BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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

In the Matters of BOTTLENOSE SOLAR, LLC; VALHALLA SOLAR, LLC; WHIPSNAKE SOLAR, LLC; SKYWARD SOLAR, LLC; LEATHERBACK SOLAR, LLC; PIKA SOLAR, LLC; COTTONTAIL SOLAR, LLC; OSPREY SOLAR, LLC; WAPITI SOLAR, LLC; BIGHORN SOLAR, LLC; MINKE SOLAR, LLC; HARRIER SOLAR, LLC, Complainants, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	COMPLAINANTS' RESPONSE IN OPPOSITION TO PGE'S MOTION TO STAY DISCOVERY AND PROCEDURAL SCHEDULE

I. INTRODUCTION

Bottlenose Solar, LLC, Valhalla Solar, LLC, Whipsnake Solar, LLC, Skyward Solar, LLC, Leatherback Solar, LLC, Pika Solar, LLC, Cottontail Solar, LLC, Osprey Solar, LLC, Wapiti Solar, LLC, Bighorn Solar, LLC, Minke Solar, LLC, and Harrier Solar, LLC (collectively "Complainants") submit this Response in Opposition to Portland General Electric Company's ("PGE") Motion to Stay Discovery and Procedural Schedule (Complainants' "Response"). Complainants agree that the procedural schedule needs to be revised in light of PGE's Motion for Summary Judgment and Complainants' pending Motion to Compel Discovery. However,

Complainants disagree that discovery or the procedural schedule should be stayed indefinitely. Rather, Complainants propose that Administrative Law Judge Arlow ("ALJ") allow the parties to continue discovery and set a pre-hearing conference to adopt a revised procedural schedule. Complainant's Motion to Compel has been fully briefed and should be resolved before any Motion for Summary Judgment is considered. Because Complainants' Motion to Compel is still outstanding, and Complainants have new facts to assert, a new schedule should be set that includes a time for Complainants to file amended complaints, PGE to submit amended answers, and a date for parties to submit dispositive motions and/or testimony.

II. RESPONSE

The Commission should not grant PGE's request to stay discovery or the procedural schedule because there are still substantial factual issues that remain in dispute and an outstanding Motion to Compel that has been fully briefed. Moreover, there have already been significant delays in this proceeding, and there will need to be further delays due to PGE's unexpected filing of its Motion for Summary Judgment. The fundamental legal issue in this case is whether a qualifying facility's commitment to sell power is the ultimate deciding factor for when a legally enforceable obligation is formed. The Complainants' position is that neither a utility nor the Commission can prevent a qualifying facility from determining when a legally enforceable obligation is formed. While the Complainants' commitments and execution of contracts have formed legally enforceable obligations regardless of PGE's actions, the Complainants are aware that the Commission's legally enforceable obligation standard takes into the reasonableness of the utility's actions. This means that PGE's actions that were intended to prevent numerous qualifying facilities, including the Complainants, from being able to execute contracts are relevant and discovery on this issue must not end prematurely.

PGE has filed a Motion for Summary Judgment claiming that the facts on record do not support the Complainants' claims of unreasonable delay while simultaneously seeking to prevent Complainants from obtaining additional facts relevant to the reasonableness of PGE's delays. In other words, PGE wants to prevent the Complainants from obtaining the very information that could demonstrate disputed material facts that would prevent the Commission from granting its Motion for Summary Judgment. PGE should be required to produce all the information that is relevant to whether PGE's actions were reasonable *before* the Commission issues any order that addresses the reasonableness of those actions. The limited expense to PGE of continuing discovery at this point is necessary, reasonable and commensurate with the needs of this case and the importance of the remaining issues in discovery.

Finally, PGE is not likely to be successful in its Motion for Summary Judgment due to at least in part to new facts that have come to light. At a minimum PGE will need to revise its Motion for Summary Judgment based on relevant factual information currently in its possession and that were not addressed in either the complaints or answers. For example, negotiations between PGE and at least some of the Complainants started three to four months earlier than the pleadings to date have revealed. In addition, at least some of the Complainants sent letters committing themselves to sell the net output of their projects to PGE in December 2016. Thus, this and other information may need to be presented to the Commission before it can rule on a Motion for Summary Judgment.

A. There Is a High Burden Upon the Party Seeking to Delay Discovery Pending the Outcome of a Dispositive Motion

A motion to stay discovery is not granted automatically when a potentially dispositive motion is filed.[1] The ability to stop, or even limit discovery is a discretionary tool used only in extraordinary circumstances. According to the Ninth Circuit, "a party seeking a stay of discovery carries a heavy burden of making a 'strong showing' why discovery should be denied."[2]

Courts typically employ a case-by-case analysis when determining whether to issue a stay of discovery and look to a number of factors.[3] These factors include: 1) whether the complaint or the potentially dispositive motion raise issues of fact or law, or whether the pending motion only raises procedural issues; 2) the complexity of the action; 3) whether there are counterclaims and/or cross-claims; 4) the posture or stage of the litigation; 5) the expected extent of the

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1 See ORCP 36C(1) (describing the circumstances under which a court may limit discovery upon motion by a party and for good cause shown.); see also e.g. Ciuffitelli v. Deloitte & Touche, LLC, 2016 U.S. Dist. LEXIS 163546, *14, 2016 WL 6963039 (D.Or. 2016) ("District courts in this circuit have rejected the general proposition that a pending dispositive motion justifies a stay of discovery.") (citing Tradebay, LLC v. eBay, Inc., 278 F.R.D. 597, 603 (D. Nev. 2011) ("The fact that a non-frivolous motion is pending is simply not enough to warrant a blanket stay of all discovery."); Mlejnecky v. Olympus Imaging Am., Inc., No. 2 :10-cv-02630 JAM KJN, 2011 U.S. Dist. LEXIS 16128, 2011 WL 489743, at *5-6 (E. D. Cal. Feb.7, 2011) (federal rules do not provide for discovery stay pending potentially dispositive motion); Turner Broadcasting System, Inc. v. Tracinda Corp., 175 F.R.D. 554, 556 (D. Nev. 1997) ("[A] pending Motion to Dismiss is not ordinarily a situation that in and of itself would warrant a stay of discovery."); Skellerup Indus. Ltd. v. City of L.A., 163 F.R.D. 598, 600-01 (C.D. Cal. 1995) ("Had the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) would stay discovery, the Rules would contain a provision for that effect.").

2 Ciuffitelli at *16 (quoting Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975).

3 Although neither Oregon nor the Ninth Circuit have articulated a controlling standard, the Federal District Court of Oregon has offered an extensive explanation that provides guidance to the Commission. See id. at *14-19 (discussing the *Skellerup* Factors).

discovery in light of the number of parties and complexity of the issue in the case; and 6) any other relevant circumstances.[4]

In the evaluation of these factors, the Federal District Court of Oregon has considered whether the scope of discovery was proportionate to the needs of the case,[5] which is analogous to the Commission's rule that "[d]iscovery must be commensurate with the needs of the case, the resources available to the parties, and the importance of the issues to which the discovery relates"[6] and consistent with FRCP 26.[7] Additionally, under factor one, the court also declined to follow the "preliminary peek" approach, where "some courts have used to tie their stay decisions to the percentage likelihood a pending dispositive motion actually will succeed."[8] It found this to be "an imperfect procedural mechanism" that "creates a risk the court will predetermine the merits of the [pending dispositive motion] without having fully and deliberately considered the law and facts which bear on it."[9] The Commission should also weigh the cost and burden of potentially unnecessary discovery against the cost and burden of delaying discovery and ultimate resolution of the case.

B. PGE Has Not Provided Any Grounds to Stay Discovery Regarding the Reasonableness of PGE's Actions Prior to the Commission Issuing an Order Regarding the Reasonableness of PGE's Actions

In this case, the Oregon District Court's factors weigh in favor of continuing discovery. First, PGE's Motion for Summary Judgment is not simply a procedural motion but raises

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4 Id.

5 Id. at *28 ("Courts now must consider proportionality when determining the scope of discovery in a particular case, a consideration which falls within *Skellerup's* 'other relevant other circumstances' factor").

6 OAR 860-001-500.

7 FRCP 26(b)(1).

8 Ciuffitelli at *21.

9 Id.

complex issues of fact and law. Complainants intend to amend their complaints to include additional factual evidence and possibly legal claims. As a result, PGE's Motion for Summary Judgment is likely to be affected, and discovery will still need to be had. Second, these complaints are not complex and by handling them with similar filings, the parties have been able to significantly reduce their cost and complexity. Third, there are no counterclaims or cross-claims. Fourth, at this stage of the litigation, discovery has already commenced and the procedural schedule will need to be delayed. Any additional, unnecessary delay in discovery harms Complainants by postponing the ultimate resolution of its cases. Fifth, the extent of the discovery is not expected to be extraordinary or unusual, and there are not a large number of issues.

Discovery should also not be stayed in this case because it is commensurate with the needs of this case. The burden on Complainants of further delay is significant and PGE's burden of engaging in further discovery is not extraordinary or unusual. Complainants are experiencing significant costs with each passing day. Delays benefit PGE and allow PGE to simply run out the clock, thereby increasing the possibility that the projects will become uneconomic.

PGE's burden of engaging in further discovery is not extraordinary or unusual. The parties have already engaged in modest discovery and briefing on Complainants' Motion to Compel. Despite this discovery dispute, the Complainants have demonstrated that their discovery to date has not been voluminous or wide ranging. Those costs are sunk and not relevant to whether future discovery will be extraordinary. Complainants are likely to engage in additional limited discovery, but other than the two data requests subject to the Motion to Compel, there are no outstanding data requests. The Commission should also issue a ruling on Complainants' Motion to Compel because it has already been fully briefed by the parties. As

indicated in the briefing on the Motion to Compel, PGE's burden of reviewing and producing the data relevant to those requests is a normal part of litigation and commensurate with the needs of this case. Therefore, because PGE's discovery burden is not unusual or extraordinary and the Complainants lose money with each passing day, the Commission should not delay these proceedings any further by staying discovery.

Further, the Commission should not engage in a "preliminary peek" review of PGE's underlying Motion for Summary Judgment in order to avoid the risk of predetermining the merits of that motion. Even if the Commission takes a preliminary peek at PGE's Motion for Summary Judgment, however, it should not put too much weight on PGE's asserted discovery burden because PGE is unlikely to succeed on its Motion for Summary Judgment. Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Complainants will oppose PGE's Motion for Summary Judgment by responding to PGE's legal arguments, filing declarations, and/or amending their complaints. If there are any material facts at issue, then PGE will lose its motion and the parties will need to continue discovery. The Commission should not prejudge its decision on the merits of the Motion for Summary Judgment by suspending discovery.

Complainants intend to seek leave to amend their complaints. Since the filing of their complaints, counsel for the Complainants has become aware that there were negotiations regarding power purchase agreements for at least some the Complainants in December 2016. When the Complainants filed their complaints, counsel was not aware that negotiations had begun prior to the March and April 2017 dates listed in the complaints. For example, at least some of the Complainants submitted "legally enforceable obligation" letters in December 2016

committing to sell their net output at rates, terms and conditions in effect at that time.[10] This was three to four months before the originally filed complaints identified that contract negotiations began. The Complainants had intended to include these and other additional facts in their upcoming testimony. However, now that PGE has filed a Motion for Summary, the Complainants intend to include additional claims regarding these facts in amended complaints.

If Complainants amended their complaints, then PGE's Motion for Summary Judgment may become moot, or at least PGE would need to re-examine whether to seek summary judgment on any additional facts or claims. Survival of any one of those additional factual issues or claims survive would also mean that the parties still need to engage in discovery. Therefore, because the probability that this case will be dismissed on PGE's Motion for Summary Judgment is not likely, the Commission should put less weight on PGE's asserted discovery burden and not stay discovery.

III. CONCLUSION

The Commission should not stay discovery because delays only serve to benefit PGE, while Complainants continue to incur added costs as a result of PGE's efforts to delay the process. Delay is prejudicial to Complainants' substantial interest in resolving these cases is a timely manner. The parties are likely to continue discovery and further delay simply postpones the ultimate outcome of this case. Complainants, however, recognize that the current procedural schedule is not reasonable in light of PGE's Motion for Summary Judgment and Complainants' outstanding Motion to Compel, and Complainants are willing to work with PGE and the ALJ to set a modified procedural schedule.

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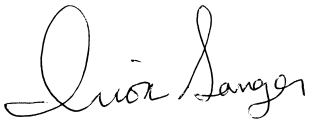
[10] Attachment A (Legally Enforceable Obligation Letters).

Dated this 2nd day of February 2018.

Respectfully submitted,



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Of Attorneys for Complainants

Attachment A

Legally Enforceable Obligation Letters

Whipsnake Solar, LLC

December 8, 2016

Bruce True
Portland General Electric Company
P.O. Box 4404
Portland, OR 97208

RE: Whipsnake Solar, LLC; Power Purchase Commitment

Dear Mr. True,

I am writing to confirm the establishment of a legally enforceable obligation for Portland General Electric Company to purchase the generation from Whipsnake Solar, LLC pursuant to the standard rate and contract terms established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016, approved by the Oregon Commission.

As you are no doubt aware, in accordance with regulations issued by the Federal Energy Regulatory Commission ("FERC") pursuant to its authority under PURPA, a "qualifying facility" ("QF") may, at its option, "provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." 18 CFR 292.304(d). As you are also aware, FERC has recently stated that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non contractual, but binding, legally enforceable obligations." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at 32 (2011) (emphasis added).

Through FERC self-certification, a formal PPA request, completion of a draft PPA, as well as other communications with the utility, Whipsnake Solar, LLC has established a legally enforceable obligation for Portland General Electric Company's purchase of the generation from this facility pursuant to the standard avoided cost rate established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016.

Thank you for your attention to this matter. Please feel free to contact me at utility@ccrenew.com with any questions.

Sincerely,

Whipsnake Solar, LLC

Jerome O'Brien
Authorized Person

Bottlenose Solar, LLC

December 8, 2016

Bruce True
Portland General Electric Company
P.O. Box 4404
Portland, OR 97208

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Dear Mr. True,

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Through FERC self-certification, a formal PPA request, completion of a draft PPA, as well as other communications with the utility, Bottlenose Solar, LLC has established a legally enforceable obligation for Portland General Electric Company's purchase of the generation from this facility pursuant to the standard avoided cost rate established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016.

Thank you for your attention to this matter. Please feel free to contact me at utility@ccrenew.com with any questions.

Sincerely,

Bottlenose Solar, LLC

Jerome O'Brien
Authorized Person

Leatherback Solar, LLC

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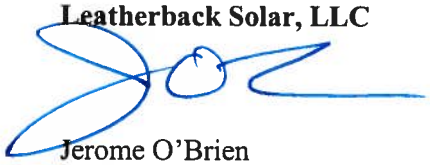
Through FERC self-certification, a formal PPA request, completion of a draft PPA, as well as other communications with the utility, Leatherback Solar, LLC has established a legally enforceable obligation for Portland General Electric Company's purchase of the generation from this facility pursuant to the standard avoided cost rate established in the Schedule 201 Standard Renewable In-System Variable Power Purchase Agreement, effective October 12, 2016.

Thank you for your attention to this matter. Please feel free to contact me at utility@ccrenew.com with any questions.

Sincerely,

Leatherback Solar, LLC



Jerome O'Brien
Authorized Person