

PGE's Stay Response inappropriately "jumps the line" and seeks to procure a ruling from this Commission on the substantive question of whether this Commission has jurisdiction to resolve PGE's complaint *before the NewSun QFs have even briefed that issue*. PGE's tactic is inappropriate and at odds with the parties' agreed-to procedural schedule. Accordingly, the Commission should disregard the portions of PGE's Stay Response that regard the primary jurisdiction doctrine. PGE may make such arguments regarding primary jurisdiction in a response to a forthcoming motion to dismiss, which will be filed only if this Commission decides to deny the NewSun QFs' Motion for Stay.

II. REQUEST FOR LEAVE TO FILE A REPLY

The Commission's administrative rules allow for a reply to a substantive motion, but do not provide for a reply to a response to a procedural motion without leave of the Administrative Law Judge. *See* OAR 860-001-0420(5). The NewSun QFs understood their Motion for Stay as a procedural motion, requesting that this proceeding be stayed, but PGE has now confused the issues by making arguments as to the substantive merits of the Commission's jurisdiction. Additionally, the NewSun QFs did not anticipate the need for a reply on the procedural matter asserted in their Motion for Stay, and therefore did not propose to include a deadline for such a reply at the time the parties agreed to the schedule to process that motion.

Given PGE's attempt to expand the issues before the Commission in its Stay Response, it is appropriate to accept this limited reply in support of the NewSun QFs' procedural motion to ensure the scope of the Motion for Stay currently before the Commission is properly understood. It is also important to accept this filing to ensure that the record clearly reflects the NewSun QFs' objection to the Commission issuing any ruling or order as to its own primary jurisdiction prior

to the NewSun QFs having briefed and argued the merits of that issue. To the extent leave is required under the procedural rules, therefore, the NewSun QFs respectfully request leave that the Administrative Law Judge allow this Reply. Because this Reply is filed on the second business day after PGE's Stay Response and is limited in scope and length, it should not impede or delay resolution of the narrow issue presented in the Motion for Stay.

Counsel for the NewSun QFs conferred with counsel for PGE through electronic mail on February 12, 2018, to attempt to obtain PGE's position on this request for leave to file this Reply. Counsel for PGE stated that PGE takes no position and reserves its rights regarding NewSun's proposed request for leave to file a reply.

III. BACKGROUND

The procedural background is succinctly stated in the NewSun QFs' Motion for Stay and need not be repeated in full here. To summarize, NewSun QFs' Motion for Stay requested, in pertinent part, that the Commission stay this proceeding until after Judge Michael Simon rules on the motion to dismiss that PGE now has filed in the federal district court asking, among other things, that the federal court defer to the Commission under the doctrine of primary jurisdiction. Both parties agreed to a procedure whereby the NewSun QFs will file a motion to dismiss with the Commission *if the Commission declines to stay this proceeding* and have further agreed that the due date for such a motion to dismiss would be February 22, 2018, if at all. The parties further agreed that the NewSun QFs may file an answer to PGE's complaint 10 days after the Commission rules on that motion to dismiss. *See PGE's Stay Response* at 10. At this point, however, the NewSun QFs have only filed the Motion for Stay.

The Motion for Stay made two basic points. First, where two “*tribunals*” may possess concurrent jurisdiction over a dispute, as a matter of policy, the second-filed tribunal may not interfere with the first-filed tribunal’s action, i.e., the first-filed rule. *Landis v. City of Roseburg*, 243 Or 44, 50, 411 P2d 282 (1966) (internal quotation omitted, *emph. added*). Therefore, because the federal district court obtained jurisdiction first, the Motion for Stay argued that to ensure orderly process and avoidance of contradictory rulings on the same jurisdictional question, the Commission should stay this proceeding to avoid interfering with the federal court. Second, the Motion for Stay pointed out that the Commission’s view of its own primary jurisdiction under state law cannot usurp the federal district court’s jurisdiction under Article III of the United States Constitution, the diversity jurisdiction statute, 16 U.S.C. § 1332, and the Supremacy Clause of the United States Constitution – further requiring that the federal district court be allowed to address the jurisdictional issue first. *See Begay v. Kerr-McGee Corp.*, 682 F2d 1311, 1315 (9th Cir 1982).

Importantly, the express purpose of the Motion for Stay was to avoid litigating the same jurisdictional question in two different forums at the same time, which could obviously result in inconsistent results, confusion, and ultimately delay. Accordingly, the NewSun QFs have not argued to the Commission why they believe the doctrine of primary jurisdiction does not apply here. Nor have the NewSun QFs argued or briefed why they believe the circumstances of this case are highly distinguishable from those in the Commission’s recent ruling in an entirely different dispute in docket UM 1894 between PGE and Pacific Northwest Solar, a decision that was expressly limited to its facts and not intended to “suggest that the Commission necessarily has primary jurisdiction over every issue involved in standard power purchase agreements.” *See*

Order No. 18-025 at 7 n.15. Instead, those are arguments that the NewSun QFs would address *only if* the Commission denies the Stay Motion and proceeds to consider that substantive jurisdictional question at the same time as the federal district court.

Yet in PGE's Stay Response, PGE argues extensively as to *the merits* of the Commission's primary jurisdiction and affirmatively asks for a ruling on that question as applied to the facts here. This argument goes on for pages before PGE finally provides a minimal (and unconvincing) response to the NewSun QFs' argument that this Commission should stay this proceeding instead of entertaining PGE's request to attempt to unilaterally "take jurisdiction"¹ back from the federal district court.

IV. ARGUMENT

The Commission should disregard PGE's premature arguments as to the Commission's primary jurisdiction. PGE agreed to a schedule that calls for the NewSun QFs filing a motion to dismiss *after* resolution of the NewSun QFs' Motion for Stay, and PGE may respond to arguments the NewSun QFs may make regarding the Commission's jurisdiction *after* the NewSun QFs make such arguments.

The apparent objective of PGE's Stay Response is to procure a ruling from the Commission on its jurisdiction before the NewSun QFs even have presented argument on the point. But the Commission should not issue any ruling or order at this time on PGE's primary jurisdiction argument without any briefing or argument on the question from the NewSun QFs. To do so would be procedurally improper and amount to an ex-parte order to which one party had no input. Because such a ruling would be entirely uninformed, with arguments presented on

¹ *PGE's Complaint* at p. 2.

the point from only one party, it would lack any persuasive value in any other forum, such as the federal district court. PGE's jurisdictional assertions should therefore be disregarded until the NewSun QFs have had a fair opportunity to address those arguments, and only if and *after* the Commission denies the NewSun QFs' Motion for Stay.

Finally, PGE's argument on the first-filed rule is incorrect. PGE asserts that the doctrine applies only to "courts." *PGE's Stay Response* at 8. However, the Oregon Supreme Court has explained that the doctrine applies where two "*tribunals*" may possess concurrent jurisdiction over a dispute. *Landis*, 243 Or at 50 (internal quotation omitted, *emph. added*). Contrary to PGE's argument, the rule is not limited to *courts*. A "tribunal" is a "court or other adjudicatory body." Bryan A. Garner, *Black's Law Dictionary* at 1512 (7th ed. 1999). Applying the rule here makes good sense because if an agency believes it can act in an adjudicatory fashion that could inform or displace a court proceeding – as PGE asks the Commission to do here – then that agency's proceeding could obviously cause risk of interference with the first-filed court. Aside from this correction, the NewSun QFs rely on the arguments in their Motion for Stay, which demonstrate PGE's minimal arguments regarding the first-filed rule are misplaced and should be rejected.

V. CONCLUSION

For the reasons stated above, the NewSun QFs respectfully request that the Commission disregard the portions of PGE's Stay Response arguing the Commission has primary jurisdiction and stay this proceeding in accordance with the NewSun QFs' Motion for Stay.

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