

**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' REPLY TO

PGE'S RESPONSE AND OBJECTION
TO COMPLAINANTS' NOTICE OF
DISMISSAL WITHOUT PREJUDICE,
AND ALTERNATIVE MOTION FOR
WAIVER OF ORCP 54A(1)

I. BACKGROUND

On October 22, 2018, 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) filed a Notice of Dismissal Without Prejudice ("Notice"), in these cases, pursuant to OAR 860-001-0000 and ORCP 54A(1). The next day, at PGE's request, the Administrative Law Judge ("ALJ") issued a Ruling, declaring that the Commission would

treat Complainants' Notice as a "substantive motion," and that PGE would be granted opportunity to file a response.¹

On November 11th, PGE filed its Response. In light of the ALJ's Ruling, and PGE's filed Response, Complainants file this Reply pursuant to OAR 860-001-0420(5), which states that "[t]he moving party may file a reply to a response to a substantive motion within 7 days of filing of the response." As explained more fully below, however, the ALJ erred in treating the Notice as a substantive motion. Instead, the Notice is a filing that Complainants are entitled to make under well-established law, and it ends these dockets, with no need for further action by PGE through responses, or replies by the Complainants.

II. ARGUMENT IN REPLY

A. ORCP 54A(1) Governs Complainants' Notice of Dismissal Without Prejudice at the Commission.

The Commission has established through rule that it follows the Oregon Rules of Civil Procedure ("ORCP") in contested cases, except where those rules are inconsistent with a Commission rule, order or ALJ ruling.² And because there is no Commission rule, order, ALJ ruling, or other law that would govern Complainants' Notice of Dismissal, ORCP 54A(1) governs. ORCP 54A(1) states, in relevant part:

Subject to the provisions of Rule 32 D and of any statute of this state, a plaintiff may dismiss an action in its entirety or as to one or more defendants without order of court by filing a notice of dismissal with the court and serving the notice on all other parties not in default not less than 5 days prior to the day of trial if no counterclaim has been pleaded, or by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice . . .³

¹ See ALJ Ruling at 1-2 (Oct. 23, 2018).

² OAR 860-001-0000(1).

³ ORCP 54A(1). For reference, ORCP 32D relates to class action lawsuits, and is not applicable here.

Not only do the Commission’s own rules lead to the conclusion that ORCP 54A(1) governs a Notice of Dismissal, but the Commission has expressly stated so in several prior cases. In Columbia Basin Elec. Coop., Inc. v. Umatilla Elec. Coop., Columbia Basin Electric Cooperative (“Columbia Basin”) filed a complaint against Umatilla Electric Cooperative (“UEC”), alleging a violation of service territory laws based on an electric transmission line that UEC was constructing.⁴ Upon reaching a settlement with a wind developer related to the dispute, Columbia Basin filed a notice of dismissal. UEC objected, arguing that it disagreed with the legal theory offered by Columbia Basin in its complaint, and that it desired to have the merits of the complaint determined by the Commission. The Commission issued an order dismissing the complaint, and finding that Columbia Basin could dismiss as of right, even over UEC’s objection. The Commission stated, “Columbia Basin correctly describes the applicable legal authority. Because the Commission does not have a specific rule regarding withdrawal of a complaint, ORCP 54 A(1) applies.”⁵

Similarly, in Oil Heat Institute of Oregon v. Northwest Natural Gas Co., the Commission reviewed a case where Oil Heat Institute of Oregon (“OHI”) filed a complaint against Northwest Natural Gas Company (“NW Natural”), and subsequently filed a Notice of Dismissal.⁶ The Commission turned to ORCP 54 to dismiss the case, noting:

Rule 54 of the Oregon Rules of Civil Procedure (ORCP) provides that a plaintiff may dismiss an action by filing a notice of dismissal at least five days prior to trial. OHI’s notice of dismissal complies with that requirement. This agency has adopted the ORCP, except for certain situations not involved in this proceeding.⁷

⁴ Columbia Basin Elec. Coop., Inc. v. Umatilla Elec. Coop., Docket No. UM 1823, Order No. 17-309 at 1 (Aug. 11, 2017).

⁵ Id. at 2-3.

⁶ Oil Heat Institute of Oregon v. Northwest Natural Gas Co., Docket No. UC 88, Order No. 88-028 at 1 (Jan. 8, 1988).

⁷ Id. at 2.

In Portland General Electric Co. v. Verizon Northwest Inc., the Commission likewise relied upon ORCP 54A to determine that complainants, who had filed a Notice of Dismissal, did so as a matter of right pursuant to that rule.⁸

The Commission's rules, as well as its precedent, establish that Complainants' Notice of Dismissal is to be evaluated under the construct provided by ORCP 54A(1)—the provision cited by Complainants in making their filing.

B. The Commission, and the Oregon Courts Have Unequivocally Held that a Notice of Dismissal Ends a Case Initiated by a Complaint.

PGE's claims in its Response are all founded upon its view that the case continues, despite the Notice of Dismissal filed by Complainants. But, the courts and this Commission have made it clear that there is no more case once the Notice is filed.

As cited in Complainants' Notice of Dismissal, the Court of Appeals has considered this very issue in Guerin v. Beamer.⁹ In Guerin, the Court reviewed a trial court's determination that a motion for summary judgment had disposed of a case on the merits, despite the fact that the complainant filed a notice of dismissal prior to the decision on the motion for summary judgment. The Court of Appeals reversed the trial court's determination. The Court in Guerin held that once a notice for dismissal is timely filed and served, the plaintiff's case should have been dismissed, and the motion for summary judgment should therefore not have been given any effect.¹⁰

⁸ Portland General Electric Co. v. Verizon Northwest Inc., Docket No. UM 1096, Order No. 04-653 at 1 (Nov. 2, 2004).

⁹ See Guerin v. Beamer, 163 Or App 172 (1999).

¹⁰ Id. at 177-78.

This Commission has applied ORCP in the same way, finding that once a Notice of Dismissal is filed, the case is automatically over. In Oil Heating Institute of Oregon, NW Natural petitioned the Commission to reject the notice of dismissal filed by the complainant in that case, and also filed a motion seeking to require the complainant to respond to earlier motions that NW Natural had filed in the case.¹¹ The Commission declined to entertain any more process, finding that ORCP 54A(1) operates to dismiss a case upon proper filing of a notice of dismissal. With respect to the pending motion by NW Natural, the Commission stated, “[t]here being nothing left to consider, the complaint should be dismissed without prejudice.”¹² In Portland General Electric Co. v. Verizon Northwest Inc., the Commission also noted the conclusiveness of a notice of dismissal under Rule 54A, finding that “[u]nder the rule, withdrawal is automatic, and there is no ongoing Commission proceeding in which [a defendant] may file [a subsequent] motion.”¹³ Finally, in Columbia Basin, the Commission specifically stated that because the notice of dismissal in that case complied with Rule 54A(1), “[t]his notice of dismissal is effective without any Commission order.”¹⁴

This precedent makes clear that once Complainants filed their Notice of Withdrawal, there was no opportunity for further proceedings in the case, and ORCP 54A(1) operated to make the case dismissed without prejudice.

C. There Is No Motions Practice Necessary or Allowed to Resolve a Notice of Dismissal Without Prejudice.

A Notice of Dismissal is not a motion, to be resolved through the Commission’s procedures regarding substantive or procedural motions. Instead, it is a filing that terminates a

¹¹ Docket No. UC 88, Order No. 88-028 at 2.

¹² Id.

¹³ Docket No. UM 1096, Order No. 04-653 at 2.

¹⁴ Docket No. UM 1823, Order No. 17-309 at 3.

case, without prejudice. The above cases establish this principle. Even more clearly, the Court of Appeals has expressly stated this, finding:

A notice of voluntary dismissal is not a request or a motion. Ordinarily, it does not provide an opportunity for a hearing, and it presents nothing for the court to deny. As we have observed before, ‘Under ORCP 54 A(1), once plaintiff filed its notice of dismissal, the trial court's only authorized option was to enter a judgment of dismissal without prejudice.’¹⁵

In different cases, the Court of Appeals has consistently been as clear, stating that “[t]he term ‘notice’ does not denote a request or a motion. Rather, notice of dismissal precipitates a judgment of dismissal, and ordinarily that ‘dismissal is without prejudice’ to refiling the action.”¹⁶ In a 2002 case, the Court also stated, “[i]n short, ORCP 54 A(1) provides that the court *shall* enter judgment of dismissal *without* prejudice upon the filing of proper notice, unless some other statute provides otherwise.”¹⁷

As described above, the ALJ’s October 23, 2018 Ruling determined that the Notice of Dismissal filed by Complainants would be treated as a substantive motion, and that PGE would have an opportunity to file a response. Presumably, this means that the ALJ is considering whether to ‘grant’ the Notice of Dismissal. Such an approach to a Notice of Dismissal is inappropriate, because the Notice was effective upon its proper filing. Complainants have filed this Reply in order to respond to PGE’s erroneous arguments that the Notice of Dismissal should not be effective in terminating these cases without prejudice, and to bring attention to the error in treating the Notice as a substantive motion within a case.

¹⁵ Ramirez v. Northwest Renal Clinic, 262 Or App 317, 320 (2014) (quoting State ex rel. Myers v. CigTec Tobacco, LLC, 200 Or App 501, 504-05 (2005), which reversed a judgment of dismissal without prejudice because that judgment added a statement that a prior ruling on personal jurisdiction remained binding).

¹⁶ Sohn v. Lam Thanh Thuy Thi, 262 Or App 313, 315 (2014).

¹⁷ Maxwell v. Stebbins, 180 Or App 48, 53 (2002) (emphasis in original).

D. A Notice Ends a Case Regardless of Whether There are Pending Motions for Summary Judgement.

PGE asserts, among other things, that because there were pending motions for summary judgement in these cases, the Notice of Dismissal does not result in a termination of the proceedings. That argument has been considered, and rejected over and over.

In Guerin, the Court of Appeals reviewed the legislative history of ORCP 54A(1) and found that the drafters had expressly considered a version of the rule that would have given import to whether a motion for summary judgement was pending at the time of a notice of dismissal. The Court found evidence that such an approach had been expressly rejected, and that “[t]he legislative history of ORCP 54 A(1) reflects a considered policy choice to permit a plaintiff to dismiss his or her action even though the defendant's summary judgment motion is pending.”¹⁸

In one case, the Court of Appeals even found that where a court had entered an order on summary judgment, and notified the parties of the order, the plaintiff was still entitled to dismiss the case because the order had not yet been entered into the Court Register.¹⁹

PGE’s claim that Complainants are not entitled to dismiss their complaint, due to pending motions for summary judgment, is made in total disregard of this established law.

¹⁸ Guerin, 163 Or App at 177.

¹⁹ See Palmquist v. FLIR Systems, Inc., 189 Or App 552 (2003). See also Ramirez v. Northwest Renal Clinic, 262 Or App 317, 321 (2014) (recognizing that in Palmquist, the Court had extended the reasoning from Guerin to “situations where the order on summary judgment had been filed but not yet entered in the court register. Even then, a plaintiff may voluntarily dismiss the action.”).

E. PGE Has Previously Enforced Its Own Rights to Voluntary Dismissal Over the Objections of Other Parties.

PGE’s position in this case is curious because PGE itself has, in the past, insisted on the absolute nature of its right to dismiss complaints that it has filed. In Portland General Electric Co. v. Verizon Northwest Inc., PGE filed a complaint against Verizon at the Commission, and later settled the case with Verizon, but not the Oregon Cable Telecommunications Association (“OTCA”), which had intervened in the proceeding. The OTCA objected to the withdrawal of the complaint, claiming that it had an interest in the resolution of the settlement. PGE asserted that the Commission follows the Oregon Rules of Civil Procedure in such a case, and that the rule enacted an automatic dismissal, and that there was no ongoing Commission proceeding in which OTCA could even file a motion.²⁰ PGE then argued that even though the OTCA objected to the withdrawal of the complaint, the rule is automatic, and “there is no ongoing Commission proceeding in which OCTA may file its motion.”²¹

As PGE has done in the past, Complainants insist on their right to dismiss their complaints under ORCP 54A(1), and have exercised them here.

F. PGE’s Arguments in its Response Have No Sound Basis in Law and Should All Be Rejected.

In its Response, PGE wholly fails to address the above-described precedent from Oregon Courts and the Commission. Instead, PGE stretches to assert that somehow Complainants in this case cannot take advantage of the Commission’s well-established approach to reliance on ORCP 54A(1) and the Oregon state courts’ uniform interpretation of it. PGE seeks an outcome that would force Complainants to persist in their claims, even against their will, despite the fact that

²⁰ Docket No. UM 1096, Order No. 04-653 at 2.

²¹ Id.

the Notice of Dismissal meets every standard of the Commission's rules for dismissal. Such an outcome cannot be justified.

1. The ORCP Apply to Commission Proceedings

PGE's first attempt is to argue that ORCP does not apply at all. PGE urges that "the Commission is not directly bound to apply ORCP 54A(1) at all, let alone required to apply it strictly."²² This position is remarkable, given the Commission's administrative rules that clearly adopt the ORCP except in limited instances. And, it ignores the above-described clear precedent of the Commission that ORCP 54A(1) does apply to the Commission as written.²³ PGE apparently argues for an approach to the Commission's administration that would leave participants wholly unable to ascertain the rules of procedure, because they would be decided on a case-by-case basis, presumably left to the sole judgement of the administrative law judge. Such an approach would be profoundly unfair to participants in the Commission's processes, and flies in the face of "a fundamental principle of administrative law that 'when an agency has the authority to adopt rules and does so, it must follow them.'"²⁴ The Commission's rules state that they incorporate the ORCP, with limited exception that does not apply here.

2. There Is No Exception to a Voluntary Dismissal After the Denial of a Motion to Amend Complaints

As a secondary argument to stating that the Commission is not bound to apply the ORCP at all, PGE argues that there is an exception to ORCP 54A(1) that applies in this case. Specifically, PGE asserts that because the ALJ previously denied a motion to amend the complaints in this case in Order No. 18-348, allowing Complainants to dismiss their complaints

²² PGE's Response at 6 (Nov. 6, 2018).

²³ See Section II.A above.

²⁴ Aetna Casualty & Sur. Co. v. Blanton, 139 Or App 283, 287 (1996) (quoting Albertson's Inc. v. Bureau of Labor and Industries, 128 Or App 97, 101 (1994)).

is inconsistent with that order, and they should therefore be deprived of reliance on ORCP 54A(1).²⁵

This argument fails for at least one obvious reason—Order No. 18-348 did not address dismissal of the complaints. Instead, it addressed whether Complainants were entitled to amend their existing complaints. The question of whether the complaints could be dismissed was not before the ALJ, and he made no finding that his Order would somehow contravene the Commission’s existing rules. It cannot be that the Notice of Dismissal is inconsistent with the order denying amendment of the complaints because they addressed wholly different questions, and different rules.

3. Voluntary Dismissal Is Allowed Even After an Adverse Procedural Ruling, as Long as the There Is No Final Order Deciding the Merits of the Case

PGE’s next argument is that the Supreme Court has held that Complainants cannot rely on ORCP 54A(1) “to avoid the effect of an adverse decision obtained earlier in a proceeding.”²⁶ In making this argument, PGE cites Garrison v. Cook, a 1977 case in which the Supreme Court reviewed a very different question than the one at issue here.²⁷ First, the Court in Garrison was not interpreting ORCP 54A(1), but its predecessor. Although the rule does closely match the current ORCP 54A(1), the Court there was asking a completely different question about its applicability—whether a plaintiff can avoid an award of attorneys’ fees by dismissing its own complaint *after the case is disposed of through summary judgement*. Not surprisingly, the Court found that the plaintiff could not. The Court stated, “the plaintiff contends that he has the right by statute to terminate his own lawsuit with the ability to refile despite the fact that he has

²⁵ PGE’s Response at 6.

²⁶ Id. at 4.

²⁷ See Garrison v. Cook, 280 Or 205 (1977).

already lost on the merits.”²⁸ In other words, the clear holding of Garrison was that reliance on ORCP 54A(1) cannot be had once a complaint has been decided on its merits. PGE cannot with a straight face argue that anything similar has occurred in this case. PGE has not been granted summary judgement. And, Oregon court opinions establish clearly that even with a motion for summary judgment pending, a plaintiff has a right to dismiss its complaint according to ORCP 54A(1). Those cases are described above in detail.²⁹

Furthermore, PGE fails to point out that the Garrison case was expressly distinguished by the court in Guerin, the case Complainants cited in their Notice of Dismissal. Exactly as described above, the Guerin court explained that the facts in Garrison do not apply to circumstances where a case has not yet been decided on its merits, and where a motion for summary judgment is only pending. The Court stated:

In Garrison v. Cook, the Supreme Court held that *former* ORS 18.230 did not permit a plaintiff to take a voluntary nonsuit after the trial court had granted the defendant's summary judgment motion. Defendant argues that the same principle should apply, by extension, to a pending summary judgment motion when an adverse ruling is inevitable. The extension of Garrison's holding that defendant proposes is inconsistent with the policy judgment embodied in ORCP 54 A.³⁰

Contrary to PGE’s broad assertion, a voluntary notice of dismissal without prejudice may be filed even after an interlocutory ruling adverse to the plaintiff.³¹ In CigTec Tobacco, the Court of Appeals reviewed the actions of a lower court that had granted a defendant’s motion to dismiss a complaint for lack of personal jurisdiction, but allowed the plaintiff an opportunity to replead the case.³² Rather than repleading, the plaintiff simply filed a voluntary notice of

²⁸ Id. at 211.

²⁹ See Section II.D above.

³⁰ Guerin, 163 Or App at 177 n.3 (emphasis in original) (internal citations omitted).

³¹ See State ex rel. Myers v. CigTec Tobacco, LLC, 200 Or App 501, 503, 506 (2005).

³² Id. at 503.

dismissal under ORCP 54 A(1).³³ The trial court allowed the voluntary dismissal but included a statement in the order dismissing the case that the court’s decision on personal jurisdiction would still be binding upon the parties.³⁴ The court of appeals reversed that order on appeal, finding that despite the trial court’s earlier order on personal jurisdiction (adverse to plaintiff), it still must enter a judgment of dismissal without prejudice, without the language intended to limit the plaintiff’s future rights if it were to file a new complaint.³⁵

The instant case is similar to the Cig. Tec. case in that Complainants have had earlier rulings in the case adverse to them. However, as the Cig. Tec. case illustrates, these adverse rulings in and of themselves do not bar Complainants’ from voluntarily dismissing their cases under ORCP 54 A(1). On the contrary, ORCP 54 A(1) represents a considered policy to allow Complainants one voluntary dismissal without prejudice. Furthermore, the Cig. Tec. case makes clear that adverse prior rulings in a case that is dismissed cannot be given a binding effect over the parties.

PGE also points to the Supreme Court’s decision in Village at Main Street, Phase II, LLC v. Dep. of Revenue³⁶ to assert that ORCP 54A(1) is inoperative for Complainants. Again, however, the holding in Village at Main Street II is not applicable here. PGE tries to explain the case with a difficult-to-follow description, and then asserts that it applies to the facts in this case. PGE urges that the case shows that:

where a defendant appeals the denial of leave to amend its answer, prevails on appeal, and the case has been remanded to allow the defendant to amend its answer, the plaintiff cannot then resort to use of Rule 54 A(1) to dismiss the case without prejudice and thereby prevent the defendant from

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Id.

³⁴

Id. at 504.

³⁵

Id. at 506.

³⁶

See Village at Main Street, Phase II, LLC v. Dep. of Revenue, 360 Or 738 (2016).

amending its answer because that would allow plaintiff to avoid the effects of a prior adverse decision in the proceeding.³⁷

This carefully crafted description of the case attempts to make the case sound like it applies, but PGE's description leaves out all of the salient facts.

In Village at Main Street II, which is an appeal of a Tax Court case, the Supreme Court was construing a Tax Court rule that essentially mirrored ORCP 54A(1). Specifically, that rule, like ORCP 54A(1) stated that a motion for voluntary dismissal cannot be granted as of right, without prejudice, *if the defendant has filed a counter-claim*. In the case, the lower court had denied a tax assessor's motion to file amended answers, which contained counterclaims. The lower court had initially determined that the counter-claims were impermissible, and denied the motion on that basis. The tax assessor appealed, and the Supreme Court remanded the case to the lower court, finding that the amended answers, with counter-claims should be allowed.³⁸ The lower court then failed to give effect to the amended answer *and counter-claims*, and thus the Supreme Court remanded once again, in Village at Main Street II, finding that the counter-claims should be implemented, and that in light of this, ORCP 54A(1) does not allow dismissal without prejudice.³⁹

This case does nothing to undermine the application of, or the conclusive nature of ORCP 54A(1). Instead, the case stands for the proposition that ORCP 54A(1) should be enforced according to its terms, which specifically include different treatment if a counter-claim has been filed. PGE cannot assert that it filed a counterclaim, or that it sought to file a counterclaim which was denied. For this reason, the Village at Main Street case does not apply at all.

³⁷ PGE's Response at 8.

³⁸ Village at Main Street, Phase II, LLC, 360 Or at 742-48.

³⁹ Id. at 748-50.

In finding these Supreme Court cases, PGE clearly did its research. Yet, it failed to mention in its brief at all the numerous and uncontroverted cases establishing that ORCP 54A(1) serves to automatically end a case upon its proper filing. The ALJ should give no weight at all to PGE's precarious description of the relevant law that applies here.

PGE's final argument is that the Commission should "waive the application of ORCP 54A(1) in these cases because there is good cause to do so."⁴⁰ PGE asserts that good cause is shown because "PGE and the Commission's administrative hearings division have invested considerable time and resources toward resolving the legal questions presented by these cases, and after more than a year of litigation those questions are now ready for resolution."⁴¹

Given that the Commission and courts have consistently found ORCP 54A(1) to confer an automatic right upon complainants, PGE has not demonstrated any good cause to remove that right in this case. Although PGE and the Commission have spent time and resources in seeking to resolve these complaints, as have Complainants, this provides no valid reason for the Commission to severely prejudice the Complainants by denying them a well-established right to dismiss their complaints when no counter-claim exists. And, as noted above, ORCP has been applied, according to its terms, consistently, even in circumstances where the defendant would have had a much more sympathetic argument than PGE's generalized complaints.⁴²

Finally, Complainants note that if they do, in fact, refile complaints similar to those dismissed by the Notice, PGE's "time and resources" put into these issues will be applicable to

⁴⁰ PGE's Response at 5.

⁴¹ *Id.* at 9.

⁴² For example, the Court of Appeals finding that where a court had entered an order on summary judgment, and notified the parties of the order, the plaintiff was still entitled to dismiss the case because the order had not yet been entered into the Court Register. Palmquist v. FLIR Systems, Inc., 189 Or App 552 (2003). See also Section II.D above.

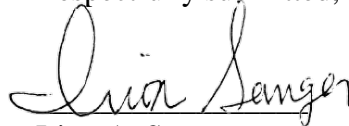
those complaints as well, to the extent the issues remain common.⁴³ In the meantime, PGE does not have a right to prevent Complainants from dismissing their complaints in accordance with a rule that the Commission has clearly adopted, and applied under similar circumstances consistently.

III. CONCLUSION

For all the reasons described above, the Commission should find that PGE's Response is not warranted, contains erroneous views about the operation of ORCP 54A(1), and that Complainants Notice of Dismissal resulted in these cases being dismissed without prejudice.

Dated this 8th day of November 2018.

Respectfully submitted,



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⁴³ PGE's Response at 9.