Specifically, the parties have a contractual dispute as to whether section 4.3 allows PNW Solar to increase or decrease the nameplate capacity of its facilities. The parties have been unable to reach an agreement on this issue.

Over the past few months, PNW Solar and PGE have disagreed over the meaning of the PPAs, and ultimately PGE threatened to terminate the contracts if PNW Solar exercised its rights to change the name plate capacity. On August 28, 2017, PNW Solar sent a demand letter to PGE requesting that PGE resolve the dispute, or PNW Solar would file a lawsuit in Oregon Circuit Court. On August 31, 2017, PGE moved expeditiously and filed its Complaint and Request for Dispute Resolution with the Commission. On September 6, 2017, PNW Solar filed a complaint requesting declaratory relief and breach of contract claims, among others, with the Multnomah County Circuit Court, case number 17CV38020.

III. MOTION TO DISMISS

A. The Complaint and Request for Dispute Resolution Should be Dismissed for Lack of Personal Jurisdiction over Defendant

The Commission does not have jurisdiction over a complaint filed against a private, non-regulated company like PNW Solar regarding a contractual dispute for the sale of electricity.

The Commission generally has personal jurisdiction over public utilities and defendants in complaints brought by the utilities on issues regarding its rates or service. PNW Solar is neither a utility, nor does this dispute concern rates or service; therefore, the Commission does not have personal jurisdiction over PNW Solar.

The Commission is not an agency with broad and general jurisdiction to hear all manner of disputes, but has limited jurisdiction based on the specific provisions of its enabling statutes. First, the Commission has jurisdiction to hear complaints against any person whose business or activities are regulated by one or more of the statutes under which the Commission has jurisdiction to enforce.¹ Further, the Commission may also hear complaints brought by public utilities as to any matter affecting its own rates or service.² These circumstances do not apply here.

¹ ORS 756.500(1) authorizes the Commission to hear complaints, but specifically provides that: “Any person may file a complaint before the Public Utility Commission, or the commission may, on the commission’s own initiative, file such complaint. The complaint shall be 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)(emphasis added). As PNW Solar’s business or activities are not regulated by the Commission, this subsection does not apply. While it is unclear, PGE does not appear to argue that PNW Solar is regulated by the Commission.

² ORS 756.500(5) authorizes broader legal authority to hear complaints, and provides that: “Notwithstanding subsection (1) of this section, any public utility or telecommunications utility may make complaint as to any matter affecting its own rates or service with like effect as though made by any other person, by filing an application, petition or complaint with the commission.” ORS 756.500(5)(emphasis added). While not clear because PGE only generically cites ORS 756.500, PNW Solar assumes that PGE argues that the

PGE raises three primary arguments why it believes that the Commission has jurisdiction over PNW Solar. First, PGE asserts that the contractual dispute between PGE and PNW Solar is within the Commission’s primary jurisdiction because it “concerns an important issue of PURPA law and policy.”³ Next, PGE argues that the Commission has jurisdiction because the “circuit court lacks jurisdiction to interpret a contract that affects utility rates, because setting and determining the reasonableness of rates is a matter within the Commission’s exclusive jurisdiction.”⁴ Thus, PGE asserts that an executed contract between a utility and qualifying facility affects utility rates, but cites to no legal authority to support that claim.⁵ Finally, PGE claims that the Commission has general jurisdiction over executed contracts, which covers the PPAs between PGE and PNW Solar.⁶

PNW Solar can come under the Commission’s personal jurisdiction under ORS 756.500(5), if the specific contract provision at issue (whether or not PNW Solar can increase or decrease its generation nameplate capacity) affects PGE’s “rates or services.” PGE argues that the Commission has jurisdiction because the key issues regarding the PPAs are based on state and federal PURPA law, rules and policies.⁷ PGE’s argument that state or federal PURPA law, rules and policies govern rather than common law contract provisions is irrelevant, if the Commission does not have jurisdiction over PNW Solar. In other words, regardless of how little

Commission has jurisdiction under a theory that the executed contract between PGE and PNW Solar affects PGE’s own rates or services.

³ Complaint at 9.

⁴ Id. (citing Wah Change v. PacifiCorp, Docket No. UM 1002, Order No. 09-343 at 11-18 (Sept. 2, 2009).

⁵ Id.

⁶ Id.

⁷ PNW Solar does not agree with PGE’s premise that common law contract rules of interpretation do not govern an executed PURPA contract. The Commission need not address what rules of contract interpretation will govern any breach of contract dispute between PNW Solar and PGE to decide this Motion to Dismiss.

common law principles may apply or how much PURPA applies, if the PPA does not address PGE's rates or services, then the Commission does not have personal jurisdiction over the defendant in a utility complaint against a person whose businesses or activities are not regulated by the Commission.

PGE next argues that a circuit court lacks jurisdiction to interpret a contract that affects rates because the determination of ratemaking is within the Commission's exclusive jurisdiction.⁸ However, the Commission order PGE cites to, Order No. 09-343, involved a contract dispute brought by a utility customer against a public utility.⁹ In that case, the

⁸ While this Motion to Dismiss is not addressing the issue of subject matter jurisdiction, PNW Solar disagrees with PGE's argument (without citation to a PURPA case) that the Commission has exclusive jurisdiction over disputes between qualifying facilities and utilities regarding executed contracts, as Oregon courts have adjudicated these types of matters for decades. PacifiCorp v. Lakeview Power Co., 131 Or. App. 301 (1993) (circuit court rendered a verdict in favor of PacifiCorp for on breach of contract and declaratory judgment claims regarding its power purchase agreement with a qualifying facility); Water Power Co. v. PacifiCorp, 99 Or. App. 125 (1989) (circuit court found that PacifiCorp was not liable for damages for alleged breach of contract with a qualifying facility); see also Oregon Trail Elec. Consumers Coop. v. Co-Gen Co., 168 Or. App. 466, 473-74 (2000) ("The threshold question for the parties and the court below was one of jurisdiction. Likewise, that is a threshold question for our review on appeal. The issue arises because of the contract's reference to the 'Public Utility Commissioner, or his successor.' That language immediately invites uncertainty as to whether a dispute over possible modification authority belongs in circuit court or in an administrative proceeding before the Public Utility Commission (PUC), which is the successor to the Commissioner. OTECC anticipates that concern on appeal, as it did below, and asserts circuit court jurisdiction for reasons that run to the merits of OTECC's position. That is, OTECC argues that the contract provides for modification, explains at some length why the parties are no longer subject to general regulatory oversight by the PUC, and contends, for several reasons, that authority to modify the contract necessarily is now vested in a circuit court.

The trial court, however, correctly identified a more straightforward ground for jurisdiction. It determined that, apart from whatever other remedy OTECC may be seeking, the action requires a declaration of the parties' rights under the contract, which is an issue that a circuit court has jurisdiction to decide. We agree. As we previously have held, the determination of parties' rights under a contract is a common-law issue that falls within a circuit court's general jurisdiction.") (emphasis added).

⁹ Order No. 09-343 at 1.

Commission had personal jurisdiction over the defendant utility under ORS 756.040 and analyzed the rate in the contract under its authority granted by ORS 757.230 to “authorize classifications or schedules of rates applicable to individual customers or groups of customers.”¹⁰

PGE cites no legal authority to support its claim that an executed contract with a qualifying facility affects rates, and PNW Solar is unaware of any such precedent. PGE argues that while the prices paid by PGE to PNW Solar “do not constitute rates, in and of themselves, they are recovered through the rates that utility customers pay.”¹¹ Thus, PGE argues that the rates or prices in the contracts between PNW Solar and PGE are not “rates” that would provide jurisdiction under ORS 756.500(5).

PGE’s theory appears to be that because a commodity that PGE is buying from a seller of goods will impact the rates that end use customers pay, then the Commission has jurisdiction. However, PGE cannot sue PNW Solar simply because PGE buys power from PNW Solar, and seeks to recover those costs in its rates. As the Commission has explained, it “does not have jurisdiction over each and every activity of a utility, its employees, or its agents” and “contract claims properly belong before a court of law.”¹² Under this approach, PGE could sue any company that sells PGE a product for which the costs will ultimately be included rates. This would radically expand the Commission’s jurisdiction as PGE includes the costs of thousands of different products in rates from toilet paper to copy paper and gasoline to natural gas.

¹⁰ Id.; ORS 757.230(1).

¹¹ Complaint at 9.

¹² Re K.S. v. Qwest Corp., Docket No. UCR 98, Order No. 08-112 at 2 (Jan. 31, 2008).

PGE also notes one other case where the Commission resolved a dispute over a standard PURPA contract.¹³ That complaint was brought by a qualifying facility against a public utility. As indicated above, the Commission has jurisdiction to hear complaints brought against utilities under ORS 756.500(1), but in this case the utility is bringing the complaint against a qualifying facility. The jurisdictional hook in the *PaTu Wind Farm* case has nothing to do with the requirement in ORS 756.500(5) that a utility can sue a person on a “matter affecting its own rates and services.”

In the end, PGE has cited no statute which gives the Commission personal jurisdiction over a qualifying facility that has not independently filed a complaint before the Commission against a utility. Accordingly, the Complaint and Request for Dispute Resolution should be dismissed for lack of personal jurisdiction.

B. The Complaint and Request for Dispute Resolution Should be Dismissed for Insufficient Process Because the Commission’s Rules Do Not Contemplate Such a Filing and It Does Not Clearly and Concisely State the Facts.

PGE’s “Complaint and Request for Dispute Resolution” is not a filing contemplated by the Commission’s rules. There is no statutory provision providing for Commission-led “Dispute Resolution.” The Commission also does not issue declaratory rulings on disputes over the interpretation of Commission orders or contracts. Finally, if the filing is meant to be simply a “Complaint,” then it is still insufficient because its form impairs PNW Solar’s substantial right to respond to the pleading. A defendant has a right to be served with a clear and concise statement of the facts in consecutively numbered paragraphs so that it can affirm or deny each claim. The

¹³ Complaint at 9 (citing *PaTu Wind Farm, LLC v. Portland General Electric Co.*, Docket No. UM 1566, Order No. 12-316 at 9 (Aug, 21, 2012) and Order No. 14-287 at 13 (Aug. 13, 2014).

form of the pleading without clearly identifying facts to admit or deny is insufficient and should be dismissed.

To state a claim for relief, PGE must allege ultimate facts constituting a claim for relief.¹⁴ Under ORCP 18(A), a “plain and concise” statement of the facts is required, and OAR 860-001-0400 requires a “clear and concise” statement of the authorization, action, or relief sought. Additionally, ORCP 16(B) requires that pleadings be formatted in consecutively numbered paragraphs and limited to a statement of a single set of circumstances, and referred to by number in all succeeding pleadings. In filing a response, the party shall “admit or deny the allegations upon which the adverse party relies.”¹⁵ Pleadings shall be liberally construed with a view of substantial justice between the parties and the errors or defects in pleadings that do not affect the substantial rights of the adverse party shall be disregarded.¹⁶ Further, the Commission only follows the ORCP in instances where those rules are not inconsistent with its own rules, and the Commission also liberally construes all rules in the interests of a just, speedy and inexpensive resolution.¹⁷

Here, the Complaint and Request for Dispute Resolution should be dismissed for insufficient process because the initiating document is inadequate. The document filed is titled “Complaint and Request for Dispute Resolution.” It is unclear what exactly is a “Request for Dispute Resolution.” The Commission’s rules do not contemplate such a filing. It sounds like

¹⁴ ORCP 18(A).

¹⁵ ORCP 19(A).

¹⁶ ORCP 12.

¹⁷ OAR 860-001-000.

what PGE seeks is a declaratory ruling under 756.450 over a contractual dispute or a dispute over a Commission order, which is not permitted.¹⁸

Further, if the document is meant to be simply a “Complaint,” then it still fails because it is not styled as a Complaint. Complaints are typically formatted with consecutively numbered paragraphs clearly and concisely stating each factual allegation. The “Complaint” in this matter is not.

While PNW Solar recognizes that pleadings should be liberally construed,¹⁹ PGE’s failure to clearly state its factual allegations substantially affects PNW Solar’s ability to respond appropriately and to admit or deny each factual allegation. When preparing a response to “admit or deny the allegations upon which the adverse party relies,” PNW Solar has a right to be informed of the factual allegations brought against it so that it can respond by admitting or denying each factual allegation. PGE’s failure to file a document contemplated by the Commission’s rules and appropriately list the factual allegations is insufficient process, and as a result, the “Complaint and Request for Dispute Resolution” should be dismissed.

C. The Complaint and Request for Dispute Resolution Should be Dismissed Because It Fails to Allege the Appropriate Statutory Basis or Other Authority as a Basis for Relief

PGE does not include appropriate references to the statutory provision(s) under which the filing is made. To survive a motion to dismiss, a complainant must allege ultimate facts constituting a claim for relief and the commission also requires appropriate references to the

¹⁸ Northwest Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition v. Portland General Electric Company, Docket UM 1805, Ruling (Jan. 19, 2017).

¹⁹ One reason the Commission’s pleading requirements should be liberally construed is that a fundamental role for the Commission is to hear complaints by residential customers, who may be pro se. PGE, however, has sufficient resources to draft a clear complaint that specifically and separately identifies the factual allegations supporting its complaint.

legal authority under which the filing is made. Specifically, for complaints brought before the Commission, a complainant must include appropriate references to the statutory provision or other authority under which the filing is made.²⁰ PGE here cites to legal authority but does not specifically identify which statutes apply or allege sufficient facts that would entitle it to relief under those statutes; therefore, PGE’s filing should be dismissed. PGE’s general statements that it brings the Complaint pursuant to ORS 756.500 is insufficient because PGE does not allege facts or legal authority sufficient to bring this claim within the Commission’s authority under that statute.

PGE asserts that it is entitled to relief under the PURPA “statutes, regulations and administrative rules” generally because the obligation to purchase power is governed by those rules and “not governed by common law concepts of contract law.”²¹ However, PGE does not cite to any specific PURPA statute, regulation, or rule under which the filing is made.

Further, the case PGE cites to, *Snow Mountain Pine Co.*, was regarding a complaint filed by a qualifying facility against an electric power distributor before a contract was executed.²² The parties in that case reached an impasse in their contract negotiations and the qualifying facility requested that the Commission order a contract.²³ The Commission ordered a contract, and the case was appealed to circuit court.²⁴ Therefore, in that case, the court was deciding what the contract terms should be in order to comply with PURPA.

²⁰ ORS 756.500; OAR 860-001-0400(2)(d)(a complaint must include “Appropriate references to the statutory provision or other authority under which the filing is made”).

²¹ Complaint at 9 (citing Snow Mountain Pine Co. v. Maudlin, 84 Or. App. 590, 598 (1987)).

²² Snow Mountain Pine Co., 84 Or. App. at 593.

²³ Id. at 597.

²⁴ Id. at 593.

This case can be distinguished from *Snow Mountain Pine Co.* in that the dispute is not over what terms should be in a contract but over a term in an already-executed contract. While it is true that the obligation to purchase power is governed by PURPA, PGE alleged no specific PURPA statute, regulation, or rule that would override the plain language of an already-executed PPA. The Oregon Court of Appeals explained that the requirement to enter into a contract and the specific price was governed by PURPA and not by common law contract law. In other words, the legal standard for determining whether a contract existed and what the price for power should be was based on PURPA and the relevant administrative rules.

The dispute between PNW Solar and PGE is not over whether PGE should enter into a contract or what the contract price should be, but a dispute over the meaning of an already-executed contract provision, which is something courts do all the time and is not governed by PURPA.²⁵ Thus, this is a matter of contract interpretation. Because PGE has neither included appropriate references to the statutory provision or other authority under which the filing is made, nor alleged ultimate facts constituting a claim for relief under that authority, its Complaint and Request for Dispute Resolution should be dismissed.²⁶

IV. REQUEST FOR MORE TIME TO FILE AN ANSWER

Pursuant to ORCP 15, PNW Solar requests that the Commission allow 10 days to file an answer if the above Motion to Dismiss is denied, or alternatively, if the Commission orders PGE to file an amended complaint, PNW Solar should receive 20 days after service of that amended

²⁵ See supra note 8.

²⁶ The Commission may not have subject matter jurisdiction over PGE's complaint, but PNW Solar is not raising that issue in this Motion to Dismiss, as it can be raised at any time in a contested case. Since PGE has not clearly articulated what the statutory basis is for the Complaint, PNW Solar cannot determine whether or not the Commission has subject matter jurisdiction.

complaint to file an answer. Under ORCP 15, if a motion is denied, the responsive pleading shall be filed within 10 days of the order dismissing that motion. Further, if an amended pleading is ordered, the responsive pleading shall be filed within the time remaining to respond to the original pleading or within 10 days of the service of the amended pleading (whichever is longer), unless ordered otherwise. Here, PNW Solar requests that the Commission allow for 20 days to respond to any amended pleading because the Complaint and Request for Dispute Resolution is so inadequate that an amended pleading will likely be significantly different from the original Complaint and Request for Dispute Resolution and require more than 10 days to respond to it.

V. CONCLUSION

The Commission should enter an order dismissing PGE's Complaint and Request for Dispute Resolution for lack of personal jurisdiction over a defendant because PGE has similarly not alleged a statutory provision granting the Commission personal jurisdiction or facts indicating how the defendant is subject to the jurisdiction of the Commission. In the alternative, the Commission should dismiss the "Complaint and Request for Dispute Resolution," for insufficient process because declaratory rulings are not permitted in disputes over Commission Orders or contracts, or because the filing is not sufficiently drafted with numbered paragraphs that would permit defendant to admit or deny each allegation. Also in the alternative, PGE's filing should be dismissed for failure to include reference to appropriate statutory provisions as required by the Commission's rules and failure to allege ultimate facts constituting a claim for relief under those statutes. Finally, PNW Solar's Answer to PGE's complaint should be stayed pending resolution of this Motion to Dismiss, and PNW Solar should be given additional time to file its answer if this Motion is denied or an amended complaint is required.

Dated this 19th day of September, 2017.

Respectfully submitted,

A handwritten signature in black ink that reads "Irion A. Sanger". The signature is written in a cursive style with a large initial "I" and a long, sweeping tail.

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