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September 28, 2018

Via Electronic Filing

Public Utility Commission of Oregon
Filing Center
201 High St SE, Suite 100
P.O. Box 1088
Salem, OR 97308-1088

Re: BOTTLENOSE SOLAR, LLC (UM 1877); VALHALLA SOLAR, LLC (UM 1878); WHIPSNAKE SOLAR, LLC (UM 1879); SKYWARD SOLAR, LLC (UM 1880); LEATHERBACK SOLAR, LLC (UM 1881); PIKA SOLAR, LLC (UM 1882); COTTONTAIL SOLAR, LLC (UM 1884); OSPREY SOLAR, LLC (UM 1885); WAPITI SOLAR, LLC (UM 1886); BIGHORN SOLAR, LLC (UM 1888); MINKE SOLAR LLC (UM 1889); and HARRIER SOLAR LLC (UM 1890) v. PORTLAND GENERAL ELECTRIC COMPANY

Attention Filing Center:

Enclosed is Portland General Electric Company's Response in Opposition to Complainants' Motion for Leave to File a Supplemental Response in the above-named dockets for filing.

Thank you for your assistance.

Sincerely,

A handwritten signature in blue ink that reads "Donald J. Light". The signature is written in a cursive style with a prominent loop at the end of the last name.

Donald J. Light
Assistant General Counsel

DJL:al
Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1877-UM 1882, UM 1884-UM 1886, UM 1888-UM 1890

BOTTLENOSE SOLAR, LLC (UM 1877);
VALHALLA SOLAR, LLC (UM 1878);
WHIPSNAKE SOLAR, LLC (UM 1879);
SKYWARD SOLAR, LLC (UM 1880);
LEATHERBACK SOLAR, LLC (UM 1881);
PIKA SOLAR, LLC (UM 1882);
COTTONTAIL SOLAR, LLC (UM 1884);
OSPREY SOLAR, LLC (UM 1885);
WAPITI SOLAR, LLC (UM 1886);
BIGHORN SOLAR, LLC (UM 1888);
MINKE SOLAR, LLC (UM 1889);
HARRIER SOLAR, LLC (UM 1890),

Complainants,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

**PORTLAND GENERAL
ELECTRIC COMPANY'S
RESPONSE IN OPPOSITION TO
COMPLAINANTS' MOTION
FOR LEAVE TO FILE A
SUPPLEMENTAL RESPONSE**

Pursuant to OAR 860-001-0420(4), Portland General Electric Company (“PGE”) respectfully submits this response in opposition to Complainants’ September 13, 2018 motion for leave to file a supplemental response.

I. INTRODUCTION

Complainants have asked for leave to file a supplemental response in opposition to PGE’s motion for summary judgment. Complainants assert that after briefing on the cross-motions for summary judgment was complete, PGE took a position in another case—*Parrott Creek Solar LLC v. PGE*¹—that Complainants allege is inconsistent with

¹ See, *Parrott Creek Solar LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1945, Complaint (Apr. 30, 2018), PGE’s Answer (Aug. 13, 2018), Complainants’ Notice of Dismissal (Aug. 17, 2018), Order 13-305 (Aug. 20, 2018) (order dismissing complaint).

PGE's position in the instant cases. Complainants argue that they should be allowed to file a supplemental brief to bring this alleged inconsistency to the Commission's attention.²

The Commission should deny leave to file a supplemental response for three reasons.

First, PGE's position in the *Parrott Creek* case is not at all inconsistent with its position in the instant cases.

Second, the issue that Complainants seek to brief in their supplemental response is not relevant to resolution of PGE's motion for summary judgment or the claims asserted in the complaints. Specifically, the issue Complainants seek to brief is Complainants' "position with respect to their eligibility for the June 1 rates if their claim to the earlier rates is rejected."³ But this alternative claim for relief is not contained in the complaints, and the Commission recently issued an order that refused to allow the Complainants to amend their complaints to add this claim.⁴ In sum, the supplemental response should be rejected because it briefs a claim that is not articulated in the complaints, is not relevant to the resolution of PGE's motion for summary judgment, is beyond the scope of these proceedings, and that was recently rejected by the Commission in Order No. 18-348.

Third, the motion for leave to file a supplemental response should also be denied because Complainants have already had the opportunity to file two briefs opposing

² Complainants' Motion for Leave to File a Supplemental Response at 2 (Sep. 13, 2018).

³ Complainants' Supplemental Response at 4 (Sep. 13, 2018).

⁴ See e.g., *Bottlenose Solar LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1877, Order No. 18-348 (Sep. 24, 2018).

PGE's motion for summary judgment;⁵ Complainants have not articulated good cause to file a third brief in opposition.

Finally, if the Commission decides to grant Complainants leave to file a third brief in the form of a supplemental response, then PGE respectfully requests that it be authorized to file a supplemental reply.

II. BACKGROUND

PGE has not taken inconsistent positions in the instant cases and in the *Parrott Creek* case regarding the question of when a legally enforceable obligation ("LEO") is established.

A. The instant cases.

The instant cases involve 12 qualifying facilities ("QFs") that seek a standard power purchase agreement ("PPA") under Schedule 201.⁶ PGE provided each Complainant with a draft PPA between May 15 and May 23, 2017.⁷ In late May 2017, each Complainant informed PGE that it sought certain changes to the terms and conditions of its draft PPA.⁸ PGE responded that it would provide each Complainant with a revised draft PPA within 15 business days as required by PGE's Commission-approved Schedule 201 process.

However, Complainants knew that PGE's rates were scheduled to decrease on June 1, 2017. Complainants did not want to wait for the completion of the Schedule 201 process, which would have resulted in their receiving PPAs containing the new, lower June 1 rates. As a result, in late May 2017, each Complainant decided to depart from the

⁵ Complainants' Response to PGE's Motion for Summary Judgment (March 9, 2018); and Complainants' Sur-Response to PGE's Motion for Summary Judgment (April 20, 2018).

⁶ See PGE's Motion for Summary Judgment at 6 (Jan. 24, 2018).

⁷ *Id.* at 10.

⁸ *Id.* at 11-12.

Schedule 201 process. Each Complainant unilaterally modified the terms and conditions of its draft PPA, signed the modified draft PPA, sent the signed draft to PGE in late May 2017, and declared itself to have established a LEO entitling it to sell to PGE at the higher rates in effect in May 2017 (the “pre-June 1 rates”).⁹

After declaring the establishment of a LEO in late May 2017, each Complainant abandoned the Schedule 201 process. They did not respond to the revised draft PPAs that PGE provided in mid-June 2017; and they did not engage in any other efforts to obtain an executable PPA from PGE during the period June 1, 2017, to September 18, 2017.¹⁰ Instead, in August 2017, each Complainant filed a complaint against PGE. In these complaints they each asserted that they established a LEO in late May 2017 when they unilaterally modified and signed a draft PPA and they asserted that they were entitled to receive the pre-June 1 rates.¹¹ The complaints contain no alternative claim to have established a LEO at the rates in effect from June 1, 2017, until September 18, 2017.¹²

In response to the Complaints, PGE filed a motion for summary judgment on January 24, 2018. PGE noted that under the Commission’s orders a LEO is only established if a QF proceeds through the stages of the standard contracting process, obtains an executable PPA from the utility, and signs that executable PPA.¹³ Alternatively, if a QF proceeds through the standard contracting process and is entitled to an executable PPA under that process *before* a rate change but the utility obstructs the QF from obtaining the executable PPA before the rate change, then the Commission can

⁹ PGE’s Motion for Summary Judgment at 16.

¹⁰ PGE’s Reply in Support of Its Motion for Summary Judgment at 34 (May 6, 2018).

¹¹ PGE’s Motion for Summary Judgment at 16.

¹² PGE’s Reply in Support of Its Motion for Summary Judgment at 34.

¹³ PGE’s Motion for Summary Judgment at 18.

declare that a LEO existed before the rate change.¹⁴ PGE argued that the Complainants did not establish a LEO before the June 1, 2017 rate change because none of the Complainants was entitled to receive an executable PPA under the Schedule 201 process before the June 1, 2017 rate change.¹⁵

In response to PGE's motion for summary judgment, the Complainants stated that if the Commission agrees with PGE, then the Commission should find that the Complainants established a LEO after June 1, 2017, and are entitled to the rates that were in effect from June 1, 2017, until September 18, 2017.¹⁶ This was the first time that Complainants raised this alternative claim for relief; it was not asserted in the complaints. Complainants conceded as much by stating that they intended to amend their complaints to state this alternative claim for relief.¹⁷

PGE responded to the alternative claim for relief by making two arguments. First, PGE argued the alternative claim for relief must be rejected because it was not asserted in the complaints and therefore had no bearing on PGE's motion for summary judgment.¹⁸ Second, PGE argued that even if the alternative claim for relief had been raised in the complaint it should be denied on its merits because Complainants abandoned the Schedule 201 process in late May 2017, and therefore never proceeded to a position where they were entitled to receive an executable PPA during the period June 1, 2017, to September 18, 2017.¹⁹ Because Complainants did not seek or obtain an executable PPA during this period, they could not have established a LEO during this period.

¹⁴ PGE's Motion for Summary Judgment at 18.

¹⁵ *Id.* at 3-5.

¹⁶ Complainants' Response to PGE's Motion for Summary Judgment at 34-35.

¹⁷ Complainants' Cross-Motion for Summary Judgment at 3 (Apr. 6, 2018) ("The Complainants intend to file amended complaints explicitly requesting this alternative relief.")

¹⁸ PGE's Reply in Support of its Motion for Summary Judgment at 33-34.

¹⁹ *Id.* at 34.

B. Complainants’ motion to amend the complaints in the instant cases.

After briefing the cross-motions for summary judgment, Complainants moved for leave to amend their complaints to add their alternative claim for relief (claiming to have established a LEO entitling them to the rates in effect from June 1, 2017, until September 18, 2017).²⁰ On September 23, 2018, the Commission issued Order No. 18-348 in which the Commission denied Complainants’ request for leave to amend their complaints. As a result, the complaints do not include Complainants’ alternative claim for relief.

C. The Parrott Creek case.

In April 2018 there were five QFs that filed complaints against PGE.²¹ These QFs were seeking standard PPAs from PGE under Schedule 201. They had all received draft PPAs or final draft PPAs in April 2018. And they knew that PGE would file its annual avoided cost rate update on May 1, 2018. The QFs wanted to “lock in” PGE’s higher April 2018 rates before those rates could change in May 2018. To that end, each QF unilaterally signed its draft PPA or final draft PPA in April 2018 and declared that it had established a LEO in April 2018.²² Each of the five QFs then filed a complaint against PGE in late April 2018 and declared that it had established a LEO that locked in the April 2018 rates. Parrott Creek Solar LLC (“Parrott Creek”) was one of those five QFs.

The critical difference between the instant complaints and the April 2018 complaints is that the complainants in the April 2018 complaints continued to work forward through the Schedule 201 process even after they claimed to have established a

²⁰ Complainants’ Motion for Leave to File First Amended Complaint (Apr. 20, 2018).

²¹ *Kaiser Creek Solar LLC v. PGE*, Docket No. UM 1941, Complaint (Apr. 30, 2018); *Marquam Creek Solar LLC v. PGE*, Docket No. UM 1942, Complaint (Apr. 30, 2018); *Ridgeway Solar LLC v. PGE*, Docket No. UM 1943, Complaint (Apr. 30, 2018); *Walker Creek Solar LLC v. PGE*, Docket No. UM 1944, Complaint (Apr. 30, 2018); *Parrott Creek Solar LLC v. PGE*, Docket No. UM 1945, Complaint (Apr. 30, 2018).

²² See e.g. Docket No. UM 1945, Complaint at page 2 and ¶ 28.

LEO in April 2018. The Commission ultimately determined that PGE's new rates would become effective on May 23, 2018.²³ As it turned out, four of the five April 2018 complainants were entitled to an executable PPA before May 23, 2018. PGE therefore provided those QFs with executable PPAs at the old, higher rates, and the QFs signed the executable PPAs, obtained the higher rates, and withdrew their complaints.²⁴

The fifth April 2018 complainant—Parrott Creek—was entitled to an executable PPA on June 7, 2018. PGE provided an executable PPA on that date and the PPA contained the new, lower rates.²⁵ On June 27, 2018, Parrott Creek signed the executable PPA without protest or any objective manifestation of intent to retain its claim to have established a LEO at the old, higher pre-May 23 rates.²⁶ However, Parrott Creek refused to withdraw its complaint until PGE filed an answer.

On August 13, 2018, PGE filed an answer in the *Parrott Creek* case. In its answer, PGE took the position that Parrott Creek never established a LEO in April 2018 because it was not entitled to an executable PPA under the Schedule 201 process until early June 2018.²⁷ And PGE also asserted as an affirmative defense that even if Parrott Creek had established a LEO in April 2018, it waived or superseded that LEO when it signed the executable PPA, which contained the lower May 23 rates and an integration clause.²⁸ Shortly after PGE filed its answer, Parrott Creek withdrew its complaint.²⁹

²³ *In the Matter of Portland Gen. Elec. Co. Annual Application to Update Schedule 201 Qualifying Facility Information*, Docket No. UM 1728, Order No. 18-199 (Mar. 23, 2018).

²⁴ See e.g., Docket No. UM 1941, Complainants' Notice of Dismissal (June 29, 2018).

²⁵ Docket No. UM 1945, PGE's Answer at ¶ 102 (Aug. 13, 2018).

²⁶ *Id.* at ¶¶ 105-115.

²⁷ *Id.* at pages 2-3.

²⁸ *Id.* at ¶¶ 102-118.

²⁹ Docket No. UM 1945, Complainant's Notice of Dismissal (Aug. 18, 2018).

III. RESPONSE

The Commission should deny leave to file the supplemental response for three reasons. First, there is no inconsistency between PGE's position on the formation of a LEO in the instant cases and in the *Parrott Creek* case. As a result, there is no basis upon which to file a supplemental response that purports to alert the Commission to PGE's inconsistent positions. Second, the whole subject matter of the supplemental response—Complainants' alternative claim for relief seeking the rates in effect from June 1, 2017, until September 18, 2017—is irrelevant because the Commission has denied Complainants' motion to amend the complaints to include this alternative claim for relief. Third, there is no reason why Complainants need the opportunity to file a third brief in opposition to PGE's motion for summary judgment when they have already been allowed to file a response in opposition and a sur-response in opposition.

A. There is no inconsistency in PGE's position on LEO formation in the instant cases and in the *Parrott Creek* case.

As discussed in the background section, PGE has consistently taken the position that under the Commission's orders a QF must proceed through the Section 201 process and reach the point where it is entitled to an executable PPA before it can establish a LEO. In both the instant cases and the *Parrott Creek* case, the QFs did not want to wait to reach the executable PPA stage of the Schedule 201 process and so the QF took a draft PPA, modified it, signed it, and declared that it had established a LEO before the date of a rate change. In both the instant cases and the *Parrott Creek* case, PGE has argued that this approach does not establish a LEO under the Commission's orders because the QF

did not proceed through the Schedule 201 process to the point where it was entitled to obtain an executable PPA.³⁰

The difference between PGE's arguments in the instant cases and in the *Parrott Creek* case arise because of differences in the QFs' actions, not because of a difference in PGE's position regarding the formation of a LEO.³¹ In the instant cases, each of the Complainants modified a draft PPA, signed the modified draft, sent it to PGE in late May 2017, and declared itself to have established a LEO entitling it to the pre-June 1, 2017 rates. The Complainants then abandoned the Schedule 201 process. As a result, PGE has argued that none of the Complainants in the instant cases could possibly have established a LEO entitling it to the rates in effect from June 1, 2017, until September 18, 2017, because none of the Complainants sought or obtained an executable PPA during that period.³²

In contrast, in the *Parrott Creek* case the complainant QF claimed to establish a LEO before the rate change, but continued to pursue the Schedule 201 process and obtained an executable PPA from PGE after the rate change. Parrott Creek could have signed the executable PPA under protest indicating that it was reserving its right to seek the earlier, higher rates under its claim to have established a LEO in April 2018 and that it was accepting the terms of the executable PPA (including the May 23 price term) in the

³⁰ See Docket No. UM 1877, PGE's Motion for Summary Judgment at 3-5; Docket No. UM 1945, PGE's Answer at 2-3.

³¹ The QF developer is largely in control of the pace at which a proposal moves through the Schedule 201 process and whether the proposal completes the process. In both the instant cases and the *Parrott Creek* case, it was the QF, not PGE, driving the respective processes. In the instant cases, Complainants, not PGE, decided to stop pursuing the Schedule 201 process at the end of May 2017. Likewise, in the *Parrott Creek* case, it was the QF, not PGE, that decided to execute a PPA with a lower price and with no indication that the QF intended to retain its claim to an earlier, higher price. In neither case did PGE really "take a position" on these issues as Complainants seem to suggest in their supplemental response; rather, PGE was simply reacting to the developers' requests and actions.

³² Docket No. UM 1877, PGE's Reply in Support of Its Motion for Summary Judgment at 33-34.

event the Commission determined that Parrott Creek did not establish a LEO at the older, higher rate. In fact, Parrott Creek signed and accepted the June 7, 2018 executable PPA without any such objective manifestation of intent to preserve its claim to have established a LEO at an earlier rate.³³ As a result, PGE decided that the facts of the case supported its affirmative defense arguing that by signing the June 7, 2018 executable PPA without condition or reservation, Parrott Creek waived its claim to have established a LEO in April 2018.

There is no inconsistency in PGE's position on the formation of a LEO in the instant cases and the *Parrott Creek* case. In order to establish a LEO a QF must proceed through the Schedule 201 process to the point where it is entitled to receive an executable PPA. If it has not, then it cannot establish a LEO.³⁴ If it obtains an executable PPA at a newer, lower rate but believes it has a valid claim to have established a LEO at an older, higher rate, then the QF should be careful to make objective any intent it has to accept the executable PPA subject to a reserved claim of entitlement to the older, higher rate. In any event, the question of accepting an executable PPA with a newer, lower rate while preserving a claim to have established a LEO at an older, higher rate never became a "live issue" in the instant cases because the Complainants abandoned the Schedule 201 process in late May 2017 and never sought or obtained an executable PPA during the time period from June 1, 2017, through September 18, 2017.

³³ Docket No. UM 1945, PGE's Answer at ¶¶ 112-115.

³⁴ As discussed at length in PGE's Motion for Summary Judgment and supporting briefs, it is possible for a QF to establish a LEO if it has proceeded through the Schedule 201 process sufficiently to become entitled to receive an executable PPA before a rate change, even if the utility obstructs the QF from actually obtaining an executable PPA before the rate change.

B. The subject of the supplemental response is irrelevant.

The issue being briefed in the supplemental response is the question of whether Complainants are entitled to alternative relief in the form of a declaration that they have established a LEO at the rates in effect from July 1, 2017, until September 18, 2017.³⁵ On September 23, 2018, the Commission issued an order in which it decided not to allow Complainants to amend their complaints to add this alternative claim for relief to their complaints.³⁶ As a result, the question of whether Complainants have established a LEO entitling them to the June 1 rates is outside the scope of the complaints. The supplemental response, which seeks to provide additional briefing on this issue, is therefore irrelevant and should be rejected.

C. There is no basis upon which to authorize a third brief in opposition to PGE’s motion for summary judgment.

Complainants have already had the opportunity to file two briefs opposing PGE’s motion for summary judgment – their March 9, 2018 response in opposition and their April 20, 2018 sur-response in opposition. There is no basis upon which to conclude that Complainants should be allowed to file a third brief in opposition to PGE’s motion for summary judgment.

IV. CONCLUSION

For the reasons discussed above, the Commission should deny Complainants’ September 13, 2018, motion for leave to file a supplemental response. In the alternative, if the Commission grants leave for Complainants to file a supplemental response, the

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³⁵ See e.g., Complainants’ Supplemental Response at 4 (“Complainants are filing this supplemental response to bring the Commission’s attention to another recent case that supports Complainants position with respect to their eligibility for the June 1 rates if their claim to the earlier rates is rejected.”).

³⁶ Order No. 18-348.

Commission should authorize PGE to file a supplemental reply and should give PGE at least three weeks to do so.

DATED this 28th day of September, 2018.

Respectfully submitted,



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