

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2090

Served electronically at Salem, Oregon, 05/13/2020, to:

Respondent's Attorney
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Re: UM 2090, CUSACK SOLAR LLC, Complainant
vs. PORTLAND GENERAL ELECTRIC COMPANY, Respondent

Cusack 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 2090 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 2, 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**

CUSACK SOLAR, LLC,

Complainant,

v.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

DOCKET NO. UM 2090

COMPLAINT

EXPEDITED CONSIDERATION
REQUESTED

I. INTRODUCTION

This is a complaint (“Complaint”) filed by Cusack Solar, LLC (“Cusack 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. Cusack Solar and PGE are parties to a power purchase agreement (“PPA”) for the output of the Cusack Solar facility, which is a 2.565-megawatt (“MW”) solar qualifying facility (“QF”) under the Public Utility Regulatory Policies Act

(“PURPA”). Cusack Solar seeks to conditionally terminate the PPA so that it can participate in the Community Solar Program (“CSP”).

PGE has taken the position that Cusack Solar cannot participate in the CSP unless the PPA is terminated. Cusack Solar has not yet applied for the CSP but intends to do so as soon as it receives its System Impact Study (“SIS”) from PGE.

Cusack Solar seeks to have the current PPA terminated if Cusack 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.

Cusack Solar provided formal notice of conditional termination to PGE on May 11, 2020. As of this filing, PGE has not responded, has not agreed to conditionally terminate the PPA, and has not agreed that Cusack Solar is even capable of terminating the PPA.

Cusack Solar requests expedited consideration of this complaint and Commission order no later than August 7, 2020. Cusack 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.

Cusack 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.¹ Under the settlement, PGE and Cusack Solar will enter into a mutual agreement for termination of Cusack Solar’s PPA if the Commission approves this tariff

¹ *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).

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, Cusack 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, Cusack Solar will not take a position on PGE's proposed tariff, but will support the Commission and PGE considering responsibility of program costs. Cusack 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, Cusack 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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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. Cusack 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. Cusack Solar's mailing address is 920 SW 6th Ave, Portland, OR 97204.

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, Cusack 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). Cusack 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 Cusack Solar project will be a 2.565-megawatt ("MW") nameplate solar generation facility located in Clackamas County, Oregon.

10. The Cusack Solar project will interconnect with PGE.
11. On December 24, 2019, Cusack Solar executed a Standard Renewable In-System Variable PPA with PGE, which PGE counter-signed on January 17, 2020 (available at: <https://edocs.puc.state.or.us/efdocs/HAQ/re143haq152935.pdf>).
12. The PPA allows Cusack 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 one provision may apply 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. Section 9.5 of Cusack Solar’s PPA does not apply to sales to non-PGE buyers, including sales to PGE ratepayers as CSP participants.
16. The PPA allows Cusack Solar to terminate the PPA without owing damages so long as Cusack 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. Cusack Solar's scheduled date to begin initial deliveries to PGE is October 1, 2022.
24. Cusack Solar's scheduled commercial operation date is November 2, 2022.
25. As of the date of this filing, Cusack Solar has not delivered any power to PGE.
26. As of the date of this filing, Cusack Solar has not exercised its option under the standard PPA option contract.
27. PGE has established a practice of allowing QFs to terminate standard PPAs.
28. For example, PGE has allowed Sulus Solar, LLC ("Sulus Solar"), the developer for Cusack Solar, to terminate eleven (11) of PGE's standard PPAs in the past year.
29. PGE has required Sulus Solar to terminate a standard PPA before making a mutually beneficial amendment to the PPA.
30. On December 6, 2018, PGE informed Sulus Solar that amendment first requires a developer to "[t]erminate relevant PPAs in accordance with section 20.1 of the executed PPAs" and "[a]fter termination, place a request for a new PPA."
31. PGE has made assertions that the PPAs force PGE's customers to purchase wholesale power at above-market prices.

32. For example, 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.”

33. For example, 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.”

34. At the time Cusack Solar executed the PPA, Cusack 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.

35. Cusack 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.

36. Cusack 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.

37. Cusack 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 7, 2020, Sulus Solar registered as a project manager in the CSP.

39. On January 7, 2020, the CSP Program Administrator approved Sulus Solar 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. As of the date of this filing, Cusack Solar has not received an SIS from PGE.

42. Sulus Solar intends to submit an application to the CSP for the Cusack Solar project as soon as Cusack Solar receives an SIS from PGE.

43. 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.

44. In considering applying for the CSP, it has been Cusack Solar's belief and expectation that it could terminate the PPA for any reason.

45. On May 11, 2020, Cusack Solar provided notice of conditional termination to PGE for the PPA, pursuant to Section 20.1 of the PPA.

46. As of this filing, PGE has not responded or acknowledged Cusack Solar's notice of conditional termination.

47. As of the date of this filing, PGE has not agreed to conditionally terminate the Cusack Solar PPA.

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

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

50. Cusack Solar seeks relief so that it can participate in the CSP.

VII. LEGAL CLAIMS

51. Complainant re-alleges all the preceding paragraphs.

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

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

54. Alternatively, Cusack Solar is entitled to relief because any party to a contract can anticipatorily repudiate the contract.

55. Cusack Solar is entitled to relief because PGE's refusal to allow Cusack Solar to terminate is a violation of the PPA.

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

57. Cusack Solar is entitled to relief because Cusack 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.

58. Cusack Solar is entitled to relief because Cusack 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.

59. Cusack Solar is entitled to relief because Cusack 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.

60. Cusack Solar is entitled to relief because PGE violated ORS 757.325 by unjustly discriminating against Cusack Solar.

61. Cusack Solar is entitled to relief because PGE violated ORS 757.325 by unjustly discriminating against Cusack Solar and other QFs.

62. Cusack Solar is entitled to relief because PGE's refusal to accept or agree to termination is imprudent.

63. Cusack Solar is entitled to relief because PGE's refusal to accept or agree to termination is harmful to PGE's customers.

64. Cusack 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.

65. Cusack 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.

66. Cusack Solar is entitled to relief because PGE's refusal to agree to terminate on the grounds that Cusack 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:

67. Finding that Cusack Solar has a contractual right to terminate the PPA.

68. Finding that PGE is obligated to allow Cusack Solar to terminate the PPA.

69. Finding that Cusack Solar is entitled to conditional termination of the PPA.

70. Directing PGE to conditionally terminate Cusack Solar’s PPA, per Cusack Solar’s notice of conditional termination.

71. Finding that PGE unjustly discriminated against Cusack Solar.

72. Finding that PGE unjustly discriminated against Cusack Solar and other QFs.

73. Directing PGE to refrain from engaging in unjust discrimination.

74. Finding that conditional termination of the PPA is the prudent course of action.

75. Finding that conditional termination of the PPA is in the public interest.

76. Finding that conditional termination of the PPA does not affect Cusack Solar’s eligibility to participate in the CSP, including that the Section 9.5 “springer” provision does not apply to Cusack Solar’s ability to participate in the CSP.

77. Finding that the conditionally terminated PPA, including any surviving provisions, will not affect Cusack Solar’s eligibility to enter contracts with subscribers or owners pursuant to the CSP.

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

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

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

81. Finding that PGE has not acted prudently.

82. Directing PGE to act prudently.

83. Finding that PGE has not acted in the public interest.
84. Directing PGE to act in the public interest.
85. Directing PGE to treat all established or aspiring CSP projects in a fair, just, and reasonable manner.
86. 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).
87. Granting any other such relief as the Commission deems necessary.

Dated this 13th day of May 2020.

Respectfully submitted,



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Of Attorneys for Cusack Solar, LLC

CERTIFICATE OF FILING

I certify that on May 13th, 2020, I filed the foregoing Complaint on behalf of Cusack Solar, LLC with the Oregon Public Utility Commission by electronic communication as consistent with OAR 860-001-0170.



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