

ENTERED MAY 23 2018

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1931

PORTLAND GENERAL ELECTRIC
COMPANY,

Complainant,

vs.

ALFALFA SOLAR I LLC , DAYTON
SOLAR I, LLC, FORT ROCK SOLAR I
LLC, FORT ROCK SOLAR II LLC, FORT
ROCK SOLAR IV LLC, HARNEY SOLAR I
LLC, RILEY SOLAR I LLC, STARVATION
SOLAR I LLC, TYGH VALLEY SOLAR I
LLC, AND WASCO SOLAR I LLC,

Defendants.

ORDER

DISPOSITION: MOTION TO DISMISS DENIED

I. SUMMARY

In this order, we deny the motion to dismiss the complaint filed by Alfalfa Solar I LLC, Dayton Solar I LLC, Fort Rock Solar I LLC, Fort Rock II LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, Riley Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I, LLC and Wasco Solar I, LLC (defendants or NewSun QFs).

II. BACKGROUND

On January 25, 2018, Portland General Electric Company (PGE) filed this complaint seeking resolution of a dispute “relating to the interpretation of ten form standard power purchase agreements executed [with defendants] throughout 2016.”¹ Specifically, PGE seeks clarification as to whether the 15-year term of fixed prices under the standard contracts begins on the commercial operation date (COD) or the date of execution.

¹ PGE Complaint at 1 (Jan 25, 2018).

On February 22, 2018, NewSun QFs filed a motion to dismiss these proceedings. NewSun QFs argue that PGE's complaint regards the identical dispute that it has already asked the United States District Court for the District of Oregon to resolve, and that PGE's attempt to take jurisdiction from the federal court should be dismissed. PGE filed a response in opposition on March 9, 2018, to which NewSun QFs replied on March 16, 2018.

III. DISCUSSION

A. Positions of the Parties

NewSun QFs characterize this case as a dispute to be adjudicated under common law principles relating to contracts. As such, they cite four grounds for seeking dismissal of the complaint, all related to our status as a state agency.

First, NewSun QFs state that there is no basis for this Commission to assert jurisdiction once the proceedings in federal court have commenced. They argue that, under the supremacy clause of the United States Constitution and diversity jurisdiction, we must dismiss the complaint unless the federal court explicitly defers to the Commission. NewSun QFs further state that adjudicating the meaning of a contract relates to questions of underlying intent, thus requiring a resolution by a trier of fact, and therefore giving rise to the common law right to a jury trial.

Second, NewSun QFs argue that, even in the absence of a pending federal proceeding, we lack jurisdiction because the dispute relates solely to the meaning of a contract and "requires nothing more than application of common law contract principles."²

Third, NewSun QFs contend that state law requires dismissal under the "first-to-file" rule, which Oregon courts have applied to require that the court which first had possession of a subject must decide it. NewSun QFs assert that the first-to-file rule is fundamentally just as applicable to an agency, such as this Commission, as it is in other cases when suits are filed in multiple judicial venues.

Finally, NewSun QFs contend that PGE's complaint must be dismissed for failure to state a claim. NewSun QFs explains that, since they have not violated any rule or order, PGE's complaint essentially requires the Commission to issue a declaratory ruling regarding its policies when interpreting the contracts—an action beyond its authority—rather than resolving a complaint.

² Defendants' Motion to Dismiss at 2 (Feb 22, 2018).

PGE responds that its complaint does not improperly impinge on federal or state court jurisdiction. PGE emphasizes that this Commission has previously addressed at length the question of jurisdiction over the interpretation of standard contracts and asserted jurisdiction to resolve a complaint via interpretation of an executed standard PPA.³ PGE urges us to reach the same conclusions here. PGE also notes that the Oregon Court of Appeals has held that a standard PPA is “not governed by common law concepts of contract law; it is created by statutes, regulations and administrative rules.”⁴

Additionally, PGE states that NewSun QFs misapply the first-to-file rule, as it relates to deference between courts, and that the doctrine of primary jurisdiction is the proper analysis for determining whether a state agency should resolve a dispute before a court exercises its jurisdiction. PGE relies on *Dreyer v. Portland Gen. Elec. Co.*, where the Oregon Supreme Court applied the primary jurisdiction doctrine and ordered the abatement of a civil court proceeding even though it pre-dated the later-initiated Commission proceeding.⁵

Last, PGE contends that it has stated a claim under ORS 756.500(3), which allows a complainant to either state “all grounds of complaint on which the complainant seeks relief *or* the violation of any law claimed to have been committed by the defendant.”⁶ PGE acknowledges that it does not claim that the New Sun QFs have violated any law, but argues that its complaint satisfies ORS 756.500(3) because it identifies the relief sought.

B. Resolution

The motion to dismiss is denied. For the reasons set forth below, we find that this Commission has concurrent jurisdiction over the parties and the subject matter of this dispute. In light of the statutory bases delegating the development and analysis of the subject matter of this complaint, we conclude that we are the most appropriate forum to address the issues presented within it.

At the outset, we note that NewSun QFs mischaracterize the nature of this complaint. The instant proceeding is not a common law contract dispute, but rather one that relates to matters that have specifically been delegated to us under federal and state law. The

³See *In the Matter of Portland General Electric Company v. Pacific Northwest Solar LLC*, Docket No. UM 1894, Order No. 18-025 (Jan. 25, 2018).

⁴PGE Response to Defendants’ Motion to Dismiss at 2 (Mar 9, 2018), citing *Snow Mountain Pine Co. v. Mauldin*, 84 Or App 590, 598 (1987).

⁵*Dreyer v. Portland Gen. Elec. Co.*, 341 Or 262, 286-87 (2003).

⁶ORS 756.500(3) (*emphasis added*).

Public Utility Regulatory Reform Act (PURPA) and its complementary Oregon legislation requires utilities to purchase electric energy from qualifying facilities (QFs). To implement those requirements, this Commission has adopted rules and policies requiring utilities like PGE to offer to small QFs standard contracts that contain specified terms and conditions. Thus, as we recently stated in Order No. 18-025, “[t]he 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.”⁷

NewSun QFs’ claim that we lack jurisdiction to hear the complaint is also incorrect. Neither this Commission nor the courts have unfettered, exclusive jurisdiction. While we do not claim to have exclusive jurisdiction over the interpretation of the standard contracts at issue, we affirm our recent decision in Order No. 18-025 concluding that we have *concurrent* jurisdiction.⁸ Concurrent jurisdiction exists where a court and an agency share authority to deal with the same subject matter.⁹ Indeed, NewSun QFs do not argue that, absent the pendency of the proceeding before the District Court, the Commission would lack such jurisdiction.

The question of deference between courts and agencies to first decide a question presented is subject to the doctrine of *primary jurisdiction*. An agency may have primary jurisdiction either by statute or by a determination by the court that it would be preferable to have the agency first address the matters presented.¹⁰ In our view, such deference is warranted here. The terms and conditions of these contracts were litigated before the Commission, adopted by the Commission, and have the force of regulation under our implementation of PURPA. Moreover, the desire for uniform resolution, and the risk that a judicial decision could adversely impact the performance of our regulatory duties and responsibilities, further supports our view that this agency’s interpretation has special significance.¹¹ Finally, the terms and conditions of standard contracts relate directly to the regulated rates and services of utilities subject to our oversight. We therefore have

⁷ *In the Matter of Portland General Electric Company v. Pacific Northwest Solar LLC*, Docket No. UM 1894, Order No. 18-025 at 6 (Jan 25, 2018). Furthermore, we note that Section 17 of the standard PPAs that PGE represents have been executed by the NewSun QFs, state in part “This Agreement is subject to the jurisdiction of those governmental agencies having control over either party or this Agreement.”

⁸ *Id.*

⁹ *Boise Cascade Corp v. Board of Forestry*, 325 Or 185, 192, fn. 8 (1997).

¹⁰ *Adamson v. WorldCom Communs., Inc.*, 190 Or App 215 at 223 (2003).

¹¹ *See Dreyer v. Portland Gen. Elec. Co.*, 341 Or 262, 286 (2003). To determine whether an agency has primary jurisdiction courts consider several factors, including (1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue, (2) the need for uniform resolution of the issue, and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities.

the expertise and the authority to review the terms and conditions of these standard contracts that were developed through Commission proceedings.¹²

For this reason, we reject NewSun QFs' arguments that our consideration of this complaint violates the Supremacy Clause of the U.S. Constitution. Our jurisdiction does not conflict with the federal courts' jurisdiction, since the interpretation and application of PURPA rules and policies has been directly conferred upon the Commission by both federal and state law. While we recommend abatement of judicial proceedings, the U.S. District Court remains free to determine when and how to address all matters before it while taking cognizance of the statutory framework of the subject matter being addressed by the Commission pursuant to its statutorily delegated authority and the standards for primary jurisdiction enunciated by the Oregon Supreme Court. Moreover, because we do not claim exclusive jurisdiction, we need not resolve NewSun QFs' claim that our exercise of jurisdiction violates its constitutional right to a jury.

We further conclude that NewSun QFs' reliance on the "first-to-file" doctrine is misplaced. That doctrine relates to deference among courts of general jurisdiction, and does not apply when determining whether a state agency has primary jurisdiction to address a dispute. As the Oregon Supreme Court recognized in *Dreyer*, our authority as an administrative agency charged with addressing subject matter delegated to it by statute does not turn on a question of timing. The first-to-file doctrine thus does not automatically give a court primary or exclusive jurisdiction over an agency.

Finally, we also conclude that PGE has satisfied the standards for bringing a complaint against NewSun QFs. Because PGE's complaint identifies the nature of the dispute and the relief sought, it satisfies the requirements of ORS 756.500(3). Furthermore, interpreting the language and intent of a particular contract—in contrast with interpreting the policy stated in an order that led to the preparation of the contract—does not constitute the issuance of a declaratory ruling whose application must be limited to a rule or statute.

¹²See, e.g., *In the Matter of Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 (May 13, 2005).

IV. ORDER

IT IS ORDERED that the motion to dismiss filed by Alfalfa Solar I LLC, Dayton Solar I LLC, Fort Rock Solar I LLC, Fort Rock II LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, Riley Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I, LLC and Wasco Solar I, LLC is denied.

Made, entered, and effective MAY 23 2018.



Lisa D. Hardie
Chair



Stephen M. Bloom
Commissioner





Megan W. Decker
Commissioner