ORDER NO. 21-210

ENTERED Jun 25 2021

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2151

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, vs. DAYTON SOLAR I LLC, TYGH VALLEY SOLAR I LLC, WASCO SOLAR I LLC, FORT ROCK SOLAR II, LLC, ALFALFA SOLAR I LLC, and HARNEY SOLAR I LLC. Defendants. Pursuant to ORS 756.500.	ORDER

DISPOSITION: DEFENDANTS' MOTION TO DISMISS GRANTED WITHOUT PREJUDICE; DEFENDANTS' MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY DENIED; COMPLAINANT'S REQUEST FOR LEAVE TO FILE SUR-REPLY DENIED

I. SUMMARY

In this order, we grant the motion filed by Dayton Solar I LLC (Dayton Solar), Tygh Valley Solar I LLC (Tygh Valley Solar), Wasco Solar I LLC (Wasco Solar), Fort Rock Solar II LLC (FRSII), Alfalfa Solar I LLC (Alfalfa Solar), and Harney Solar I LLC (Harney Solar) (collectively the NewSun QFs) to dismiss the complaint of Portland General Electric Company. We also deny the motion for a protective order staying discovery that was filed by the NewSun QFs.

II. BACKGROUND AND PROCEDURAL HISTORY

In 2016, PGE entered into a standard renewable power purchase agreement (PPA) with each of the NewSun QFs. At the time the PPAs were executed, PGE's renewable resource deficiency date was January 1, 2020. Each defendant promised to construct a 10 MW solar project and interconnect with PGE directly, or indirectly via the Bonneville Transmission Authority (BPA), to deliver 60 MW of renewable power. Each of the six defendants promised to achieve commercial operation within 36 months of the effective date of its PPA, and PGE agreed to pay fixed prices based on PGE's 2016 avoided cost

rates. Commercial operation of the six solar projects in 2019 would have allowed PGE to avoid the need to secure 60 MW of renewable capacity from other sources by January 1, 2020. The bargain inherent to each PPA, PGE explains, "was that PGE would pay relatively high 2016 prices to obtain 60 MW of capacity in time to address PGE's 2020 deficiency date" thereby avoiding the need to secure 60 MW of renewable capacity from other sources.[1]

During the first half of 2019, none of the defendants constructed a QF project, interconnected a project, or achieved commercial operation. Under Section 8.2 of the PPAs, the defendants had one year to cure the defaults but none did. The NewSun QFs filed notices of *force majeure* events to excuse performance. The identified events include BPA's failure to issue interconnection agreements and studies in 2017 and 2018, the length of our UM 1931 proceedings, and COVID-19 pandemic-related work stoppages at BPA. PGE disputes the merit and effectiveness of the *force majeure* notices for multiple reasons, and sent a written notice of termination for each project pursuant to Sections 8 and 20 of each PPA.[2]

On January 8, 2021, PGE filed a complaint against the NewSun QFs asking the Commission under ORS 756.500 to review and interpret certain terms in the PPAs, and to issue an order declaring the ineffectiveness of each notice of *force majeure*, and the effectiveness of each notice of termination. On February 1, 2021, the defendants filed a motion to dismiss pursuant to OAR 860-001-0420, ORCP 21 A(1) and ORCP 21 A(8). Defendants assert that the Commission lacks subject matter jurisdiction, as well as primary jurisdiction, to decide PGE's complaint. On March 12, 2021, PGE filed a response to the motion to dismiss. On April 2, 2021, the NewSun QFs filed a reply. On May 11, 2021, the NewSun QFs filed a motion requesting a protective order staying discovery until after a case management conference. PGE filed a response on May 18, 2021. On May 21, 2021, the NewSun QFs filed a reply. On June 22, 2021, PGE requested leave to file a sur-reply, along with a sur-reply.

III. LEGAL STANDARD

The Commission's administrative rules, in conjunction with the Oregon Rules of Civil Procedure (ORCP), govern all practice and procedure before the agency.[3] ORCP 21 provides that certain defenses may be made by a motion to dismiss, including: ORCP 21 A(1) for lack of jurisdiction over the subject matter; and ORCP 21 (A)(8) for a failure to state ultimate facts sufficient to constitute a claim provides sufficient grounds for a

[1] Complaint at 2.
[2] Complaint at 1. The complaint states: "PGE terminated each PPA because: (a) the Seller failed to achieve the scheduled Commercial Operation Date ("COD") on or before the deadline established in Section 2.2.2 of each PPA; (b) the Seller then failed to cure this default within one year as required by Section 8.2 of each PPA.
[3] *See* OAR 860-011-0000(1).

motion to dismiss. Judgment in favor of the moving party may be entered if a motion to dismiss is granted. For the purpose of considering a motion to dismiss, all factual allegations are assumed to be true, and construed in a light most favorable to the non-moving party.

IV. DISCUSSION

A. Parties' Positions

1. NewSun QFs

a. Motion to Dismiss

The NewSun QFs argue that PGE improperly filed a complaint under ORS 756.500 seeking declaratory relief. PGE requests multiple "declarations" from us, they explain, that each notice of *force majeure* by a NewSun QF was ineffective, and that the company validly terminated the PPA of each NewSun QF. Noting that we may act only within our delegated authority to address a complaint,[4] the defendants assert that we do not have subject matter jurisdiction under ORS 756.500 to provide the requested declaratory relief. They analyze the text of the statute, its legislative history, and its context with regard to our authorizing statutes to argue its inapplicability as a means for declaratory relief, noting that the statute does not include any form of the word "declaration." The NewSun QFs argue that, "ORS 756.450 strictly limits the Commission's authority to grant declaratory relief," and is inapplicable here as declaratory rulings are binding between a petitioner and us, but not between a petitioner and a third party. [5]

The NewSun QFs raise additional concerns about PGE using ORS 756.500 to file a complaint against them. They argue that as QFs, they are not proper parties against whom a utility can bring a complaint. The defendants also assert that the complaint involves matters not subject to our ongoing regulation, as their business and activities are not regulated by us. In any case, they argue that ORS 756.500(3) precludes our jurisdiction as PGE's complaint does not properly allege the violation of any law or appropriate grounds for relief. ORS 756.500(3) addresses complaints against persons alleged to have violated a law or rule that we administer, or complaints seeking relief that we can provide, but PGE's complaint involves a contractual dispute, does not concern Oregon statutes or administrative rules that implement PURPA, and seeks declaratory relief more properly provided under ORS 756.450.

[4] Motion to Dismiss at 4 (citing *Diack v. City of Portland*, 306 Or 287, 293, 759 P2d 1070 (1988), *SAIF Corp. v. Shipley*, 326 Or 557, 561, 955 P2d 244 (1998)).
[5] *Id.* at 17.

In any case, the defendants observe, we have consistently "shied away from intervening in contract disputes,"[6] since 1986 when we stated, "unless a party can show a substantial adverse effect on the ratepayers, or the contract names the Commissioner as an authority to resolve disputes in a specific area, the Commissioner will avoid intervening in settled contracts."[7] In 2008, we held that we do not necessarily have jurisdiction over every claim involving a utility, and that "contract claims properly belong before a court of law."[8] A year later in 2009, we confirmed "that the determination of parties' rights under a contract is generally a common law issue that falls within a circuit court's general jurisdiction."[9] Then in 2010, regarding a contract dispute about the ownership of environmental attributes between a utility and a QF, we declined jurisdiction based on advice from Staff's counsel that we did not have "any special expertise in interpreting contracts,"[10] and that the "legal significance of a Commission order based solely upon the application of contract law to interpret a contract is unclear."[11]

Most recently, the NewSun QFs state, we determined that our jurisdiction was limited to the adjudication of "disputes over the meaning of PURPA contracts where the issue presented was not '*simply a common law contract interpretation issue*.'"[12] As this dispute involves common law contract interpretation issues regarding the effectiveness of defendants' notices of *force majeure*, and of PGE's notices of termination, we should not exercise jurisdiction to hear it, they argue. Three provisions of the PPAs are at issue: 1) Section 12 addressing "*Force Majeure*;" 2) Section 20 addressing "Notice;" and 3) Section 9 addressing "Default, Remedies and Termination;" all three are essentially boilerplate terms included in numerous construction and business contracts, the NewSun QFs assert. These are standard contract provisions, not unique to standard PPAs, and require no specialized knowledge of law or policy to evaluate, the NewSun QFs argue.

We have not specifically defined "*force majeure*," the NewSun QFs state.[13] Rather, we indicated that the term "should be defined in standard contracts to be consistent with the general spirit of Order No. 05-584," which allowed variations on non-essential terms,

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[6] Defendants' Reply in Support of Motion to Dismiss at 2.
[7] *Id*. (citing *In the Mater of the Proposed Rules Relating to Cogeneration and Small Power Production*, Docket No. AR 116, Order No. 86-488 at 2 (May 12, 1986)).
[8] Defendants' Reply in Support of Motion to Dismiss at. 2 (citing *Re K.S. v. Qwest Corp*., Docket No. UCR 98, Order No. 08-112 at 2 (Jan 31, 2008)).
[9] *Id*. (citing *Wah Chang*, Docket No. UM 1002, Order No. 09-343 at 12 (Sep 2, 2009)).
[10] Motion to Dismiss at 9 (citing *Re Central Oregon Irrigation District*, Docket No. DR 45, Order No. 10-495 at Appendix A at 4 (Dec 27, 2010)).
[11] Defendants' Reply in Support of Motion to Dismiss at 2 (citing Order No. 10-495, Appendix A at 6).
[12] *Id*. at 6 (quoting Order No. 18-025 at 7, n 15 (*emphasis in Reply)*), and pointing to Order No. 18-174 at 3-4 ("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.").
[13] *Id*. at 5 (citing *Re Public Utility Commission of Oregon*, Docket No. 1129, Order No. 06-538 at 24 (Sep 20, 2006)).

they contend.[14] The term is not specific to utilities or connected to PURPA, nor are the terms used to apply it, such as due diligence or reasonable foresight. As for application here, the NewSun QFs assert that we do not have any specialized knowledge of BPA's interconnection policies.

b. New Sun QFs' Motion for Protective Order Staying Discovery and PGE's Request for Leave to File a Sur-Reply

The NewSun QFs filed a motion under OAR 860-001-0420 seeking a protective order staying discovery until after a case management conference is scheduled. Defendants assert that PGE has filed extensive data requests that are premature and should be stayed. They explain that our new administrative rules, OAR 860-001-0360(3) and (5)(b), require that a case management conference be held within ten days after an answer to a complaint is filed, with one purpose being the postponement of discovery until after a case management conference is held. As an answer has not yet been filed pending resolution of the motion to dismiss, defendants argue that PGE's data requests are not timely and waste resources, because the data requests will be rendered moot if the motion to dismiss is granted.

2. PGE

a. Motion to Dismiss

We have jurisdiction to address the complaint, as filed under ORS 756.500, PGE asserts, "[b]ecause standard PPAs under PURPA are a matter 'regulated by' the Commission under ORS 756.500(1), and are a matter 'affecting' PGE's rates under ORS 756.500(5), the Commission has jurisdiction," to address the company's complaint.[15] We have consistently exercised jurisdiction, since at least 2012, to interpret standard PPAs under PURPA, PGE observes. In keeping with this precedent, PGE seeks an interpretation from us regarding Commission-approved standard PPA terms for commercial operation date (COD), termination, and *force majeure*. These terms were mandated and approved by us,[16] and we have jurisdiction under ORS 756.500 to address their meaning and application, PGE states. Having jurisdiction pursuant to this statute over any defendant with business or activities we regulate, we can exercise jurisdiction over each NewSun QF with an executed PPA to sell power to PGE under PURPA. We have already rejected the notion that a utility cannot ask us to do so in a complaint brought by a utility against a

[14] *Id*. (citing *Re Public Utility Commission of Oregon*, Docket No. UM 1129, Order No. 05-584 at 41 (May 13, 2005)).
[15] PGE's Response to Defendants' Motion to Dismiss at 3.
[16] *Id.* at 3-4 (citing Order No. 15-130 (Commission required that QFs select a COD typically no longer than three years from PPA execution and permitted one-year cure period)); Order No. 06-538 (mandated inclusion of *force majeure* clauses in PPAs).

QF, PGE also observes.[17] Moreover, ORS 756.500(5) allows a utility to file a complaint regarding any matter affecting its rates or services, PGE states. The fate of the NewSun QF PPAs could have a $51 million impact on rates if not terminated.[18] PGE also rebuts the defendants' argument that ORS 756.450 precludes our authority to declare legal rights in a complaint proceeding under ORS 756.500. There are no textual limitations in ORS 756.450 or ORS 756.500, and defendants' observation that the word, "declaration," is absent from ORS 756.500 does not support the "broad proposition that the Commission can never declare the meaning of statutes, rules, orders, or policies when deciding a complaint under ORS 756.500."[19]

PGE challenges the NewSun QFs' position that historical precedent counsels against exercising jurisdiction to interpret the PPAs and disputed issues in these proceedings. Calling the cited cases and orders inapposite, PGE rebuts their precedential value to this docket. For example, PGE explains, our decision in *K.S. v. Qwest Corp*. involved an allegation by a non-customer of trespass, a matter not regulated by us, and having no impact on rates, while *In Central Oregon Irrigation District* invoked ORS 756.450, not 756.500.[20] The defendants also cite cases that involve disputes about negotiated PPAs, not standard PPAs.[21]

In any case, the NewSun QFs seem to concede to our jurisdiction to address the dispute here, PGE observes, as they spend a significant time arguing that a court should have primary jurisdiction. The issue is irrelevant as there is no pending court case, thus no reason for us to address questions of deference, PGE argues.[22] Regardless, PGE contends that we have primary jurisdiction based on the factors considered by courts to determine whether an agency should exercise jurisdiction over a dispute: 1) need for agency's specialized expertise; 2) need for uniform resolution of issues; and 3) whether judicial resolution of issues could interfere with agency's performance of its regulatory responsibilities.[23]

PGE argues that this dispute requires specialized expertise to assess the merit of alleged *force majeure* events. PGE states, we are "uniquely qualified to ascertain the effect of BPA interconnection and workflow policies on the parties' obligations under a standard PPA," while "the concepts would be foreign to a circuit court." PGE further explains:

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[17] *Id*. at 5 (citing *In the Matter of the Complaint of Portland General Electric Company against Pacific Northwest Solar, LLC,* Docket No. UM 1894, Order No. 18-025 at 5 (Jan 25, 2018)).
[18] PGE's Complaint at 3.
[19] PGE's Response to Defendants' Motion to Dismiss at 15-16.
[20] *Id*. at 19, fn 75 (citing *K.S. v. Qwest Corp.*, Docket No. UCR 98, Order No. 08-112 at 2 (Jan 31, 2008)), and fn 76 (citing *Cent. Oregon Irrigation Dist. Petition for Declaratory Ruling*, Docket No. DR 45, Order No. 10-495 at 1-2 (Dec 27, 2010)).
[21] *Id*. at 19.
[22] *Id*. at 20.
[23] *Id*. (citing *Dreyer v. Portland Gen. Elec. Co*., 341 Or 262, 284 (2006)).

> To establish that BPA interconnection delays excused defendants from achieving commercial operations, defendants must demonstrate, among other things, that the interconnection process was beyond its "reasonable control," that it exercised "due diligence" in pursuing interconnection, and that it could not have avoided its interconnection issues with "reasonable foresight." The Commission has much more experience than a circuit court to determine what "due diligence" and "reasonable foresight" are in an interconnection context when determining whether an independent power producer reasonably pursued its interconnection. Nor will a circuit court be well suited to determine if interconnection is the type of process within the "reasonable control" of a QF.
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> Similarly, the Commission is uniquely qualified to determine the effect of its own procedural schedule in a related matter interpreting the NewSun PPAs. Each of defendants' *force majeure* theories calls for application of the Commission's "specialized expertise."

We also recently ruled in Order No. 18-025 and Order No. 18-174 that interpreting a standard PPA calls for our involvement, PGE states, due to expertise, uniform resolution, and mitigation of interference with our regulatory responsibilities. For example, PGE argues, it is critical that ratepayers remain indifferent to QF development.

b. New Sun QFs' Motion for Protective Order Staying Discovery and PGE's Request for Leave to File a Sur-Reply

The Oregon Rules of Civil Procedure, followed by us, permit discovery to begin when a complaint is filed, PGE states. PGE asserts that OAR 860-001-0360 neither states, nor implies, that discovery must wait until after a case management conference. PGE also argues that a pending motion to dismiss does not justify staying all discovery, particularly when many of the data requests merely call for simple yes or no answers. In any case, defendants failed to comply with OAR 860-001-0500(5) by conferring with PGE about discovery issues before filing their motion. PGE asks that the motion to stay be denied in its entirety, but offers alternative relief options.

B. Resolution

1. Motion to Dismiss

We find it unnecessary to examine at length, the NewSun QFs' arguments about whether PGE properly filed a complaint under ORS 756.500 seeking declarations about our interpretation of certain contractual terms in standard QF PPAs. Although the NewSun QFs rely on our recent orders in *Pacific Northwest Solar* and *Alfalfa* to argue persuasively that we should not exercise jurisdiction over the dispute here, they fail to

acknowledge our determinations in both orders that a utility may bring a complaint against a QF under ORS 756.500 that seeks our interpretation of standard PPA terms, as we approved such terms to govern a QF's sale of energy to a utility under PURPA and ORS 758.355. In Order No. 18-025, we specifically held that we have jurisdiction over a QF's activities "under ORS 756.500(1) as such activities relate to state and federal PURPA statutes for which 'jurisdiction for enforcement or regulation' is 'conferred upon the Commission.'"[24] In Order No. 18-174, we concluded that a complaint satisfies ORS 756.500(3) by identifying the nature of the dispute and the relief sought, and we indicated that seeking a contractual interpretation does not call for a declaratory ruling. We agree with PGE that ORS 756.450 does not limit our ability to issue an order under ORS 756.500 that states (a synonym for declares) our interpretation of disputed contractual terms.

Despite finding that PGE's complaint meets foundational subject matter jurisdictional requirements, we decline to consider it further, and we grant defendants' motion to dismiss. In Order No. 18-025, we exercised primary jurisdiction over a utility's complaint against a QF asking us to resolve a contractual dispute between the parties, and denied the QF's motion to dismiss to do so. Like here, the QF challenged our subject matter jurisdiction to consider legal questions that allegedly involved only common law contractual interpretation. We disagreed, however, about the narrowness of that dispute, as interpretation of the contractual term at issue required analysis of underlying federal and state PURPA laws as well as a long, evolving history of Commission policy and rules implementing them.[25] We acknowledged the proficiency of state circuit courts regarding the interpretation of common law contractual terms, but we discerned a need for our grasp of underlying state and federal PURPA laws, policy development, and regulatory responsibilities. We set forth parameters for assuming jurisdiction over a complaint: 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. When we applied the parameters in that case, we affirmed primary jurisdiction to address the disputed issues. The disputed contractual issue in *Pacific Northwest Solar* was whether the QF was entitled to increase the contractual capacity of a facility after contract execution. The issue was factually intertwined with a related complaint alleging a violation of the Commission's administrative rules regarding QF interconnections,[26] and interpretation of the scope of a 2006 Commission order that addressed capacity expansion.[27] In particular, we determined that uniform resolution of the disputed issues was critical due to potential application in numerous other PPAs.

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[24] *See In the Matter of the Complaint of Portland General Electric Company against Pacific Northwest Solar, LLC*, Docket No. UM 1894, Order No. 18-025 at 4 (Jan 25, 2018).
[25] *Id.* at n 4 (citing *In re Public Utility Commission of Oregon, Investigation Relating to Electric Utility Purchases from Qualifying Facilities*).
[26] Motion to Dismiss at 5 (citing Order No. 18-025 at 3 & 5).
[27] *Id*. at 4 & n 4 (citing Order No. 06-538 at 37-38); *Id*. at 6 (noting the term).

Finding concurrent jurisdiction, we also exercised jurisdiction in *Alfalfa Solar* to determine whether the 15-year fixed rate for QFs in a standard PPA began at execution of the contract or at the COD. The Commission again held that resolution of the issues would benefit from the Commission's specialized expertise as the contractual provisions in dispute "were litigated before the Commission, adopted by the Commission, and have the force of regulation under [the Commission's] implementation of PURPA."[28]

Applying the parameters here, we arrive at a different conclusion. We deem the interpretation of the disputed standard PPA terms, in context of application of the facts in this dispute, to not require our specialized expertise and to not pose significant effects on other QFs, or to regulatory policy. For these reasons, we do not find it necessary to exercise primary or concurrent jurisdiction here.

As the analysis of PGE's notices of termination depends on an evaluation of the NewSun QFs' notices of *force majeure*, it is appropriate to first consider whether the *Pacific Northwest Solar* parameters recommend that we assume jurisdiction to address *force majeure* in the QF standard contract PPAs at issue. With regard to analysis of the merit of *force majeure* notices, we note that we do not have significant experience with the jurisprudence of *force majeure*, and that the factual applications are so specific as to not pose a larger influence on future contracts or policy—*e.g.*, the administrative process for a particular docket. As we allowed the utilities to individualize, to some degree, general standard PPA terms like *force majeure*, cure, and termination, we determine that there is less likelihood that analysis of one term will be directly applicable to another. Most importantly, we recognize that how the term in question here is defined in the PPAs at issue is not interlinked with a long history of policy development. Rather, we confirmed in Order No. 06-538, where we reviewed the compliance of each utilities' draft standard QFs PPAs with policy for standard QF PPAs set forth in Order No. 05-584, that we had not defined the term, or discussed the scope of QF default, in Order No. 05-584. Moreover, we advised that standard contracts should incorporate the common legal definition of *force majeure* which we understood to commonly mean "an unforeseeable event of superior or irresistible force that excuses performance."[29] In other words, we indicated that our legal understanding of the term, *force majeure*, was informed by common law and not specialized regulatory policy.

[28] *Id*. at 6 (citing Order No. 18-174 at 4).
[29] *In the Matter of Public Utility Commission of Oregon, Staff Investigation Relating to Electric Utility Purchases from Qualifying* Facilities, Docket No. UM 1129, Order No. 06-538 at 24 (Sep 20, 2006).

2. *New Sun QFs' Motion for Protective Order Staying Discovery and PGE's Request for Leave to File a Sur-Reply*

By granting the NewSun QFs' motion to dismiss PGE's complaint, we render defendants' motion for a protection order to stay discovery moot, thereby also rendering PGE's request to file a sur-reply moot.

V. ORDER

IT IS ORDERED that:

1. The motion to dismiss the complaint of Portland General Electric Company filed by Dayton Solar I LLC (Dayton Solar), Tygh Valley Solar I LLC (Tygh Valley Solar), Wasco Solar I LLC (Wasco Solar), Fort Rock Solar II LLC (FRSII), Alfalfa Solar I LLC (Alfalfa Solar), and Harney Solar I LLC (Harney Solar) is granted.

2. Portland General Electric Company's Complaint is dismissed without prejudice.

3. The motion for a protective order staying discovery is denied.

Made, entered, and effective Jun 25 2021.

Megan W. Decker
Chair

Letha Tawney
Commissioner

Mark R. Thompson
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.