

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2085

Served electronically at Salem, Oregon, 05/11/2020, to:

Respondent's Attorney
Douglas C. Tingey
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Complainant's Attorneys & Representative
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Troy Snyder
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Re: UM 2085, FRUITLAND CREEK SOLAR, LLC, Complainant
vs. PORTLAND GENERAL ELECTRIC COMPANY, Respondent

Fruitland Creek Solar, LLC has filed a complaint against Portland General Electric Company. A copy of the complaint is attached and served on Respondent, under ORS 756.512(1). The Commission has assigned Docket No. UM 2085 to this complaint. Please use this number whenever you refer to this case.

The Public Utility Commission must receive an Answer from the Respondent or its attorneys by June 1, 2020, under OAR 860-001-0400(4)(a). A copy must be served on the complainant.

After the filing of the answer, the PUC will contact the parties to provide information about further proceedings in this matter.

PUBLIC UTILITY COMMISSION OF OREGON

/s/Cheryl Walker
Cheryl Walker
Administrative Specialist 2
Administrative Hearings Division
(503) 378-2849

c: Helen Parker, Helen.Parker@pgn.com

Attachments: Complaint
Notice of Contested Case Rights and Procedures

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

Oregon law requires state agencies to provide parties written notice of contested case rights and procedures. Under ORS 183.413, you are entitled to be informed of the following:

Hearing: The time and place of any hearing held in these proceedings will be noticed separately. The Commission will hold the hearing under its general authority set forth in ORS 756.040 and use procedures set forth in ORS 756.518 through 756.610 and OAR Chapter 860, Division 001. Copies of these statutes and rules may be accessed via the Commission's website at www.puc.state.or.us. The Commission will hear issues as identified by the parties.

Right to Attorney: As a party to these proceedings, you may be represented by counsel. Should you desire counsel but cannot afford one, legal aid may be able to assist you; parties are ordinarily represented by counsel. The Commission Staff, if participating as a party in the case, will be represented by the Department of Justice. Generally, once a hearing has begun, you will not be allowed to postpone the hearing to obtain counsel.

Notice to Active Duty Servicemembers: Active Duty Servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

Administrative Law Judge: The Commission has delegated the authority to preside over hearings to Administrative Law Judges (ALJs). The scope of an ALJ's authority is defined in OAR 860-001-0090. The ALJs make evidentiary and other procedural rulings, analyze the contested issues, and present legal and policy recommendations to the Commission.

Hearing Rights: You have the right to respond to all issues identified and present evidence and witnesses on those issues. *See* OAR 860-001-0450 through OAR 860-001-0490. You may obtain discovery from other parties through depositions, subpoenas, and data requests. *See* ORS 756.538 and 756.543; OAR 860-001-0500 through 860-001-0540.

Evidence: Evidence is generally admissible if it is of a type relied upon by reasonable persons in the conduct of their serious affairs. *See* OAR 860-001-0450. Objections to the admissibility of evidence must be made at the time the evidence is offered. Objections are generally made on grounds that the evidence is unreliable, irrelevant, repetitious, or because its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay. The order of presenting evidence is determined by the ALJ. The burden of presenting evidence to support an allegation rests with the person raising the allegation. Generally, once a hearing is completed, the ALJ will not allow the introduction of additional evidence without good cause.

Notice of Contested Case Rights and Procedures continued

Record: The hearing will be recorded, either by a court reporter or by audio digital recording, to preserve the testimony and other evidence presented. Parties may contact the court reporter about ordering a transcript or request, if available, a copy of the audio recording from the Commission for a fee set forth in OAR 860-001-0060. The hearing record will be made part of the evidentiary record that serves as the basis for the Commission's decision and, if necessary, the record on any judicial appeal.

Final Order and Appeal: After the hearing, the ALJ will prepare a draft order resolving all issues and present it to the Commission. The draft order is not open to party comment. The Commission will make the final decision in the case and may adopt, modify, or reject the ALJ's recommendation. If you disagree with the Commission's decision, you may request reconsideration of the final order within 60 days from the date of service of the order. *See* ORS 756.561 and OAR 860-001-0720. You may also file a petition for review with the Court of Appeals within 60 days from the date of service of the order. *See* ORS 756.610.

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

FRUITLAND CREEK SOLAR, LLC,

Complainant,

v.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

DOCKET NO. UM 2085

COMPLAINT

EXPEDITED CONSIDERATION
REQUESTED

I. INTRODUCTION

This is a complaint (“Complaint”) filed by Fruitland Creek Solar, LLC (“Fruitland Creek Solar” or “Complainant”) with the Oregon Public Utility Commission (the “Commission” or “OPUC”) against Portland General Electric Company (“PGE” or the “Company”) under Oregon Revised Statute (“ORS”) 756.500 and Oregon Administrative Rule (“OAR”) 860-001-0170. Fruitland Creek Solar and PGE are parties to a power purchase agreement (“PPA”) for the output of the Fruitland Creek Solar facility, which is a 1.75-megawatt (“MW”) solar qualifying facility (“QF”) under the Public Utility

Regulatory Policies Act (“PURPA”). Fruitland Creek Solar seeks to conditionally terminate the PPA so that it can participate in the Community Solar Program (“CSP”).

PGE has taken the position that Fruitland Creek Solar cannot participate in the CSP. The Commission has recognized that Fruitland Creek Solar meets all requirements for precertification in the CSP but faces practical barriers to participating as a result of the PPA in dispute. On April 21, 2020, the Commission awarded CSP pre-certification to the Fruitland Creek Solar project conditional upon the termination of the PPA.¹

Fruitland Creek Solar seeks to have the current PPA terminated if Fruitland Creek Solar is able to be certified in the CSP. Conditional termination will avoid the uncertainty of developing without a PPA and the burden of potentially needing to negotiate to re-enter the terminated PPA.

Fruitland Creek Solar provided formal notice of conditional termination to PGE on May 7, 2020. As of this filing, PGE has not responded, has not agreed to conditionally terminate the PPA, and has not agreed that Fruitland Creek Solar is even capable of terminating the PPA.

Fruitland Creek Solar requests expedited consideration of this complaint and Commission order no later than August 7, 2020. Fruitland Creek Solar proposes that PGE file its Answer on or before June 12, 2020, followed by three simultaneous rounds of cross-motions for summary judgment, to be filed on July 3, 2020; July 17, 2020; and July 24, 2020.

¹ See *In re Cmty. Solar Projects for Conditional Pre-Certification Consideration*, Docket No. UM 1930, Order No. 20-142 at 1, Appendix A, 2 (Apr. 27, 2020).

Fruitland Creek Solar and PGE have reached a settlement in principle that is being finalized. PGE has filed a tariff request to allocate all generic costs of the CSP to all customers.² Under the settlement, PGE and Fruitland Creek Solar will enter into a mutual agreement for termination of Fruitland Creek Solar’s PPA if the Commission approves this tariff request, and will support the expedited schedule for resolution of this complaint regarding the PPA terminations if the Commission does not timely approve the tariff. Under the settlement, Fruitland Creek Solar will provide a statement of support explaining that the CSP furthers decarbonization of energy supply in Oregon and provides a public benefit and a public good that benefits all customers. Under the settlement, Fruitland Creek Solar will not take a position on PGE’s proposed tariff, but will support the Commission and PGE considering responsibility of program costs. Fruitland Creek Solar has filed this complaint as a “placeholder” in the event that PGE does not agree to terminate its PPA. If PGE agrees to terminate its PPA, Fruitland Creek Solar will withdraw this complaint.

II. SERVICE

Copies of all pleadings and correspondence should be served on Complainant’s counsel and representatives at the addresses below:

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² *PGE Schedule 136, Adv No 20-09 Cmty. Solar Cost Recovery Mechanism Update*, Docket No. ADV 1112, PGE Advice No. 20-09 at 1-2 (Apr. 23, 2020).

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In support of this Complaint, Complainant alleges as follows:

III. IDENTITY OF THE PARTIES

1. PGE is an investor-owned public utility regulated by the Commission under ORS Chapter 757. PGE is headquartered at 121 Southwest Salmon Street, Portland, Oregon 97204.

2. Fruitland Creek Solar, LLC is an Oregon limited liability company, the owner of a QF solar project, and will be the seller of the net output from that project. Fruitland Creek Solar's mailing address is 3519 NE 15th Ave., #325, Portland, OR 97212.

IV. APPLICABLE STATUTES AND RULES

3. The Oregon statutes expected to be involved in this case include: ORS 756.040-756.068, 756.500-756.558, 756.990, 757.020, 757.325, 757.386, 758.010-758.035, and 758.505-758.555. The Oregon rules expected to be involved in this case include: OAR 860-001, 860-023, 860-024, 860-029, 860-082, and 860-088.

4. The federal statute expected to be involved in this case is PURPA: 16 USC 824a-3. The federal rules expected to be involved in this case include: 18 CFR 292.101-292.602 (2020).

V. JURISDICTION

5. The Federal Energy Regulatory Commission ("FERC") adopted regulations and policies governing utility purchases from QFs under PURPA. 18 CFR

292.101-292.602. State regulatory agencies are required to implement FERC's regulations. *See* 16 USC 824a-3(f); *FERC v. Mississippi*, 456 U.S. 742, 751 (1982).

6. The Commission is the Oregon state agency that implements the state and federal PURPA statutes. ORS 758.505(3); OAR 860-029-0001; *Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 593 (1987). PGE is a public utility according to the definition in ORS 758.505(7). The Commission has the power and jurisdiction to hear complaints by QFs against public utilities, including PGE. ORS 756.040, 756.500-756.558, and 758.505-758.555; OAR 860-001-0010(3), 860-029-0030, and 860-088-0140.

7. The Commission has jurisdiction to represent the customers of any public utility, including interconnection customers, in all controversies respecting rates, valuations, service and all matters of which the Commission has jurisdiction, and has jurisdiction to protect customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates. ORS 756.040.

8. The federal District Court and/or an Oregon Circuit Court has concurrent and may have exclusive jurisdiction over certain claims in this Complaint. However, Fruitland Creek Solar understands that the Commission has held that it has primary and concurrent jurisdiction over post-contract execution claims involving PGE's standard PURPA PPA. *PGE v. Pac. Nw. Solar, LLC*, Docket No. UM 1894, Order No. 18-025 at 7 (Jan. 25, 2018); *PGE v. Alfalfa Solar*, Docket No. UM 1931, Order No. 18-174 at 3-4 (May 23, 2018). Fruitland Creek Solar is not waiving any rights to have a District or

Circuit court adjudicate and resolve its claims for relief by filing this Complaint before the Commission.

VI. FACTUAL BACKGROUND

9. The Fruitland Creek Solar project will be a 1.75-megawatt (“MW”) nameplate solar generation facility located in Marion County, Oregon.

10. The Fruitland Creek Solar project will interconnect with PGE.

11. On May 4, 2018, Fruitland Creek Solar executed a Standard Renewable In-System Variable PPA with PGE, which PGE counter-signed on May 25, 2018 (available at: <https://edocs.puc.state.or.us/efdocs/HAQ/re143haq123147.pdf>).

12. The PPA allows Fruitland Creek Solar to terminate the PPA for any reason.

13. On December 7, 2018 and again on October 1, 2019, PGE proposed to *clarify* its standard PPA forms by adding language explaining that the PPA’s “springer” provision applies when “Seller terminates this Agreement without cause.”

14. If the PPA does not allow QFs to terminate without cause, then PGE’s proposed revision would have been meaningless.

15. The PPA’s “springer” provision does not apply to sales to non-PGE buyers, including sales to PGE ratepayers as CSP participants.

16. The PPA allows Fruitland Creek Solar to terminate the PPA without owing damages so long as Fruitland Creek Solar provides notice of termination to PGE at a reasonable time prior to the start of delivery.

17. PGE has made statements that QFs can terminate standard PPAs.

18. On January 31, 2019, PGE stated that “Developers can terminate contracts at no cost.”

19. On January 31, 2019, PGE stated that the “Standard Contract is a free option.”

20. On January 31, 2019, PGE stated that the “Standard contract provides QF developers a free option.”

21. PGE has interpreted the standard PPA to be an option contract for QFs.

22. A QF can exercise its option by delivering power to PGE.

23. Fruitland Creek Solar’s scheduled date to begin initial deliveries to PGE was November 1, 2019.

24. Fruitland Creek Solar’s scheduled commercial operation date (“COD”) was December 1, 2019.

25. As of the date of this filing, Fruitland Creek Solar has not delivered any power to PGE.

26. As of the date of this filing, Fruitland Creek Solar has not exercised its option under the standard PPA option contract.

27. On December 4, 2019, PGE issued a notice of default to Fruitland Creek Solar for not having achieved its scheduled COD.

28. PGE has established a practice of allowing QFs to terminate standard PPAs.

29. For example, PGE has allowed TLS Capital, LLC (“TLS Capital”), the developer for Fruitland Creek Solar, to terminate PGE’s standard PPA in the past.

30. PGE has made assertions that the PPAs force PGE's customers to purchase wholesale power at above-market prices.

31. On June 30, 2017, PGE asserted that standard avoided cost prices for solar QF PPAs cost PGE and its ratepayers "approximately \$30/MWh more than market for solar QF output."

32. On June 30, 2017, PGE asserted that QFs "locking in inaccurate standard prices for 15 years will result in substantial and irreparable harm to PGE's customers."

33. At the time Fruitland Creek Solar executed the PPA, Fruitland Creek Solar believed and expected that the contract terms in PGE's standard PPAs would allow any QF to terminate a standard PPA for any reason.

34. Fruitland Creek Solar's belief and expectation that PGE's standard PPAs allow any QF to terminate a standard PPA for any reason was based on PGE's statements that QFs can terminate standard PPAs.

35. Fruitland Creek Solar's belief and expectation that PGE's standard PPAs allow any QF to terminate a standard PPA for any reason was based on PGE's practice of allowing QFs to terminate standard PPAs.

36. At the time Fruitland Creek Solar executed the PPA, Fruitland Creek Solar believed and expected that PGE would allow any QF to terminate a standard PPA for any reason.

37. Fruitland Creek Solar's belief and expectation that PGE would allow any QF to terminate a standard PPA for any reason was based on PGE's assertions that the PPAs force PGE's customers to purchase wholesale power at above-market prices.

38. On January 10, 2020, FC PM, LLC registered as a project manager in the CSP.

39. On January 14, 2020, the CSP Program Administrator approved FC PM, LLC as a registered project manager.

40. On January 21, 2020, the CSP Program Administrator allowed project managers to submit applications for potential CSP projects.

41. On January 21, 2020, FC PM, LLC submitted an application to the CSP for the Fruitland Creek Solar project.

42. On or about January 21, 2020, PGE submit applications to the CSP for various QF projects that are subject to standard PPAs between PGE and the project developers.

43. On January 21, 2020, the total number of applications to the CSP in PGE's service territory exceeded the available capacity.

44. On January 22, 2020, a lottery was run to determine queue order for the CSP in PGE's service territory.

45. On January 22, 2020, a queue order was established for the CSP in PGE's service territory.

46. On January 22, 2020, the CSP Program Administrator posted the queue order for the CSP in PGE's service territory on the CSP website (see <https://www.oregoncsp.org/p/ProjectQueue/>).

47. On January 22, 2020, the Fruitland Creek Solar project was awarded a spot in the CSP in PGE's service territory.

48. When applying for the CSP, it was Fruitland Creek Solar's belief and expectation that it could terminate the PPA for any reason.

49. On April 13, 2020, Commission Staff recommended that the Commission conditionally pre-certify the Fruitland Creek Solar project in the CSP.

50. The first condition requires Fruitland Creek Solar to terminate the PPA within six weeks of the Commission approving conditional pre-certification.

51. The second condition requires Fruitland Creek Solar to terminate the PPA before the CSP project manager may enter contracts with CSP participants.

52. The third and final condition requires Fruitland Creek Solar to provide documentation of termination to the CSP program administrator before the CSP program administrator will list the Fruitland Creek Solar project on the CSP website.

53. On April 21, 2020, the Commission adopted Staff's recommendation to conditionally pre-certify the Fruitland Creek Solar project in the CSP.

54. On May 7, 2020, Fruitland Creek Solar provided notice of conditional termination to PGE for the PPA, pursuant to Section 20.1 of the PPA.

55. As of this filing, PGE has not responded or acknowledged Fruitland Creek Solar's notice of conditional termination.

56. As of the date of this filing, PGE has not agreed to conditionally terminate the Fruitland Creek Solar PPA.

57. As of the date of this filing, PGE has not agreed to conditionally terminate the Fruitland Creek Solar PPA so that Fruitland Creek Solar can participate in the CSP.

58. PGE has taken the position that any QF with an executed standard PPA is not eligible to participate in the CSP.

59. Fruitland Creek Solar seeks relief so that it can participate in the CSP.

VII. LEGAL CLAIMS

60. Complainant re-alleges all the preceding paragraphs.

61. Fruitland Creek Solar is entitled to relief because PGE's standard PPA is an option contract, and Fruitland Creek Solar seeks only to exercise its contractual right not to exercise its option in the event the Commission grants CSP certification to the Fruitland Creek Solar project.

62. Alternatively, Fruitland Creek Solar is entitled to relief because PGE's standard PPA allows QFs to terminate and instead pay damages, if any exist.

63. Alternatively, Fruitland Creek Solar is entitled to relief because any party to a contract can anticipatorily repudiate the contract.

64. Alternatively, Fruitland Creek Solar is entitled to relief because PGE's notice of default enables Fruitland Creek Solar to anticipatorily repudiate the PPA.

65. Fruitland Creek Solar is entitled to relief because PGE's refusal to allow Fruitland Creek Solar to terminate is a violation of the PPA.

66. Fruitland Creek Solar is entitled to relief because PGE's refusal to allow Fruitland Creek Solar to terminate is a violation of the duty of good faith and fair dealing.

67. Fruitland Creek Solar is entitled to relief because Fruitland Creek Solar detrimentally relied on PGE's past statements that QFs can terminate the standard PPA and detrimental reliance legally estops PGE from contradicting its past statements.

68. Fruitland Creek Solar is entitled to relief because Fruitland Creek Solar detrimentally relied on PGE's past practice of allowing QFs to terminate the standard PPA and detrimental reliance legally estops PGE from contradicting its past practice.

69. Fruitland Creek Solar is entitled to relief because Fruitland Creek Solar detrimentally relied on PGE's past practice of agreeing to QFs' requests to terminate the standard PPA and detrimental reliance legally estops PGE from contradicting its past practice.

70. Fruitland Creek Solar is entitled to relief because PGE violated ORS 757.325 by unjustly discriminating against Fruitland Creek Solar.

71. Fruitland Creek Solar is entitled to relief because PGE violated ORS 757.325 by unjustly discriminating against Fruitland Creek Solar and other QFs.

72. Fruitland Creek Solar is entitled to relief because PGE's refusal to accept or agree to termination is imprudent.

73. Fruitland Creek Solar is entitled to relief because PGE's refusal to accept or agree to termination is harmful to PGE's customers.

74. Fruitland Creek Solar is entitled to relief because PGE's refusal to agree to terminate is contrary to the legislative policy of having a CSP in PGE's service territory.

75. Fruitland Creek Solar is entitled to relief because PGE's refusal to agree to terminate is contrary to the Commission's policy of having a CSP in PGE's service territory.

76. Fruitland Creek Solar is entitled to relief because PGE's refusal to agree to terminate on the grounds that Fruitland Creek Solar's participation in the CSP would impose undue costs on PGE's ratepayers is contrary to the Commission's policy and orders.

VIII. PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests that the Commission issue an order:

77. Finding that Fruitland Creek Solar has a contractual right to terminate the PPA.
78. Finding that PGE is obligated to allow Fruitland Creek Solar to terminate the PPA.
79. Finding that Fruitland Creek Solar is entitled to conditional termination of the PPA.
80. Directing PGE to conditionally terminate Fruitland Creek Solar's PPA, per Fruitland Creek Solar's notice of conditional termination.
81. Finding that PGE unjustly discriminated against Fruitland Creek Solar.
82. Finding that PGE unjustly discriminated against Fruitland Creek Solar and other QFs.
83. Directing PGE to refrain from engaging in unjust discrimination.
84. Finding that conditional termination of the PPA is the prudent course of action.
85. Finding that conditional termination of the PPA is in the public interest.
86. Finding that conditional termination of the PPA does not affect Fruitland Creek Solar's eligibility to participate in the CSP, including that the Section 9.5 "springer" provision does not apply to Fruitland Creek Solar's ability to participate in the CSP.

87. Finding that the conditionally terminated PPA, including any surviving provisions, will not affect Fruitland Creek Solar's eligibility to enter contracts with subscribers or owners pursuant to the CSP.

88. Finding that conditional termination of a pre-existing PURPA PPA does not affect a QF's eligibility to participate in the CSP.

89. Finding that allowing QFs to conditionally terminate their PPAs in order to participate in the CSP is the prudent course of action.

90. Finding that allowing QFs to conditionally terminate their PPAs in order to participate in the CSP is in the public interest.

91. Finding that PGE has not acted prudently.

92. Directing PGE to act prudently.

93. Finding that PGE has not acted in the public interest.

94. Directing PGE to act in the public interest.

95. Directing PGE to treat all established or aspiring CSP projects in a fair, just, and reasonable manner.

96. Instituting penalties up to \$10,000 pursuant to ORS 756.990 against PGE and paid by PGE's shareholders for each breach of the standard PPA's terms and for each violation of ORS 757.020, ORS 757.386, and ORS 758.525(2).

97. Granting any other such relief as the Commission deems necessary.

Dated this 11th day of May 2020.

Respectfully submitted,



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Of Attorneys for Fruitland Creek Solar, LLC

CERTIFICATE OF FILING

I certify that on May 11th, 2020, I filed the foregoing Complaint on behalf of Fruitland Creek Solar, LLC with the Oregon Public Utility Commission by electronic communication as consistent with OAR 860-001-0170.



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