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