IN THE COURT OF APPEALS OF THE

STATE OF OREGON

In the Matter of: PACIFIC NORTHWEST SOLAR, LLC, Defendant-Petitioner, v. PORTLAND GENERAL ELECTRIC COMPANY, Complainant-Respondent, THE OREGON PUBLIC UTILITY COMMISSION, Respondent, and THE COMMUNITY RENEWABLE ENERGY ASSOCIATION, Intervenor Below.	Oregon Public Utility Commission Docket No. UM 1894 CA No. A __________ PETITION FOR JUDICIAL REVIEW OF FINAL ORDER AND INTERIM ORDERS OF THE OREGON PUBLIC UTILITY COMMISSION

RECEIVED
NOV 09 2018
APPELLATE DIVISION
SALEM, OR 97301

PETITION FOR JUDICIAL REVIEW

Pacific Northwest Solar, LLC, Defendant-Petitioner, seeks judicial review of the final order and interim orders of the Oregon Public Utility Commission in docket no. UM 1894, including Order No. 18-369 dated October 9, 2018 which denied rehearing and/or reconsideration of Order No. 18-284 dated August 2, 2018, and Order No.18-025 dated January 25, 2018.

The parties to the judicial review proceeding before the Court of Appeals are:

Petitioner:

Pacific Northwest Solar, LLC
c/o Ryan Meyer
9450 SW Gemini Drive #33304
Beaverton, OR 97008

Respondents:

Portland General Electric Company
121 SW Salmon Street
Portland, OR 97204

Oregon Public Utility Commission
201 High Street NE, Suite 100
Salem, OR 97301

Petitioner Pacific Northwest Solar, LLC is represented by:

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Respondent Portland General Electric Company is represented by:

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Respondent Oregon Public Utility Commission is represented by:

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and

Attorney General of the State of Oregon
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A. Attached to this petition is a copy of each of the orders for which judicial review is sought. Order No. 18-025 affirmed the ruling of the administrative law judge denying Defendant-Petitioner's motion to dismiss the complaint that was the subject of docket no. UM 1829. This order was an interim order, but is now subject to review in this proceeding because a final order has been issued. Order No. 18-284 denied Defendant-Petitioner's cross-motion for summary judgment and granted Complainant-Respondent's cross-motion for summary judgment. Order No. 18-369 denied Defendant-Petitioner's motion for rehearing and/or reconsideration of Order No. 18-284.

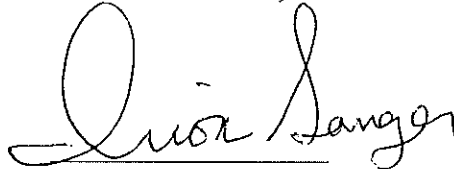
B. Petitioner was a party to the administrative proceeding which resulted in the orders for which review is sought.

C. Petitioner is not willing to stipulate that the agency record may be shortened at this time.

Dated this 7th day of November 2018.

Respectfully submitted,

SANGER LAW, PC



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Of Attorneys for Defendant-Petitioner
Pacific Northwest Solar, LLC

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **PETITION FOR JUDICIAL REVIEW** on all of the following:

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By

☒ Mailing, by placing the copy in a postage prepaid sealed envelope addressed to the attorney's last known address as shown above and deposited with the U.S. Postal Service at Portland, OR by registered or certified mail.

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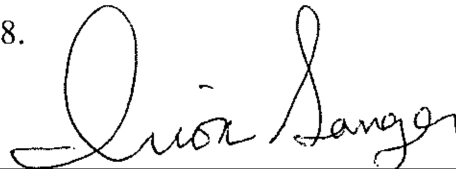
DATED this 7th day of November 2018.

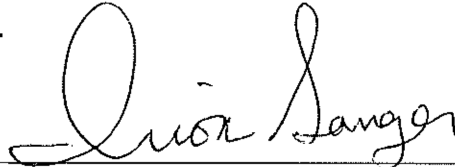


Irion A. Sanger, OSB #003750
Of Attorneys for Defendant-Petitioner

CERTIFICATE OF FILING

I certify that I filed the foregoing **PETITION FOR JUDICIAL REVIEW** with the Appellate Court Administrator via the Oregon Appellate Court eFiling system

DATED this 7th day of November 2018.



Irion A. Sanger, OSB #003750
Of Attorneys for Defendant-Petitioner

ORDER NO. 18 025

ENTERED JAN 25 2018

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1894

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. PACIFIC NORTHWEST SOLAR, LLC, Defendant.	ORDER

DISPOSITION: MOTION TO DISMISS DENIED; RULING OF THE ADMINISTRATIVE LAW JUDGE AFFIRMED

I. SUMMARY

In this order, we affirm the October 27, 2017 ruling of the administrative law judge (ALJ) to deny the motion to dismiss the complaint filed by Portland General Electric Company (PGE) against Pacific Northwest Solar, LLC (PNW).

II. BACKGROUND AND PROCEDURAL HISTORY

In the first half of 2016, PNW executed power purchase agreements (PPAs) with PGE for six solar qualifying facilities (QFs). The avoided costs included in the PNW PPAs were those the Commission approved on August 25, 2015, and the initial delivery dates for these PPAs is November 1, 2017.

On May 8, 2017, PNW contacted PGE and stated that it would be increasing the nameplate capacity rating for one of the contracting QFs—the Butler QF—from 4 MW to 10 MW. Then, on June 23, 2017, PNW sent PGE a letter that requested nameplate capacity changes to four of its six QFs, including the Butler QF.

PGE and PNW disagreed as to whether Section 4.3 of the PPAs permits a QF to materially change its nameplate capacity unilaterally while retaining its right to previous avoided cost prices. To resolve that issue, PGE filed, on August 31, 2017, a complaint

with the Public Utility Commission of Oregon and a request for dispute resolution. Shortly thereafter, PNW filed a complaint with the Multnomah County Circuit Court seeking more than $11 million in damages, costs and attorney fees.[1]

PNW moved to dismiss the complaint on September 19, 2017, on the grounds that this Commission lacks personal jurisdiction. Following additional pleadings by the parties, the ALJ denied the motion to dismiss on October 27, 2017.

On November 13, 2017, PNW filed a request that the ALJ certify the matter to the Commission. Following additional pleadings, including a petition to intervene by the Community Renewable Energy Association (CREA) and response in support of ALJ certification, the ALJ granted both the request for certification and CREA's petition to intervene.

III. QUESTIONS PRESENTED AND POSITIONS OF THE PARTIES

The request for certification asks that we address two questions:

1. Does the Commission have personal jurisdiction over PNW?
2. Does the Commission have primary jurisdiction over the subject matter of the dispute?

PNW makes several arguments as to why the Commission lacks personal jurisdiction. Because it is neither a utility nor a party to a dispute about utility rates or terms of service, PNW argues that any personal jurisdiction we may have over it depends upon whether the Commission has been granted specific statutory authority. PNW asserts that the Commission has not been granted such authority over a private, non-regulated company such as PNW. PNW contends that we cannot exercise personal jurisdiction merely because a party does business with a utility, even if a party is willing to subject itself to such jurisdiction via a written agreement.

PNW further argues that nothing in the subject standard power purchase agreement's operative provisions indicate authority to resolve disputes under the executed contract. PNW states that any requirement that a QF subject itself to Commission jurisdiction as a precondition to obtaining a standard power purchase agreement would violate PURPA. In sum, PNW argues that, once a contract is executed, we are powerless to intervene in any disputes between PGE and private parties, if the complaint is brought *by* the utility. However, PNW concedes that we do have the authority to hear complaints with respect to the interpretation and enforcement of QF contracts when they are brought *against* a utility by a QF, under ORS 756.500(1).[2]

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[1] *Pacific Northwest Solar, LLC v. Portland General Electric Co.*, Multnomah County Circuit Court, Case No. 17DV38020, Complaint (Sep 6, 2017).

[2] PNW Request at 12, fn. 21 (Nov 13, 2017), 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).

With respect to subject matter jurisdiction, PNW argues that we do not have primary jurisdiction. PNW states that common law contract interpretation is not within the Commission's expertise but is an issue which a court is better suited to decide. Although PNW states that this is a question of first impression in Oregon, it argues that federal courts in other jurisdictions do not give the state commission primary jurisdiction if the courts can resolve the issue without the commission's special technical knowledge. In a case where a state court found the utility commission had primary jurisdiction, the court relied on specific rules adopted by the commission, which, PNW asserts, is not the case in Oregon. Finally, PNW argues that the administrative law judge ruling deprives it of its right to a jury trial.

In response, PGE contends that PNW explicitly agreed to subject itself to our jurisdiction by entering into an agreement developed by the utility at Commission direction and approved by the Commission to implement state and federal statutes and policies. PGE contends that subject matter jurisdiction may not be conferred upon parties via agreement, but that parties are capable of submitting themselves to personal jurisdiction.

PGE states that PURPA section 210(h) specifically authorizes this Commission to regulate QF's sales of energy to utilities, the activity at issue in this dispute, which requires jurisdiction over both parties. PGE states that these activities—and therefore, the parties who engage in them—are plainly regulated by the Commission because revising nameplate capacities unilaterally will have a clear impact on PGE's rates. Therefore, PGE contends we have jurisdiction under ORS 756.500. PGE also argues that we have personal jurisdiction over PNW because the sale of QF electricity is regulated by this Commission pursuant to both PURPA and ORS 758.535. Thus, PGE states, being exempt from *rate* regulation does not shield a party from having its activities regulated by the Commission generally. PGE notes that ORS 756.500(5) provides that "any public utility * * * may make complaint as to any matter affecting its own rates or service * * *" without being subject to any interpretation as a possible limitation by any language in ORS 756.500(1), and that purchases of QF power obviously impact rates. Finally, PGE notes that PNW has voluntarily subjected itself to our jurisdiction by filing six interconnection complaints (Docket Nos. UM 1902-UM 1907) seeking relief with respect to the interconnection process *of these same projects,* which would also relate to the interpretation of Section 4.3 of the standard power purchase agreement, which is the subject of this dispute.

With respect to subject matter jurisdiction, PGE states that we have primary jurisdiction when three factors are present: (1) an issue benefits from the Commission's specialized expertise, (2) uniform resolution is preferable, and (3) a judicial resolution could adversely impact agency performance of its regulatory responsibilities. All of these factors, PGE argues, are present in this case. PGE, also contends that, while not necessary to resolve the instant question, the Commission has *exclusive* jurisdiction because of the legislature's intention to create a comprehensive regulatory scheme of agency implementation. The Commission already has exclusive jurisdiction for determining the rates, terms and conditions of standard power purchase agreements and

similarly therefore has exclusive jurisdiction over subsequent disputes concerning those terms.

IV. DISCUSSION AND RESOLUTION

We affirm the October 27, 2017 ruling of the administrative law judge denying the motion to dismiss the complaint. In implementing PURPA, we have, on a number of occasions, reaffirmed our intention "to encourage the economically efficient development" of QFs, "while protecting ratepayers by ensuring that utilities pay rates equal to that which they would have incurred in lieu of purchasing QF power."[3] Our orders implementing PURPA reflect our efforts to balance encouraging QF development with maintaining ratepayer indifference.

In certain circumstances, such as those present here, we require utilities like PGE to offer QFs standard contracts. Standard contracts have a standard set of rates, terms and conditions that govern a utility's purchase of power under PURPA. The forms of standard contracts, which reflect and implement our policies related to PURPA, are subject to our review and approval. We do not have authority to alter the terms of the contract, or its established avoided cost prices, once it is executed.

In this case, PNW has executed standard power purchase agreements with PGE pursuant to PURPA. Although PNW frames the dispute as one of straightforward contract interpretation, the issue, properly framed, relates to our interpretation of PURPA implemented through PGE's standard purchase agreement. Our implementation of state and federal PURPA policies are reflected in Section 4.3,[4] the provision at issue in this complaint.

A. Personal Jurisdiction

We have personal jurisdiction over PNW under our complaint statutes. PGE's standard power purchase agreement, which we approved, governs a QF's sale of energy to a utility—an activity that we regulate under PURPA and ORS 758.355. We have adopted policies, implemented through the standard purchase power agreements that dictate the terms and conditions for the sale of the QFs' energy to PGE. Even though PNW is not a regulated entity under our statutes, we have jurisdiction over PNW's activities here under ORS 756.500(1) as they relate to state and federal PURPA statutes for which "jurisdiction for enforcement or regulation" is "conferred upon the Commission."

We also have personal jurisdiction over PNW under ORS 756.500(5), because this matter is a complaint from a public utility concerning a matter "affecting its own rates or service * * *." As explained by the ALJ, "[a]voided cost prices paid for QF-supplied electricity, the costs associated with interconnection with a QF and the administrative costs involved

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[3] *In re Public Utility Commission of Oregon, Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 06-538 at 8 (Sep 20, 2006), citing Order No. 05-584 at 1 and Order No. 81-319 at 3.

[4] *Id* at 37-38.

in managing the contractual relationship all impact the utility's revenues and expenses, which, in turn, have an impact on recovery of costs through rates charged to customers via power cost annual update tariffs and power cost adjustment mechanisms."[5]

Moreover, we conclude that a party can voluntarily submit to personal jurisdiction, which PNW has done here.[6] The standard PPAs entered into by PNW with PGE were developed and filed in compliance with Commission Order No. 05-584 and subsequent orders to implement state and federal PURPA statutes. Section 17 of the PGE-PNW PPAs explicitly acknowledges our authority over the terms and conditions of the agreement by stating, in part, the following:

> SECTION 17: GOVERNMENTAL JURISDICTION AND AUTHORIZATIONS
> This Agreement is subject to the jurisdiction of those governmental agencies having control over either Party or this Agreement.

PNW argues that Section 17 was intended solely to clarify that the utility is not required to purchase electricity if the QF cannot produce it. However, Section 17 makes the agreement "subject to our jurisdiction" because we have control over PGE, a regulated utility, particularly as it relates to implementation of PURPA. To agree that a power purchase agreement is subject to our jurisdiction, but that a signatory is not makes no sense – PURPA authorizes the Commission to exercise jurisdiction over a QF's sale of energy to utilities, which for certain sales we do through standard purchase agreements, such as the one at issue here. Furthermore, we have previously exercised personal jurisdiction over a QF in a prior dispute with respect to an executed power purchase agreement without objection by either party.[7]

PNW has separately filed six complaints against PGE here at the Commission regarding the same projects.[8] PNW asks that we have jurisdiction of claims it brings, but not those brought by PGE. PNW has cited no circumstance under which it may bring a claim, while prohibiting the defendant in the case from raising defenses or counterclaims with respect to the same set of transactions in the same forum, which, at least in part, is what PNW attempts to do here.[9]

We affirm that we have personal jurisdiction over PNW in this proceeding. Although we lack the authority to alter the terms of an executed contract, the issue presented here does not implicate such action. Rather, the complaint asks us to resolve an issue that fundamentally involves state and federal PURPA law as implemented by the

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[5] ALJ Ruling on Motion to Dismiss at 3 (Oct 27, 2017).

[6] *Aguirre v. Albertson's, Inc.*, 201 Or App 31 at 41 (2005): "subject matter jurisdiction—*unlike personal jurisdiction*—cannot be conferred on the court by consent or estoppel" (*emphasis added).*

[7] *PaTu Wind Farm, LLC v. Portland General Electric Co., supra,* at 5, interpreting a provision of the PPA relating to the mechanical availability guaranty that must be provided by a wind generator QF.

[8] *See* Dockets UM 1902-UM 1907.

[9] *See also* Docket Nos. UM 1902-UM 1907 in which PNW seeks enforcement of the subject PPA with respect to PGE's alleged obligations thereunder while avoiding any discussion of the nameplate capacity change issue which it regards as a "separate matter." PNW Reply at 3 (Dec 12, 2017).

Commission—namely the interpretation of Section 4.3 in a standard power purchase agreement that we reviewed and approved to implement our policies and rules on state and federal PURPA.

B. Primary Subject Matter Jurisdiction

We need not reach the issue of whether or not we have exclusive jurisdiction over this dispute,[10] but we affirm that we have primary subject matter jurisdiction. We have primary jurisdiction when (1) an issue benefits from our specialized expertise, (2) uniform resolution is preferable, and (3) a judicial resolution could adversely impact agency performance of its regulatory responsibilities.

As discussed previously, we disagree with PNW's framing of the issue as a common law contract dispute for which we have no expertise. By law, the Commission sets the terms and conditions for contracts between QFs and public utilities. The terms and conditions of those contracts relate directly to the regulated rates and services of utilities subject to our oversight. The complaint raises an issue related to a provision of a standard power purchase agreement, which we reviewed and established consistent with our own orders and rules to implement state and federal PURPA policy. As such, we have the expertise and the authority to review the terms and conditions of the contract developed at the Commission after litigated proceedings.

PURPA is a federal statute that places the states in charge of implementing FERC's regulations pertaining to determining avoided costs and to setting rates paid to QFs.[11] The obligation to enter into a PURPA contract is not governed by common law concepts of contract law, but rather an obligation created by statutes, regulations, and this Commission's administrative rules.[12]

Under PURPA, states are given broad latitude to set the terms and conditions of QF contracts. As the Ninth Circuit has noted, PURPA delegates to the states "broad authority to implement section 210 * * *. Thus, the states play the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilities * * *."[13] Under Oregon law, these contractual terms and conditions are set by the Commission. ORS 758.535(2).

Uniform resolution of this dispute is important. Section 4.3 is a standard term in PGE's standard power purchase agreements with other QFs. Indeed, as discussed previously, Section 4.3 was amended at our direction in docket UM 1129. An interpretation of the section that is inconsistent with our intent would affect not only the complainant here, but

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[10] Because we do not reach the issue of exclusive jurisdiction here, we find no need to resolve PNW's claim that our exercise jurisdiction violates its constitutional right to a jury.

[11] 16 U.S.C. § 824a-3(f).

[12] *See, e.g., Snow Mt. Pine Co. v. Mauldin,* 84 Or App 590 (1987); ORS 758.525 (requiring a utility to purchase power from a qualifying facility); 18 CFR 292.303(a) (same); OAR 860-029-0030 (requiring an electric utility to purchase any energy and capacity "which is made available from a qualifying facility.")

[13] *Independent Energy Producers Association, Inc. v. California Public Utilities Commission,* 36 F.3d 848 at 856 (9th Cir. 1994).

a multitude of QFs that have entered into or intend to enter into PURPA contracts with utilities regulated by the Commission.

The interpretation of PURPA contracts is critical to the discharge of our regulatory responsibilities. As we have stated, one critical feature of our implementation of PURPA, including (but not limited to) the terms and conditions of our regulated PURPA contracts, is the need to ensure that ratepayers remain financially indifferent to QF development. While standard contract rates, terms, and conditions allow for streamlined QF contracting, "[a]t the same time, however, we recognize the need to balance our interest in reducing [QF] market barriers with our goal of ensuring that a utility pays a QF no more than its avoided costs for the purchase of energy."[14]

While we agree that state circuit courts are well-suited to resolve common law contract interpretation issues, the issue presented in this particular complaint involves a long and evolving history of Commission policies, orders, and rules related to this our legal obligation to implement state and federal PURPA policy. We believe our role and expertise in state and federal PURPA policy makes this an appropriate issue for primary jurisdiction.[15] We conclude that the ALJ was correct to find that primary jurisdiction was appropriate here.

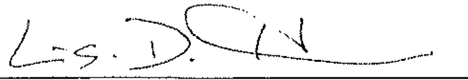
[14] *See, e.g.,* Order No. 05-584 at 16 (May 13, 2005).

[15] We do not agree that the issue presented in this complaint is simply a common law contract interpretation issue. However, we do not intend to suggest that the Commission necessarily has primary jurisdiction over every issue involved in standard power purchase agreements. Rather, in applying the criteria for primary jurisdiction, we find that the issue presented in this complaint would benefit from the Commission's expertise, uniform resolution is important, and that a judicial resolution could adversely impact our ability to apply our PURPA policy, rules, and orders in a uniform and consistent manner.

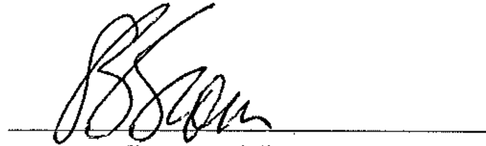
V. ORDER

IT IS ORDERED that the October 27, 2017 ruling of the administrative law judge is affirmed, and the motion to dismiss filed by Pacific Northwest Solar, LLC is denied.

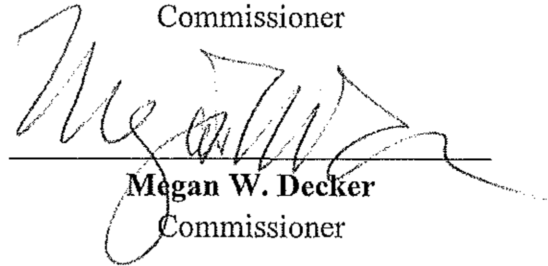
Made, entered, and effective JAN 25 2018.



Lisa D. Hardie
Chair



Stephen M. Bloom
Commissioner



Megan W. Decker
Commissioner

ORDER NO. 18 284

ENTERED: AUG 02 2018

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1894

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. PACIFIC NORTHWEST SOLAR, LLC, Defendant.	ORDER

DISPOSITION: PORTLAND GENERAL ELECTRIC COMPANY's MOTION FOR SUMMARY JUDGMENT GRANTED; PACIFIC NORTHWEST SOLAR, LLC's CROSS-MOTION FOR SUMMARY JUDGMENT DENIED

I. SUMMARY

We grant the motion of Portland General Electric Company (PGE) for summary judgment and find that Pacific Northwest Solar, LLC (PNW) is not entitled to revise the nameplate capacities of its qualifying facilities under its standard contract power purchase agreement (standard PPA) prior to the time at which the facilities become operational and receive the fixed prices set forth in the agreements at the date of execution. Accordingly, we deny the cross-motion of PNW for summary judgment.

II. BACKGROUND AND PROCEDURAL HISTORY

In the first half of 2016, PNW executed PPAs with PGE for six solar qualifying facilities (QFs). The avoided costs included in the PNW PPAs were those the Commission approved on August 25, 2015, and the initial delivery dates for these PPAs were November 1, 2017.

On May 8, 2017, PNW contacted PGE and stated that it would be increasing the nameplate capacity rating for one of the contracting QFs—the Butler QF—from

4 megawatts (MW) to 10 MW. Then, on June 23, 2017, PNW sent PGE a letter that requested nameplate capacity changes to four of its six QFs, including the Butler QF.[1]

PGE and PNW disagreed as to whether the executed PPAs permit a QF to materially change its nameplate capacity unilaterally while retaining its right to previous avoided cost prices in effect at the date of execution of the PPAs. To resolve that issue, on August 31, 2017, PGE filed a complaint with us and a request for dispute resolution. Shortly thereafter, PNW filed a complaint with the Multnomah County Circuit Court.[2]

PNW moved to dismiss PGE's complaint on September 19, 2017, on the grounds that this Commission lacks personal jurisdiction. Following additional pleadings by the parties, a ruling by the administrative law judge (ALJ), and Commission certification, we affirmed the ALJ's ruling denying PNW's motion to dismiss. In Order No. 18-025, we affirmed that we have both personal and subject matter jurisdiction over the parties in this dispute.

Under a procedural schedule agreed to by the parties, PGE and PNW filed a joint statement of stipulated facts on March 16, 2018, and a motion and a cross-motion for summary judgment, respectively, on March 23, 2018. The Community Renewable Energy Association (CREA), which had intervened as a party, replied to those motions on March 30, 2018. PGE and PNW filed answers to each other's motions for summary judgment, and appeared for oral argument before us on July 12, 2018.

III. DISCUSSION

A. Stipulated Facts and Contested Issue

In the first half of 2016, PNW executed PPAs for six solar QFs. The PPAs for three of the six solar QFs—Butler, Starlight and Stringtown—are the subjects of this dispute. Each of these three PPAs contained the following language relevant to our resolution of the issue:

> Section 3.1.7. Seller warrants that the Facility has a Nameplate Capacity Rating not greater than 10,000 kW.

[1]During the course of these proceedings, PNW advised PGE that one of the four projects—the Amity QF—would be built at its originally-stated 4 MW nameplate capacity. Consequently, the Amity QF is not a subject of this dispute.

[2] *Pacific Northwest Solar v. Portland General Electric Co.*, Multnomah County Circuit Court, Case No. 17CV38020, Complaint (Sep 6, 2017).

> Section 3.1.8. Seller warrants that Net Dependable Capacity of the Facility is 4,000 kW.[3]
>
> Section 3.1.11. Seller will deliver from the Facility to PGE at the Point of Delivery Net Output not to exceed a maximum of [9,800,000 kWh [Butler], 9,900,000 kWh [Starlight], 9,950,000 kWh [Stringtown]] of Net Output during each Contract Year ("Maximum Net Output").
>
> Section 4.3. 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, through any means including, but not limited to, replacement, modification, or addition of existing equipment, except 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.

During the negotiations leading up to the execution of the contracts, the parties never discussed whether or not the PPAs allowed PNW to increase or decrease the capacities of its QFs. The prices that PGE was obligated to pay to PNW under the PPAs for the output of each of those six QFs, were the avoided cost prices we approved on August 25, 2015. In January, February and May of 2017, PNW advised PGE that the nameplate capacity ratings for three QFs would be changed as follows:

Solar Facility	**Original Size**	**Requested Size**	**Change**
Butler	4 MW	10 MW	+6 MW
Starlight	4 MW	2.2 MW	-1.8 MW
Stringtown	4 MW	2.3 MW	-1.7 MW

[3] During the oral argument, it became apparent that the Stringtown PPA included a typographical error listing the Net Dependable Capacity at "8,000 kW," rather than "4,000 kW." For purposes of this decision, we assume the parties intended the Stringtown PPA capacity to be 4,000 kW.

On July 21, 2017, PGE notified PNW that it did not believe that PNW's QFs were entitled to materially change their nameplate capacities and remain entitled to the contract execution date avoided cost prices.

Following the parties' execution of the PNW PPAs, we approved new, and lower renewable avoided cost prices for PGE on June 7, 2016, June 1, 2017, and again on September 18, 2017. The parties have stipulated that the net effect of the changes to the Butler, Starlight, and Stringtown QFs nameplate capacities would require PGE to purchase an additional 2.5 MW of renewable energy at a cost of $5,354,282 over the course of the contracts' lives.

B. Positions of the Parties

The sole question presented is whether Section 4.3 of the PPAs authorizes PNW to increase (to not more than 10 MW), or to decrease to any extent, the nameplate capacity rating of a facility prior to the facility's construction, and still retain the right to the contract price in the executed standard PPA.

PGE answers the question in the negative. PGE argues the Section 4.3 implements our Order No. 06-538,[4] which only addressed nameplate changes in operational QFs resulting from efficiency improvements or necessary upgrades to its operations. PGE contends that our policy determination in that order, as well as the plain language of Section 4.3 incorporating our decision into the company's standard PPA, authorizes increases only to an existing facility's output and not to material, pre-construction changes to nameplate capacity resulting from the QF's change of plans. PGE argues that this Commission has consistently limited nameplate capacity changes only for necessary equipment replacement and any resulting improvements in efficiency, and has not allowed QFs to make changes its nameplate capacity prior to operation. Allowing QFs to modify their output at will would, in PGE's view, undermine the resource planning process and expose customers to significant and unpredictable rate increases.

PNW counters that Section 4.3 allows pre-construction nameplate changes, provided that a developer does not increase its output above the standard contract threshold of 10 MW. PNW contends that Section 4.3 reflects an underlying assumption that changes in nameplate capacity will take place, as it requires QFs to provide prior written notice of any increases and an "As-built Supplement" to specify the changes that occurred after contract execution. PNW emphasizes that neither Order No. 06-538 nor the standard PPA contain any prohibition with respect to a decrease in nameplate capacity. Finally,

[4] *In the Matter of the Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 06-538 at 37-39 (Sep 20, 2006).

PNW argues that preventing such changes in nameplate capacity would be inconsistent with the goals of both PURPA and the Commission to encourage the development of QFs.

C. Resolution

We grant PGE's motion for summary judgment. For the reasons set forth below, we find that the scope of Section 4.3, in the context of the entire standard PPA, is applicable only to currently-operational QF facilities seeking to increase nameplate capacity or delivered power.

When examining the language of a provision of a contract, we look at both the text of the provision and the context of that provision within the meaning and purpose of the contract as a whole in accordance with the standards for analysis prescribed under Oregon law:

> When considering a written contractual provision, the court's first inquiry is what the words of the contract say * * *. To determine that, the court looks at the four corners of a written contract, and considers the contract as a whole with emphasis on the provision or provisions in question. The meaning of disputed text in that context is then determined. In making that determination, the court inquires whether the provision at issue is ambiguous. Whether terms of a contract are ambiguous is a question of law. In the absence of an ambiguity, the court construes the words of a contract as a matter of law.[5]

We begin our analysis with Section 4.3, and note that it is a single paragraph. There are no independent, numbered subsections—as exist elsewhere throughout the contract—to distinguish and set apart one sentence or group of sentences from the whole. The first sentence sets the temporal circumstances for all that is to follow:

> Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built.

While not drafted in the terms of a condition precedent, it provides an assumption of a preexisting event for the remainder of the paragraph. The opening sentence implies that

[5] *Eagle Industries, Inc. v. Thompson*, 321 Or 398, 900 P2d 475 (1995). *See also* ORS 42.230 (in construing a document, the court is "to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted * * *.").

the remainder of Section 4.3, which describes the permissible modifications to a QF, is predicated upon the facility's completed construction and the provision of the As-built Supplement by the seller to PGE.

This interpretation is consistent with and confirmed by the provisions contained in Section 3: Representations and Warranties, and Section 9: Default, Remedies and Termination. In Section 3.1.8, the QF warrants the net dependable capacity of the facility; in Section 3.1.11, the QF warrants the maximum annual output. These two provisions, taken together, provide the performance parameters within which the QF promises to operate. A QF's failure to perform within these parameters is addressed in Section 9.1:

> 9.1. In addition to any other event that may constitute a default under this Agreement, the following events shall constitute defaults under this Agreement:
>
> 9.1.1. Breach by Seller or PGE of a representation or warranty, except for Section 3.1.4, set forth in this Agreement.

Taken together, these provisions establish the QF's primary obligation to commit its best efforts to sell the output of a facility as described at contract execution and satisfy the performance warranty provisions of the agreement—that is, to act in "good faith" without a material deviation from the agreed-upon terms.[6] Interpreting the contract in a manner such as to allow a QF to unilaterally materially change its nameplate capacity and the resulting performance parameters, merely upon notice to PGE, would give little certainty and meaning to the fundamental warranties of Section 3.

We are not persuaded by PNW's argument that the "As-built Supplement" provision in Section 4.3 must be interpreted to allow a QF to modify its facility at any point after execution in order for the provision to have meaning. As defined Section 1.1 of the standard PPA, the As-built Supplement is "the supplement to Exhibit A provided by Seller in accordance with Section 4.3 following completion of construction of the Facility, describing the Facility as actually built." A review of the PPAs attached to the stipulated facts show that Exhibit A provides specific facts about the construction design for each facility, including the property description, the construction details such as the type of foundation and the number of solar photo voltaic panels, the number of inverters to which the panels are connected, and the maximum output per inverter.

[6] A "material" breach is one that causes "substantial" harm to the aggrieved party "including imposing costs that significantly exceed the contract value." *See* Uniform Commercial Code 2B-108(b).

In light of this context, the As-built Supplement fulfills an important purpose by clarifying for the agreement any modifications made during construction so that both parties have an accurate description of the facility "as-built." It is not unexpected that, during the construction phase, there may be non-material changes to the facility from its original plans. In the supplement, the QF could specify the exact number of panels actually installed, describe any potential changes to the manner in which the facility foundation was constructed, or any other changes that might have been made during construction. We find nothing, however, to support PNW's broad reading to permit a QF, in providing an update to the description of how the facility is constructed, to unilaterally change the fundamental warranties solely upon notice to PGE.

Thus, from the foregoing, we conclude 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.

While it is not necessary for a prospective QF to look beyond the terms and conditions of the standard PPA itself to discern the contractual provisions' intent, our legal conclusion is supported by our proceeding in docket UM 1129, which, among other things, provided the direction for PGE to include the language in Section 4.3 relating to permissible QF modifications. In what we identified as Issue 8 in that proceeding, we addressed the following question:

> If a QF, under a standard contract, increases power output due to a facility *change*, such as efficiency improvements or operation at a higher power factor, Issue Number 8 asks whether the QF should be compensated for power delivered above the facility's originally designated nameplate capacity at avoided costs rates, and if so, whether the compensation should be at avoided costs rates that were effective when the underlying contract was executed, or at avoided costs rates that are effective at the time the QF is improved. Issue Number 8 also queries whether a QF that is operating under a standard contract can permanently change its nameplate rating under the contract, in the event that facility equipment is upgraded.[7]

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[7] *In the Matter of the Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 06-538 at 37-38 (Sep 20, 2006) (emphasis added).

In Order No. 06-538, we answered that question first by noting that, in setting a 10 MW eligibility threshold for standard PPAs, we did not intend to discourage QF operators from upgrading their existing operating facilities. Thus, we determined that "*a QF may upgrade operations* and *continue* to receive its existing contract price for all power delivered up to 10 MW, but if the QF project is upgraded to a capacity that is above 10 MW, a new contract must be negotiated to price any power delivered over 10 MW at updated avoided cost rates."[8] Thus, our conclusion allowing a QF to increase its output was limited to circumstances where 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. Any changes outside those distinct parameters were beyond the policy intent of our order, and the application of the existing contract provisions then in effect would otherwise control. The utilities were directed to revise their standard PPA to implement the contemplated circumstances, and PGE did so by the addition of a new language to Section 4.3.

In light of the fact that neither the planned increase in nameplate capacity of the Butler facility nor the planned reductions to nameplate capacities of the Starlight and Stringtown facilities meet any of the three criteria necessary for the application of Section 4.3, the remaining contract provisions must govern the dealings between the parties.

IV. ORDER

IT IS ORDERED that:

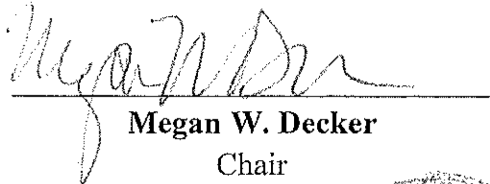
1. The Motion for Summary Judgment filed by Portland General Electric Company is granted.

[8] *Id.* at 39 (emphasis added).

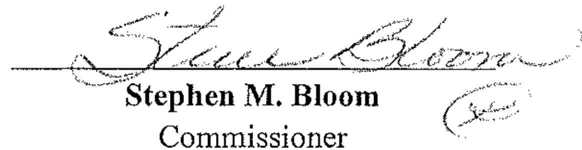
2. The Cross-Motion for Summary Judgment filed by Pacific Northwest Solar, LLC is denied.

3. The docket is closed.

Made, entered, and effective AUG 0 2 2018



Megan W. Decker
Chair



Stephen M. Bloom
Commissioner

Letha Tawney
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.

ORDER NO. 18 369

ENTERED: OCT 09 2018

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1894

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. PACIFIC NORTHWEST SOLAR, LLC, Defendant.	ORDER

DISPOSITION: APPLICATION FOR RECONSIDERATION AND REHEARING DENIED

I. SUMMARY

We deny Pacific Northwest Solar, LLC's (PNW Solar's) request for reconsideration and rehearing of Order No. 18-284.

II. BACKGROUND AND PROCEDURAL HISTORY

As relevant here, PNW Solar executed standard contract power purchase agreements (PPAs) with Portland General Electric Company (PGE) for six solar qualifying facilities (QFs). The prices that PGE was obligated to pay to PNW Solar under the PPAs for the output of each facility were the avoided cost prices we approved on August 25, 2015.

In those executed contracts, PNW Solar identified specified nameplate capacities of 4 megawatts (MW) for three facilities—Butler, Starlight and Stringtown. Prior to the execution of the contracts by both parties, the parties had no discussions that might have put PGE on notice that PNW Solar had any intention to construct the facilities other than as specified in the contracts.

Following the parties' execution of PNW Solar's PPAs, we approved new renewable avoided cost prices for PGE on June 7, 2016, June 1, 2017, and September 18, 2017.

In January, February, and May of 2017, PNW Solar advised PGE that the nameplate capacity ratings for the three QFs would be changed as follows:

Solar Facility	Original Size	Requested Size	Change
Butler	4 MW	10 MW	+6 MW
Starlight	4 MW	2.2 MW	-1.8 MW
Stringtown	4 MW	2.3 MW	-1.7 MW

On July 21, 2017, PGE notified PNW Solar that it did not believe that PNW Solar's QFs were entitled to materially change their nameplate capacities and remain entitled to the contract execution date avoided cost prices. Unable to resolve the dispute between them, PGE filed this complaint on August 31, 2017.

In Order No. 18-284, we agreed with PGE's assertion that PNW Solar's proposed actions would be in violation of the executed PPAs for the subject facilities. On August 13, 2018, PNW Solar filed a request for reconsideration and rehearing, to which PGE filed a response on August 28, 2018.

III. DISCUSSION

A. Positions of the Parties

PNW Solar asks that we clarify Order No. 18-284 by providing answers to the following questions regarding the consequences to PNW Solar:

- If the Butler facility is constructed at 10 MW, rather than 4 MW, or the Stringtown and Starlight facilities are constructed at lower capacities, what avoided cost rates apply?
- If the Butler facility is constructed at 10 MW, can it keep the original avoided cost pricing for the first 4 MW and establish a legally enforceable obligation (LEO) with new prices for the additional 6 MW or does it need to enter into a new PPA for all 10 MW?
- Whether the limitations listed in our 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?[1]

PNW Solar asserts that it is indisputable that it can change its nameplate capacities—the only question is "under what circumstances?"[2] PNW Solar asserts that our order did not

[1] PNW Solar Application for Reconsideration and Rehearing at 1-2 (Aug 13, 2018).
[2] *Id.* at 2.

completely answer that question and will therefore spawn more litigation, unless clarified now. PNW Solar again renews prior arguments we previously rejected in Order No. 18-025, that we lack jurisdiction in this case and asserts that we have failed to provide clear and understandable answers to the questions presented above. PNW Solar argues that each QF facility is entitled to the avoided cost rates in effect on the day it notified PGE of the intended nameplate capacity change and should "not be penalized for attempting to obtain judicial resolution"[3] of the question.

PNW Solar also argues that our description of the three elements necessary to allow a QF to increase its nameplate capacity or output beyond that specified in the PPA appears nowhere in the PPA and may thus be merely *dicta* as opposed to an express limitation. PNW Solar argues that we erred because we went on to "look beyond the terms and conditions of the standard PPA" while saying that was not necessary. It thus seeks a definitive decision so that "there is a well-developed and clear record in the event of any appeal."[4]

PGE objects to PNW Solar's request, and contends no clarification of Order No. 18-284 is needed. PGE also argues that we should decline to comment on hypothetical scenarios or enter into abstract semantic discussions regarding specific contractual terms.

In response to PNW Solar's hypothetical questions, PGE argues that any changes to the nameplate capacities specified in the PPAs would violate Sections 3.1.8 and 3.1.11 of the agreement, and, pursuant to Section 9, PNW Solar would be in default, providing grounds for PGE to terminate the agreement and require that new PPAs be executed at current avoided cost prices. PGE further argues that PNW Solar did not establish a LEO with respect to any of the subject projects at their new capacities merely by providing non-binding notice of its intent to change its projects' nameplate capacities.

Finally, PGE asks that we reject PNW Solar's repeated attack on our prior order regarding the questions of personal and subject matter jurisdiction, as well as PNW Solar's complaints about our contract interpretation methodology and support.

B. Applicable Law

Any party may seek reconsideration or rehearing of any Commission order within 60 days from the date of service.[5] We may grant an application for reconsideration if there is shown to be (1) newly-available evidence essential to the decision, (2) a change

[3] *Id.* at 4-5.
[4] *Id.* at 8-9.
[5] ORS 756.561(1).

in law or policy since the order was issued, (3) an error of law or fact in the order, or (4) good cause for further examination of an issue essential to the decision.[6]

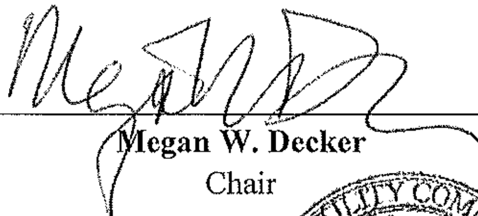
C. Resolution

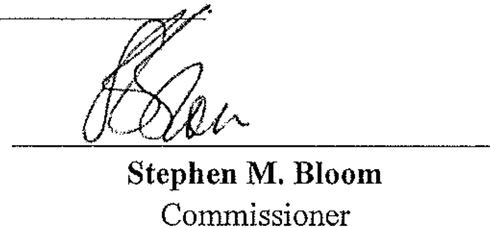
We find that PNW Solar has failed to provide sufficient grounds for reconsideration and rehearing and deny its application in its entirety. PNW Solar does not assert that newly-available evidence has been discovered since Order No. 18-284 was entered. Rather, we are asked to provide responses about potential actions that PNW Solar might take. PNW Solar's hypothetical scenarios are beyond the scope of the stipulated facts underlying this complaint, and we decline to address them. Similarly, PNW Solar does not assert a change in law or policy, nor does it assert an error of law or fact. Finally, we find no good cause to further examine this matter, as our prior order addressed each issue essential to our decision.

IV. ORDER

IT IS ORDERED that the application for reconsideration and rehearing filed by Pacific Northwest Solar, LLC is denied.

Made, entered, and effective OCT 09 2018





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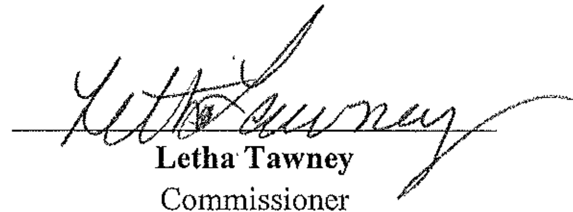

Letha Tawney
Commissioner

A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

[6] OAR 860-001-0720(3).