

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2079

Served electronically at Salem, Oregon, 04/23/2020, to:

Respondent's Attorney
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Complainant's Attorneys & Representative
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Hunter Strader
Marquam Creek Solar, LLC
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Re: UM 2079, MARQUAM CREEK SOLAR, LLC, Complainant
vs. PORTLAND GENERAL ELECTRIC COMPANY, Respondent

Marquam 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 2079 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 May 13, 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**

MARQUAM CREEK SOLAR, LLC,

Complainant,

v.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

DOCKET NO. UM 2079

COMPLAINT

EXPEDITED CONSIDERATION
REQUESTED

I. INTRODUCTION

This is a complaint (“Complaint”) filed by Marquam Creek Solar, LLC (“Marquam 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. Marquam Creek Solar and PGE are parties to a power purchase agreement (“PPA”) for the output of the Marquam Creek Solar facility, which is a 2.0-megawatt (“MW”) solar qualifying facility (“QF”) under the

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

The PPA at issue is the second PPA that Marquam Creek Solar and PGE have mutually executed (“Second PPA”). Marquam Creek Solar encountered site-specific challenges under the first PPA that Marquam Creek Solar and PGE previously mutually executed (“First PPA”). Marquam Creek Solar provided PGE a notice of termination, per PGE’s direction for how to terminate. PGE accepted Marquam Creek Solar’s notice of termination for the First PPA. PGE and Marquam Creek Solar subsequently executed the Second PPA. Marquam Creek Solar followed the same procedure in this instance by sending a formal notice of termination to PGE, but, unlike its previous action, PGE declined to allow termination. As of this filing, PGE has not agreed that Marquam Creek Solar can terminate the Second PPA.

Marquam Creek Solar asks the Commission to order PGE to either accept Marquam Creek Solar’s notice of termination or terminate the PPA itself, so that Marquam Creek Solar can participate in the CSP.

Marquam Creek Solar requests expedited consideration of this complaint, and Commission order no later than June 15, 2020. Marquam Creek Solar understands that PGE intends to file a tariff request to allocate all costs of the CSP to all customers, and that PGE will agree to accept termination of Marquam Creek Solar’s Second PPA if the Commission approves this tariff request. Marquam Creek Solar does not take a position on whether the Commission should approve the tariff request. Marquam Creek Solar has filed this complaint as a “placeholder” in the event that PGE does not agree to terminate

its Second PPA. If PGE agrees to terminate its Second PPA, Marquam 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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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. Marquam 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. Marquam Creek Solar's mailing address is 3519 NE 15th Ave #106, 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, Marquam 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). Marquam 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 Marquam Creek Solar project will be a 2.0-MW nameplate solar generation facility located in Clackamas County, Oregon.

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

11. On May 24, 2018, Marquam Creek Solar executed a Standard Renewable In-System Variable PPA with PGE, which PGE counter-signed on June 4, 2018 (available at: <https://edocs.puc.state.or.us/efdocs/HAQ/re143haq16499.pdf>) (the First PPA).

12. In the 2018 PPA, Marquam Creek Solar intended to construct the Marquam Creek Solar project at 36225 S Hwy 213, Molalla, 97038.

13. After PPA execution, Marquam Creek Solar encountered site-specific challenges that rendered the original site infeasible for development.

14. Marquam Creek Solar identified an alternative site across the street from the original site (from GPS 45.085, -122.675 to GPS 45.084, -122.670).

15. PGE refused to allow Marquam Creek Solar to move its proposed facility across the street.

16. On September 9, 2018, Marquam Creek Solar sought to amend or supersede the First PPA by seeking a new PPA from PGE.

17. On September 14, 2018, PGE informed Marquam Creek Solar of the following: “If the project is the same, the associated PPA must first be terminated before PGE will begin contracting for another PPA. The first step towards termination requires the Seller to send PGE a notice as outlined in section 20.1 of the already executed Marquam Creek Solar PPA.”

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

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

20. On September 14, 2018, Marquam Creek Solar provided notice to PGE of its intent to terminate the First PPA, pursuant to Section 20.1 of the First PPA.

21. On or about September 18, 2018, PGE received the notice from Marquam Creek Solar.

22. PGE accepted the notice.

23. Marquam Creek Solar terminated the First PPA.

24. PGE never formally acknowledged the notice but did allow Marquam Creek Solar to begin negotiations for a new PPA.

25. On December 27, 2018, Marquam Creek Solar executed a second Standard Renewable In-System Variable PPA with PGE, which PGE counter-signed on

February 9, 2019 (available at:

<https://edocs.puc.state.or.us/efdocs/HAQ/re143haq145242.pdf>) (the Second PPA).

26. The Second PPA allows Marquam Creek Solar to terminate the PPA for any reason.

27. PGE has stated that QFs can terminate their PPAs.

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

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

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

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

32. At the time Marquam Creek Solar executed the Second PPA, Marquam 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.

33. Marquam 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.

34. On January 21, 2020, Marquam Creek Project Manager, LLC registered as a project manager in the CSP.

35. On January 21, 2020, the CSP Program Administrator approved Marquam Creek Project Manager, LLC as a registered project manager.

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

37. On January 21, 2020, Marquam Creek Project Manager, LLC submitted an application to the CSP for the Marquam Creek Solar project.

38. 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.

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

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

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

42. 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/>).

43. On January 22, 2020, the Marquam Creek Solar project was assigned to the wait list for the CSP in PGE's service territory.

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

45. On February 19, 2020, Marquam Creek Solar provided notice of termination to PGE for the Second PPA, pursuant to Section 20.1 of the Second PPA (“Termination Notice”).

46. In its Termination Notice, Marquam Creek Solar explained that Marquam Creek Solar sought to terminate the Second PPA so that Marquam Creek Solar could participate in the CSP in PGE’s service territory.

47. Marquam Creek Solar will not be able to participate in the CSP if the Second PPA is not terminated.

48. In its Termination Notice, Marquam Creek Solar asked PGE to acknowledge the notice, because PGE had not acknowledged the termination notice for Marquam Creek Solar’s First PPA.

49. On March 9, 2020, PGE responded to Marquam Creek Solar’s Termination Notice via letter (“PGE’s Letter”).

50. In PGE’s Letter, PGE refused to permit Marquam Creek Solar to terminate.

51. PGE should have accepted Marquam Creek Solar’s Termination Notice or otherwise agreed to terminate the Second PPA as soon as PGE received the Termination Notice.

52. As of the date of this filing, PGE has not accepted Marquam Creek Solar’s Termination Notice.

53. As of the date of this filing, PGE has not agreed to terminate the Marquam Creek Solar PPA.

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

55. Marquam Creek Solar seeks relief.

VII. LEGAL CLAIMS

56. Complainant re-alleges all the preceding paragraphs.

57. Marquam Creek Solar is entitled to relief because PGE's standard PPA is an option contract, and Marquam Creek Solar validly exercised its contractual right not to exercise its option under the option contract by sending PGE the Termination Notice.

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

59. Marquam Creek Solar is entitled to relief because PGE's refusal to allow Marquam Creek Solar to terminate is a violation of the Second PPA.

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

61. Marquam Creek Solar is entitled to relief because Marquam 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.

62. Marquam Creek Solar is entitled to relief because Marquam 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.

63. Marquam Creek Solar is entitled to relief because Marquam 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.

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

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

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

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

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

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

70. Marquam Creek Solar is entitled to relief because PGE's refusal to accept or agree to terminate on the grounds that Marquam 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:

71. Finding that Marquam Creek Solar validly terminated the Second PPA by sending PGE the Termination Notice.
72. Finding that PGE wrongfully denied Marquam Creek Solar's Termination Notice.
73. Finding that PGE is obligated to allow Marquam Creek Solar to terminate the Second PPA.
74. Finding that Marquam Creek Solar is entitled to termination of the Second PPA.
75. Directing PGE to terminate the Second PPA.
76. Finding that PGE unjustly discriminated against Marquam Creek Solar.
77. Finding that PGE unjustly discriminated against Marquam Creek Solar and other QFs.
78. Directing PGE to refrain from engaging in unjust discrimination.
79. Finding that termination of the Second PPA is the prudent course of action.
80. Finding that termination of the Second PPA is in the public interest.
81. Finding that the termination of the Second PPA does not affect Marquam Creek Solar's eligibility to participate in the CSP, including that the Section 9.5 "springer" provision does not apply to Marquam Creek Solar's ability to participate in the CSP.
82. Finding that any surviving provisions of the Second PPA will not affect Marquam Creek Solar's eligibility to enter contracts with subscribers or owners pursuant to the CSP.

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

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

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

86. Finding that PGE has not acted prudently.

87. Directing PGE to act prudently.

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

89. Directing PGE to act in the public interest.

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

91. 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).

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

Dated this 23rd day of April 2020.

Respectfully submitted,



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Of Attorneys for Marquam Creek Solar, LLC

CERTIFICATE OF FILING

I certify that on April 23, 2020, I filed the foregoing Complaint on behalf of Marquam Creek Solar, LLC with the Oregon Public Utility Commission by electronic communication as consistent with OAR 860-001-0170.



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