ORDER NO. 18 284

ENTERED: AUG 0 2 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

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[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.

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[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]

[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.