

**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.

MOTION TO SUSPEND  
COMPLAINANTS' RESPONSE TO  
PGE'S MOTION FOR SUMMARY  
JUDGMENT AND SET A  
SCHEDULING CONFERENCE

*EXPEDITED CONSIDERATION  
REQUESTED*

**I. INTRODUCTION**

Pursuant to OAR §§ 860-001-0420, 860-001-0090, and 860-001-0590, Complainants 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 hereby:

1. Move to Suspend Complainants' Response to Portland General Electric Company's ("PGE's") Motion for Summary Judgment,

2. Move to Suspend Complainants' Testimony that is currently due February 12, 2018;  
and
3. Move the Administrative Law Judge ("ALJ") Allan Arlow to Set a Scheduling Conference.

At this Scheduling Conference, the Complainants intend to propose that the ALJ set new dates to allow Complainants to file amended complaints, PGE to file amended answers, and then set a new schedule that would allow either the filing of Complainants' testimony or for PGE and Complainants to file simultaneous motions for summary judgment.

In this Motion, Complainants specifically request that the deadline for their response to PGE's Motion for Summary Judgment be temporarily suspended and that the ALJ set at a scheduling conference. PGE's position on this Motion is as follows:

PGE does not believe a new procedural schedule should be adopted until PGE's motion for summary judgment has been resolved. PGE opposes deferral of Complainants' deadline to respond to the motion for summary judgment until after a new procedural schedule is adopted. PGE is willing to agree to a one week extension of time for Complainants to respond to PGE's motion for summary judgment (new deadline to be February 15, 2018).

Complainants request expedited consideration of this Motion because their response to PGE's Motion for Summary Judgment is currently due February 8, 2018.

## **II. BACKGROUND**

The Complainants filed their complaints between August 7, 2017 and August 14, 2017. PGE requested a 45-day extension of time to file its answers, and the Complainants agreed to PGE's request.

A pre-hearing conference was held on November 13, 2017. Complainants desired to set a full procedural schedule to allow for discovery and testimony. PGE reserved the right to file a

motion for summary judgment, and Complainants understood that PGE would work with the Complainants regarding a new schedule, if PGE believed that a motion for summary judgment should be filed.

A discovery dispute is outstanding regarding whether PGE should provide information that may demonstrate that PGE has changed at least one of its business practices recently with the intent and purpose of ensuring that qualifying facilities like the Complainants are unable to timely obtain executable power purchase agreements from PGE.

On January 24, 2018, PGE filed a motion for summary judgment and motion to suspend discovery. PGE provided Complainants with only one day notice that it would be filing its motion for summary judgment.<sup>1</sup> Complainants requested that PGE not file its motion for summary judgment, but work with the Complainants to attempt to set a mutually agreed upon schedule. Complainants informed PGE that, if the case is going to be resolved through motions for summary judgment, then both parties should be provided the opportunity to file simultaneous competing motions for summary judgment. PGE refused to work with the Complainants regarding a new schedule and filed their motion for summary judgment instead.

On February 2, 2018 Complainants filed their response to PGE's Motion to Stay Discovery and Procedural Schedule, and PGE's response is due today. The Complainants' opening testimony is currently due February 12, 2018.

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<sup>1</sup> PGE called Complainants on January 23, 2018 and informed Complainants that it was intending to file the motion for summary judgment on that day. PGE, however, filed the motion the next day.

### III. MOTION

Complainants request that their response to PGE’s Motion for Summary Judgment currently due February 8, 2018 be suspended, that their opening testimony currently due February 12, 2018 be suspended, and that the ALJ set a scheduling conference to reschedule these items. The ALJ has authority to decide procedural matters and may enlarge the time to file a response “upon such terms as may be just.”<sup>2</sup>

In this case, it is just to suspend Complainants’ response because additional time is needed to set a new schedule that provides the Complainants with sufficient opportunity to address the issues raised in PGE’s Motion for Summary Judgment. PGE’s surprise filing of a Motion for Summary Judgment is a substantive filing that addresses many but not all of the key legal issues in this proceeding, and the Complainants need additional time to prepare their Response. To file their answers, which are far less substantive documents, PGE sought and obtained a month and half of additional time. PGE, however, is only willing to provide the Complainants with one additional week of time for what PGE intends to be the Complainants’ one and only substantive filing that will resolve the entire case.

Complainants intend to seek leave to file amended complaints which “shall be freely given when justice so requires.”<sup>3</sup> Complainants intended to include new factual allegations regarding earlier negotiations than those alleged in the original complaints in their testimony. When the Complainants filed their complaints, counsel was not aware that negotiations had begun three to four months before the March and April 2017 dates listed in the complaints and

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<sup>2</sup> ORCP 15D.

<sup>3</sup> ORCP 23A.

that the Complainants had made commitments to sell power as early as December 2016. The Complainants had intended to include these and other 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.

Therefore, a new schedule should be set to allow the Commission to have all information available to make a decision, including amended complaints. As a matter of law, the Commission needs to be aware of all the alleged facts before it can issue a ruling regarding whether there are any disputed material facts.

The ALJ and the Commission would benefit from a more complete and orderly record by setting a new schedule. PGE's approach would have the Commission rule on only its Motion for Summary Judgment. For practical purposes, this allows PGE to frame the issues, the Complainants only one response, and then PGE to have the final rebuttal. If the issues in this case are going to be resolved through motions practice, then the Complainants will request the opportunity to also file a motion for summary judgment. While there are disputed issues of material fact, the Commission could resolve the legal issues in this proceeding by simply concluding that the qualifying facility's commitment to sell power is the ultimate deciding factor for when a legally enforceable obligation is formed, and that the Complainants' commitments have satisfied that standard. Only if the Commission disagrees with the Federal Energy Regulatory Commission's clearly enunciated legally enforceable obligation policy, then the issues of PGE's delays and unreasonable negotiation practices become relevant.

Therefore, the Commission should have the benefit of reviewing both PGE's and the Complainants' pleadings before issuing a ruling on either Motion for Summary Judgment. PGE

is simply attempting to use procedural tricks to ensure that the Complainants are unable to fully make their arguments to the Commission.

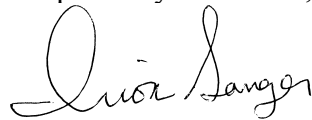
Finally, there are other issues regarding the procedural schedule. First, Opening Testimony is currently due February 12, 2018. It is unrealistic for the parties to file opening testimony by that deadline with all the other unresolved issues regarding discovery, summary judgement, etc. Second, at the same time it filed its Motion for Summary Judgment, PGE also filed a motion to Stay Discovery and the Procedural Schedule, which Complainants opposed. PGE's deadline to file a reply is due today, February 7, 2018. Because there are already issues regarding the procedural schedule, it is reasonable to set a scheduling conference at which point the ALJ can set a date for Complainants to respond to PGE's Motion for Summary Judgment.

#### IV. CONCLUSION

For the reasons above, the Complainants request that the ALJ suspend the Complaints due date for filing their testimony as well as their response to PGE's Motion for Summary Judgment, and hold a scheduling conference to set a new schedule.

Dated this 7th day of February 2018.

Respectfully submitted,



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