



Portland General Electric Company
Legal Department
121 SW Salmon Street • Portland, Oregon 97204
503-464-7181 • Facsimile 503-464-2200

V. Denise Saunders
Associate General Counsel

February 8, 2018

Via Electronic Filing

Public Utility Commission of Oregon
Filing Center
201 High St SE, Suite 100
PO Box 1088
Salem OR 97308-1088

Re: **UM 1877-UM 1882, UM 1884-UM 1886, UM 1888-UM 1890, Bottlenose Solar, LLC,
et al., Complainants, vs. Portland General Electric Company, Defendant**

Attention Filing Center:

Enclosed for filing in the above-captioned dockets is Portland General Electric Company's Response to Complainants' Motion to Suspend Complainants' Response to PGE's Motion for Summary Judgment and to set a Scheduling Conference.

Thank you for your assistance.

Sincerely,

A handwritten signature in blue ink that reads "V. Denise Saunders". The signature is fluid and cursive, written over a white background.

V. Denise Saunders
Associate General Counsel

VDS:bop

Enclosure

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

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

BOTTLENOSE SOLAR, LLC (UM 1877);
VALHALLA SOLAR, LLC (UM 1878);
WHIPSNAKE SOLAR, LLC (UM 1879);
SKYWARD SOLAR, LLC (UM 1880);
LEATHERBACK SOLAR, LLC (UM 1881);
PIKA SOLAR, LLC (UM 1882);
COTTONTAIL SOLAR, LLC (UM 1884);
OSPREY SOLAR, LLC (UM 1885);
WAPITI SOLAR, LLC (UM 1886);
BIGHORN SOLAR, LLC (UM 1888);
MINKE SOLAR, LLC (UM 1889);
HARRIER SOLAR, LLC (UM 1890),

Complainants,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

**PORTLAND GENERAL ELECTRIC
COMPANY’S RESPONSE TO
COMPLAINANTS’ MOTION TO
SUSPEND COMPLAINANTS’
RESPONSE TO PGE’S MOTION FOR
SUMMARY JUDGMENT AND TO
SET A SCHEDULING CONFERENCE**

I. INTRODUCTION

Portland General Electric Company (“PGE”) opposes the two motions filed by Complainants on February 7, 2018. Those motions are: (1) a motion to suspend Complainants’ obligation to respond to PGE’s motion for summary judgment; and (2) a motion to set a scheduling conference to establish a schedule for the filing of amended complaints, for the filing of amended answers, and then for the filing either of simultaneous motions for summary judgment or testimony.¹

¹ *Bottlenose Solar, LLC, et al.*, Docket Nos. UM 1877-UM 1882, UM 1884-UM 1886, UM 1888-UM 1890 (hereinafter *Docket Nos. UM 1877 et al.*), Motion to suspend Complainants’ response to PGE’s motion for summary judgment and set a scheduling conference at 2 (Feb. 7, 2018).

There is no basis to delay Complainants' response to PGE's motion for summary judgment, which is due today, February 8, 2017. Nevertheless, PGE has offered to grant a one-week extension of the deadline to respond. And there is no basis to set a schedule for the filing of amended complaints or any of the subsequent procedural steps proposed by Complainants *unless and until* Complainants have filed for leave to amend their complaints and such leave is granted. As a result, the Commission should deny both motions and rule that Complainants must respond to PGE's motion for summary judgment by February 15, 2018.

II. BACKGROUND

PGE filed a motion for summary judgment on January 24, 2018. Complainants' response is due today, February 8, 2018. Complainants waited until the end of the day on February 7, 2018, to file a motion to suspend their obligation to respond. Complainants request expedited consideration but propose no schedule for expedited briefing of their motion. The Complainants' only basis for requesting a suspension of their deadline to respond is that they think the Commission should ignore PGE's motion for summary judgment and instead set a new procedural schedule to allow an undisclosed number of the Complainants to file amended complaints, to allow PGE to file amended answers, and to provide for the parties to file simultaneous motions for summary judgment or to file testimony. In effect, Complainants want the Commission to ignore PGE's motion for summary judgment and allow the Complainants to file "do over" complaints more than six months into these proceedings.

III. RESPONSE

Complainants accuse PGE of playing "procedural tricks"² but PGE is not playing tricks at all. PGE has followed all of the Commission's rules of practice and procedure. When the Administrative Law Judge (ALJ) established a procedural schedule for these cases on November 13, 2017, PGE noted for the record that it was reserving its right to file a motion for summary

² Docket Nos. UM 1877 *et al.*, Complainants' Motion to Suspend at 5-6 (Feb. 7, 2018) ("PGE is simply trying to use procedural tricks to ensure that the Complainants are unable to fully make their arguments to the Commission.").

judgment.³ Two months later, on January 24, 2018, PGE filed its motion for summary judgment. This filing date was at least 60 days before the date set for hearing (April 26, 2018) as required by ORCP 47. PGE also filed a motion to stay discovery and to stay the procedural schedule until PGE’s motion for summary judgment is resolved. And PGE requested expedited consideration of the motion for stay. PGE followed the Commission’s rule governing requests for expedited consideration and proposed a reasonable, expedited briefing schedule, which was promptly approved by the ALJ.⁴ That briefing schedule concluded yesterday.

While PGE has followed the Commission’s procedural rules and specifically reserved the right to file its motion for summary judgment, Complainants have not followed applicable procedural rules and appear to be employing a “hide the ball” strategy regarding the new information or new claims that they now say they want to add to their complaints. If Complainants have any new information they believe is relevant, they can attach it to their response to PGE’s motion for summary judgment. Alternatively, under ORCP 23 A, which has been incorporated into the Commission’s rules,⁵ if Complainants wish to amend their complaints after PGE has filed an answer, then Complainants need to file a motion for leave to amend their complaints.⁶ Such a motion would identify which complaints the Complainants wish to amend, how Complainants propose to amend their complaints, and why Complainants should be allowed to add new factual allegations or new claims after a dispositive motion has been filed when Complainants chose not to include such allegations or claims in their original complaints. PGE would then have a chance to respond and to oppose leave to amend if the proposal to amend would prejudice PGE’s defense. The Oregon Court of Appeals has held that a court has the

³ Docket Nos. UM 1877 *et al.*, ALJ Ruling at 2 (Nov. 14, 2017) (adopting a procedural schedule and stating: “At the prehearing conference, PGE noted on the record that it reserves the right to file a motion for summary judgment with respect to the disposition of the complaints subject to this prehearing conference.”).

⁴ Docket Nos. UM 1877 *et al.*, ALJ Ruling (Jan. 25, 2018) (granting expedited consideration and setting February 2, 2018 deadline for response and February 7, 2018 deadline for reply).

⁵ OAR 860-001-000(1) (“The Oregon Rules of Civil Procedure (ORCP) also apply in contested case and declaratory ruling proceedings unless inconsistent with these rules, a Commission order, or an Administrative Law Judge (ALJ) ruling.”).

⁶ ORCP 23 A (once an answer has been filed, the plaintiff may amend its complaint “only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.”).

discretion to deny a request to amend made in response to a motion for summary judgment and to deny requests to amend that would prejudice the defendant.⁷

But Complainants have elected not to present their new information in response to PGE's motion for summary judgment or to file motions for leave to amend their complaints. Instead, they make vague assertions that they need to amend their complaints and ask the Commission to effectively nullify PGE's motion for summary judgment and to instead establish a new schedule that allows Complainants to file new complaints, requires PGE to file new answer, and provides for new motions for summary judgment at a later date. There is no basis to abandon the Commission's well-established rules of practice and procedure in order to adopt such an ad hoc process that would prejudice PGE and effectively invalidate its pending motion for summary judgment.

At a minimum, the Commission should require Complainants to move for leave to amend and decide whether to grant such leave, *before* the Commission even considers adopting a new procedural schedule that provides for amended complaints and amended answers before motions for summary judgment will be entertained.

By waiting until the day before their response to PGE's motion for summary judgment is due, Complainants appear to be betting that the Commission will ignore the procedural impropriety of their actions and grant them some form of relief because the alternative (declaring the Complainants to have waived the chance to file a response to PGE's motion for summary judgment) is so harsh. The Commission should not reward this behavior. Nevertheless, PGE has

⁷ *Edwards v. Lewis*, 76 Or. App. 94, 96-97 (1985) (trial court did not abuse its discretion when it denied a motion to amend the complaint because of the alleged discovery of new evidence when it was "clear from the record ... that plaintiffs were well aware of the allegedly new evidence very early on in the proceedings [and] Plaintiffs' counsel could offer no reasonable excuse to the court for his delay in raising the new claims."); *Marineau v. A.P. Green Refractories Co.* 201 Or. App. 590 599 (2005) (it is within a court's discretion to deny a request to amend a complaint once a defendant has filed a motion for summary judgment in reliance on the complaint: "Plaintiff did not have a right to amend in response to summary judgment; rather, leave to amend was a matter entrusted to the discretion of the trial court ... the trial court's denial of plaintiff's motion to amend was well within its discretion under ORCP 23."); *Reeves v. Reeves*, 203 Or. App. 80, 84 (2005) (noting that "an amendment should normally be allowed *unless the other party is prejudiced.*") (emphasis added); *Quirk v. Ross*, 257 Or. 80, 83 (1970) (noting motion to amend complaint "should normally be allowed unless the other party will be prejudiced in some respect.").

offered to agree to a one-week extension of time for Complainants to respond to the motion for summary judgment. PGE has made this offer even though Complainants have not identified any specific reason why they needed more than 15 days to respond.

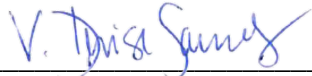
At present there is no basis for a scheduling conference and it will only serve to reward Complainants' efforts to circumvent their obligation to respond to PGE's motion for summary judgment.

For the reasons discussed above, PGE urges the ALJ or the Commission to:

- (1) Deny Complainants' motion to suspend their response to the motion for summary judgment;
- (2) Deny Complainants' motion to set a scheduling conference; and
- (3) Rule that Complainants' response to PGE's motion for summary judgment is due no later than February 15, 2018.

DATED this 8th day of February, 2018.

Respectfully submitted,



V. Denise Saunders, OSB #903769
Associate General Counsel
Portland General Electric Company
121 SW Salmon Street, 1WTC1301
Portland, Oregon 97204
(541) 752-9060 (phone)
(503) 464-2200 (fax)
denise.saunders@pgn.com

/s/ Jeffrey S. Lovinger

Jeffrey S. Lovinger, OSB #960147
Law Offices of Jeffrey S. Lovinger
2000 NE 42nd Avenue, Suite 131
Portland, OR 97213-1397
(503) 230-7120 (office)
(503) 709-9549 (cell)
jeff@lovingerlaw.com