

**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
REPLY IN SUPPORT OF ITS
MOTION FOR WAIVER OF
ORCP 54 A(1)**

**PORTLAND GENERAL
ELECTRIC COMPANY’S
MOTION FOR LEAVE TO FILE
A SUR-RESPONSE IN SUPPORT
OF ITS RESPONSE AND
OBJECTION TO
COMPLAINANTS’ NOTICES
OF DISMISSAL WITHOUT
PREJUDICE AND PORTLAND
GENERAL ELECTRIC
COMPANY’S SUR-RESPONSE**

Pursuant to OAR 860-001-0420(5), Portland General Electric Company (“PGE”) respectfully submits this reply in support of its November 6, 2018 motion for waiver of ORCP 54 A(1). PGE also respectfully requests leave to submit a sur-response in support of its November 6, 2018, response and objection to Complainants’ October 22, 2018 Notices of Dismissal Without Prejudice.

This reply and sur-response are filed to address the arguments raised in Complainants’ November 8, 2018 reply opposing PGE’s November 6, 2018 filing. The Commission’s rules specifically authorize PGE to file a reply in support of its motion for

waiver of ORCP 54 A(1).¹ The Commission's rules do not specifically authorize PGE to file a sur-response in support of its response and objection. However, the Commission has allowed additional briefing not specifically authorized in its rules when such briefing is helpful or otherwise appropriate.² Here, Complainants' November 8, 2018 reply raises arguments to which PGE has not had an opportunity to object or respond and Complainants' reply misconstrues the key cases discussed in PGE's November 6, 2018 filing. PGE believes its sur-response will aid the Commission in better understanding PGE's position and therefore respectfully requests leave to file this sur-response.

I. INTRODUCTION

On October 22, 2018, each of the Complainants filed a Notice of Dismissal Without Prejudice pursuant to ORCP 54 A(1). If these notices are given effect it will allow Complainants to circumvent Order No. 18-348, which denied Complainants leave to amend their complaints. If Complainants are allowed to withdraw without prejudice under ORCP 54 A(1), then they will be free to refile the very complaints the Commission decided they could not file in Order No. 18-348.

Complainants argue the Commission is without authority or jurisdiction to prevent Complainants from withdrawing under ORCP 54 A(1).³ Complainants are incorrect. PGE acknowledges that ORCP 54 A(1) generally applies to contested case

¹ OAR 860-001-0420(5).

² *See e.g.*, Docket No. UM 1234, Order No. 07-227 at 4 (Jun. 8, 2007) (Commission held that it would consider a reply that was not authorized by the rules and which was objected to by the other party to the proceeding because the reply "better explains" the filing party's position than did that party's original filing); Docket No. UE 267, Order No. 15-195 at 1 (Jun. 16, 2015) (Commission grants leave to file a reply where no objection is made to the reply); Docket No. UM 1566, Order No. 14-425 (Dec. 8, 2014) (Commission grants leave to file a reply not otherwise authorized by rules and not objected to by other parties).

³ Docket No. UM 1877, Complainants' Reply at 5-6 (Nov. 8, 2018) (hereafter "Complainants' Reply"); Docket No. UM 1877, Complainants' October 24, 2018 email from Irion Sanger to Administrative Law Judge Allan Arlow regarding PGE's October 23, 2018 email (Oct. 24, 2018).

proceedings before the Commission because ORCP 54 A(1) has been incorporated by reference by the Commission as part of the Commission's rules of procedure pursuant to OAR 860-001-0000(1).⁴ However, there are three separate and independently sufficient grounds under which the Commission has the authority and the jurisdiction to decide that ORCP 54 A(1) is not available to Complainants under the circumstances of these cases.

First, the Commission can find that by the express terms of OAR 860-001-0000(1), ORCP 54 A(1) does not apply under the circumstances of these cases because its application would be inconsistent with Order No. 18-348. *Second*, the Commission can find that ORCP 54 A(1) is not available to Complainants because its application would allow Complainants to avoid the effects of a prior adverse decision in these cases (the order denying leave to amend) and this outcome violates the limits imposed on a plaintiff's use of ORCP 54 A(1) by the Oregon Supreme Court in *Village at Main Street Phase II*. *Third*, the Commission has the express authority under OAR 860-001-0000(2) to waive the application of any procedural rule, including ORCP 54 A(1), upon motion by a party for good cause shown.

PGE has moved the Commission to waive application of ORCP 54 A(1) and demonstrated good cause. The good cause includes: 1) it would be inequitable to allow Complainants to accomplish through ORCP 54 A(1) that which they were denied leave to accomplish by Order No. 18-348; 2) as the Commission has already determined in Order No 18-348, it would prejudice PGE to allow Complainants to withdraw their existing complaints and leave them free to file new complaints; and 3) it would be

⁴ See e.g., *Dunn Rd Solar LLC v. Portland Gen. Elec. Co.*, Order No. 18-434 (Nov. 9, 2018) (Commission order closing docket after complainant filed notice of dismissal without prejudice stating: "ORCP 54A, as applied to Commission proceedings through OAR 860-001-0000(1), allows complainant to dismiss an action in its entirety without an order of the Commission.").

administratively inefficient to allow withdrawal and resubmission of new complaints because the parties and the Commission have invested considerable time and resources into the resolution of the issues presented by these cases and those issues are now ready for resolution.

In their November 8, 2018 reply, Complainants argue: 1) dismissal is consistent with Order No. 18-348 because the order did not specifically address ORCP 54 A(1) or dismissal without prejudice; 2) the Oregon Supreme Court has not prohibited a plaintiff from using ORCP 54 A(1) to avoid the effects of a prior adverse decision in a proceeding; and 3) there is no good cause to waive ORCP 54 A(1) because the rule guarantees a plaintiff one chance to dismiss without prejudice and because PGE's efforts to date will not be wasted when Complainants refile their complaints. PGE respectfully submits the following reply to these arguments.

II. REPLY AND SUR-RESPONSE

A. **The Commission may consider whether ORCP 54 A(1) applies.**

Complainants argue that there is no opportunity for the Commission to consider any argument or briefing on Complainants' Notices of Dismissal Without Prejudice.⁵ Specifically, Complainants argue "that once Complainants filed their Notice of Withdrawal, there was no opportunity for further proceedings in the case, and ORCP 54 A(1) operated to make the case dismissed without prejudice."⁶

But the Notices could only have this effect if ORCP 54 A(1) applies. PGE asserts that ORCP 54 A(1) does not apply. Alternatively, PGE has asked the Commission to waive application of ORCP 54 A(1) for good cause shown. If the Commission agrees that

⁵ Complainants' Reply at 4-7.

⁶ *Id* at 5.

ORCP 54 A(1) does not apply under the circumstances of these cases, then the Notices of Dismissal are without effect and there is no basis to conclude that the cases are dismissed without prejudice. Alternatively, if the Commission grants waiver of ORCP 54 A(1), then the Notices are likewise without effect, and there is no basis to conclude the cases are dismissed without prejudice.

The cases cited by Complainants indicate that the filing of a Notice of Dismissal pursuant to ORCP 54 A(1) dismisses a case without further action, but this is so *only if* ORCP 54 A(1) applies under the circumstances of these cases at this time. If the civil rule does not apply, then the filing of an ORCP 54 A(1) notice is an action with no effect and cannot deprive the Commission of the authority to entertain PGE's objections and motion. In order to determine whether ORCP 54 A(1) applies (and therefore whether the Notices have any effect), the Commission must rule on PGE's objections and alternative motion for waiver.

B. ORCP 54 A(1) does not apply under the circumstances of these cases because its application would be inconsistent with Order No. 18-348.

The ORCP do not apply directly to the Commission. Rather, they have been adopted by reference by the Commission itself under OAR 860-001-0000(1). But that same Commission rule makes it clear that the ORCP apply *unless inconsistent with a Commission order*. In these cases, application of ORCP 54 A(1) is inconsistent with Order 18-348. Complainants argue that voluntary dismissal without prejudice does not violate Order No. 18-348 because that order does not address voluntary dismissal; it addresses leave to amend the complaints. Specifically, Complainants state:

This argument [that ORCP 54 A(1) is inconsistent with Order No. 18-348] 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.⁷

Complainants' argument is incorrect for several reasons. First, Order No. 18-348 is not an ALJ ruling; it is a Commission order in which the Commission carefully considered the impact of allowing Complainants to amend their existing complaints and denied Complainants permission to do so. The Commission denied leave to amend because replacing the existing complaints with amended complaints would have prejudiced PGE and because there was no adequate showing of good cause why Complainants did not plead their additional claims or allegations at an earlier stage in the proceeding.⁸ In other words, Order No. 18-348 considered a request to revise the content of the complaints and held that Complainants would not be allowed to amend or revise their complaints. The practical effect of allowing a voluntary dismissal without prejudice at this stage would be to allow Complainants to withdraw their current complaints and refile new complaints, exactly as if they had been allowed to amend their complaints. Such a result would clearly be inconsistent with Order No. 18-348.

OAR 860-001-0000(1) does not state that the ORCP apply unless there is a Commission order to the effect that a particular civil rule will not apply in a particular case. OAR 860-001-0000(1) states the ORCP apply unless *inconsistent* with a Commission order. Here, there is a Commission order specifically denying Complainants leave to withdraw their existing complaints and refile amended complaints because such

⁷ Complainants' Reply at 10.

⁸ Docket No. UM 1877, Order No. 18-348 at 5 (Sep. 24, 2018) ("Based on our findings that the proposed amendments would change the cause of action and prejudice PGE, and the failure of complainants to adequately explain the delay of their requests or support them beyond mere allegations, we conclude that complainants' motions to amend their complaints should be denied.").

action would prejudice PGE and is not supported by the record.⁹ Allowing Complainants to now resort to use of ORCP 54 A(1) would be *inconsistent* with Order No. 18-348 because it would allow Complainants to accomplish exactly what was prohibited by Order No. 18-348. It is not necessary for Order No. 18-348 to be a ruling on ORCP 54 A(1); it is enough that allowing dismissal of the complaints without prejudice would be inconsistent with the Commission's decision in Order No. 18-348. As a result, the Commission can and should hold that ORCP 54 (1) is not available under the circumstances of these cases and that Complainants' October 22, 2018 Notices of Dismissal Without Prejudice are without force or effect.

C. ORCP 54 A(1) does not apply under the circumstances of these cases because its application would allow Complainants to avoid the effects of a prior adverse decision in the cases in violation of the limits on ORCP 54 A(1) established by the Oregon Supreme Court in *Village at Main Street Phase II*.

PGE's arguments about Oregon Supreme court precedent are a second, independent reason why the Commission can hold that the Notices of Dismissal Without Prejudice are without force or effect.¹⁰ The Oregon Supreme Court has held that the right to dismiss without prejudice is subject to a judicially imposed limitation. The Oregon Supreme Court has described that limitation as prohibiting a plaintiff from dismissing without prejudice where doing so would allow the plaintiff to avoid the effects of a prior adverse decision in the proceeding.

⁹ *Id.*

¹⁰ If the Commission decides ORCP 54 A(1) does not apply because it is inconsistent with Order No. 18-348, then the Commission need not decide whether ORCP 54 A(1) is also prohibited by the Oregon Supreme Court's holding in *Village at Main Street Phase II*. Each is a separate and independently sufficient grounds for rejecting the Notice of Dismissal.

This principle was most directly articulated by the Supreme Court in *Village at Main Street Phase II*.¹¹ In that 2016 decision, the Supreme Court stated: “a plaintiff’s right to voluntarily dismiss an action is subject to judicially created limitations.”¹² And the Supreme Court cited the *Garrison* case in support of that statement. The Supreme Court then described the relevant holding in *Garrison*:

In *Garrison*, the plaintiff, to avoid litigating the issue of attorney fees, sought to terminate his action after he had lost a summary judgment motion. He filed a motion as provided in *former* ORS 18,230 (a predecessor to ORCP 54 A(1)), which allowed such a motion “not less than five days prior to the day of trial if no counterclaim has been pleaded.” This court held that, in those circumstances, the plaintiff could not avail himself of a judgment of nonsuit as “a matter of right” as provided in the statute. The court reasoned that to conclude otherwise would allow plaintiff to “avoid the effect of an adverse summary judgment.”¹³

In other words, in *Village at Main Street Phase II*, the Supreme Court described its holding in *Garrison* as prohibiting the use of the predecessor to ORCP 54 A(1) because to allow the plaintiff to use the procedure would have allowed the plaintiff to avoid the effect of the adverse decision previously rendered in the case.

In *Village at Main Street Phase II*, the Supreme Court applied the same principle. In that case the defendant county tax assessor had sought to amend its answer to allege a counterclaim. The Tax Court denied leave to amend the answer. The defendant appealed and the Supreme Court reversed and remanded so that the defendant could amend its answer. Before the defendant could amend its answer, the plaintiff filed notice of dismissal without prejudice and claimed the case was dismissed without further action. The Tax Court agreed and entered a judgment of dismissal. The defendant county

¹¹ *Village at Main Street Phase II, LLC v. Department of Revenue*, 360 Or 738 (2016) (“*Village at Main Street Phase II*”).

¹² *Id.* at 749.

¹³ *Id.* at 749-50.

assessor then appealed again and the Supreme Court held that dismissal without prejudice under Tax Court Rule 54 A(1)—which is identical to ORCP 54 A(1)—was not available to the plaintiff because its use would allow plaintiff to avoid the effect of the prior adverse decision in the case (the Supreme Court’s decision that defendant should be allowed to amend its answer to add a counterclaim).¹⁴

The Supreme Court’s reasoning in *Village at Main Street Phase II* makes it clear that in both *Garrison* and *Village at Main Street Phase II* the Supreme Court applied a rule that prohibits the use of ORCP 54 A(1) (or its predecessor) to avoid the effects of a prior adverse decision in a proceeding. In *Garrison* the plaintiff was trying to avoid the adverse effects of a summary judgment decision and in *Village at Main Street Phase II*, the plaintiff was trying to avoid the adverse effects of the appellate court’s decision to allow the defendant to amend its answer to assert a counterclaim. However, in both cases the Supreme Court refused to allow a plaintiff to use a voluntary dismissal without prejudice to avoid the effect of a prior adverse decision in the cases. In the same way, the Commission has the authority in these cases to hold that Complainants cannot use ORCP 54 A(1) to avoid the effect of the adverse decision in Order No. 18-348 prohibiting them from amending their complaints.

Complainants argue (a) that *Garrison* is distinguishable because it dealt with dismissal of a case after the case had been disposed of through summary judgment, and (b) that *Garrison* was distinguished by *Guerin*.¹⁵ Both of these points are irrelevant. PGE does not rely on *Garrison* to argue that Complainants cannot dismiss these cases because there is a pending motion for summary judgment. That was the argument that was

¹⁴ *Id.*

¹⁵ Complainants’ Reply at 10-11.

advanced and rejected in *Guerin*.¹⁶ Rather, PGE cites *Garrison* for the proposition that dismissal without prejudice is not available to a plaintiff when it allows the plaintiff to avoid the effect of an adverse decision that has already been made (not a decision that is yet to be made, like a decision on the pending motion for summary judgment).

Here what prevents the use of ORCP 54 A(1) is not PGE's pending motion for summary judgment but rather the Commission's previously issued decision denying leave to amend the complaints. Nothing about *Guerin* undercuts the value of *Garrison* for the proposition that a plaintiff may not dismiss with prejudice to avoid the effects of an adverse decision previously issued in the case.

Complainants' attempt to distinguish *Village at Main Street Phase II* is also unpersuasive.¹⁷ In that case, the Supreme Court held that dismissal without prejudice cannot be used by a plaintiff to avoid a prior adverse decision. In that case, the specific prior adverse decision was a decision by the Supreme Court that the defendant should be allowed to amend its answer to allege a counterclaim. Plaintiff was not allowed to use ORCP 54 A(1) to dismiss without prejudice before the defendant could amend its answer because that would improperly allow the plaintiff to avoid the effects of the prior adverse decision. PGE is not claiming that the nature of the prior adverse decision in the instant cases is the same as it was in *Village at Main Street Phase II*. That case involved a prior decision that defendant should be allowed to amend its answer and assert a counterclaim; these cases involve a prior decision that Complainants are not allowed to amend their complaints. The specifics of the prior decision are not important; what is important is the

¹⁶ *Guerin v. Beamer*, 163 Or. App. 172, 177 (1999).

¹⁷ See Complainants' Reply at 12-13.

principle that a plaintiff is not free to use ORCP 54 A(1) to dismiss without prejudice in order to avoid the effects of a prior adverse decision in the case.

Finally, Complainants argue that *CigTec Tobacco* undercuts PGE’s analysis and provides that a plaintiff may use ORCP 54 A(1) to dismiss with prejudice even when that dismissal will allow the plaintiff to avoid a prior adverse decision in the proceeding.¹⁸ In *CigTec*, defendant prevailed on a motion to dismiss for lack of personal jurisdiction but the plaintiff was allowed an opportunity to replead the case. Rather than replead, the plaintiff dismissed without prejudice. The trial court held that dismissal would be subject to the prior ruling on personal jurisdiction. The court of appeals reversed that ruling and held that the voluntary dismissal was without prejudice and therefore did not include a binding determination on personal jurisdiction.¹⁹

CigTec does not demonstrate that a plaintiff may use ORCP 54 A(1) to avoid the effects of a prior adverse decision. First, *CigTec* is a 2005 decision by the Oregon Court of Appeals; to the extent that its holding is in conflict with the Oregon Supreme Court’s 2016 holding in *Village at Main Street Phase II*, the Supreme Court’s holding prevails. In *CigTec* the Court of Appeals did not recognize that a plaintiff’s right to use ORCP 54 A(1) is subject to judicial limits. The Court of Appeals stated: “... [ORCP 54 A(1)] does not authorize the court to impose conditions that limit its duty to enter a judgment of dismissal without prejudice upon receiving a notice of dismissal under ORCP 54 A(1).”²⁰ In contrast, in *Village at Main Street Phase II*, the Supreme Court found that “a plaintiff’s right to voluntarily dismiss an action is subject to judicially

¹⁸ Complainants’ Reply at 11-12 citing to *State ex rel. Myers v. CigTec Tobacco, LLC*, 200 Or App 501, 503, 506 (2005) (hereafter “*CigTec*”).

¹⁹ *CigTec* 200 Or App at 503-504, 506.

²⁰ *Id.* at 505.

created limitations.”²¹ The Oregon Supreme Court then described that limitation as prohibiting a plaintiff from using ORCP 54 A(1) to avoid the effect of a prior adverse decision.²² *CigTec* cannot be relied on to counter *Village at Main Street Phase II* because *CigTec* was a ruling by an inferior court that predates the Supreme Court’s decision in *Village at Main Street Phase II*.

Second, it is not clear that *CigTec* conflicts with *Village at Main Street Phase II*. By using ORCP 54 A(1) to dismiss without prejudice, the *CigTec* plaintiff did not effectively avoid the prior adverse decision regarding a lack of personal jurisdiction. If and when the *CigTec* plaintiff refiled its complaint, the plaintiff would still be subject to the same personal jurisdiction limitation that applied when it filed its original complaint. And the original decision on personal jurisdiction included an opportunity to refile the complaint; so by dismissing without prejudice the *CigTec* plaintiff did not succeed in avoiding any of the effects of a prior adverse decision. The limits on personal jurisdiction that were the focus of *CigTec* are external to the trial court’s decision and apply when a complaint is refiled regardless of whether the trial court’s prior decision continues to have binding effect. In contrast, in the instant cases, if Complainants are allowed to dismiss without prejudice and then refile their complaints, they will improperly avoid the effects of Order No. 18-348 which denied leave to amend the complaints. And unlike in *CigTec*, the effect of Order 18-348 will not still apply by operation of a background principle of law such as personal jurisdiction.

²¹ *Village at Main Street Phase II*, 360 Or at 749.

²² *Id.* at 749-50.

D. The Commission has the express authority under OAR 860-001-0000(2) to waive the application of ORCP 54 A(1) for good cause shown.

Even if the Commission is not convinced that ORCP 54 A(1) does not apply because (a) it is inconsistent with Order No. 18-348 or (b) it would allow Complainants to avoid the effect of a prior adverse decision in violation of the limits imposed by the Oregon Supreme Court, the Commission clearly has the express authority under OAR 860-001-0000(2) to waive ORCP 54 A(1) for good cause shown.

Good cause exists under these circumstances. As discussed above, allowing the use of ORCP 54 A(1) under the circumstances of these cases would allow Complainants to defy Order No. 18-348, withdraw the existing complaints, and file new complaints when the Commission has already denied leave to do so and determined that such an outcome would prejudice PGE. That alone provides good cause to waive ORCP 54 A(1). In addition, it would be inequitable to allow Complainants to use ORCP 54 A(1) to avoid the effect of a prior adverse decision denying leave to amend the complaints. Good cause also exists because the parties and the Commission have expended considerable effort to reach a point where a decision can be made on the important issues raised by the Complainants' and PGE's motions for summary judgment, and the Commission should not allow Complainants' attempt to misuse ORCP 54 A(1) to prevent the Commission from resolving the important questions before it.

Complainants have provided no arguments for why the Commission should find there is a lack of good cause other than to argue that ORCP 54 A(1) confers an automatic right of dismissal, and to argue that PGE's efforts and those of the Commission can be recycled if Complainants refile their cases.²³ These are both disingenuous arguments.

²³ Complainants' Reply at 14-15.

PGE has presented ample argument that ORCP 54 A(1) does not automatically apply in all cases and the entire point of the waiver is to prevent the use of ORCP 54 A(1) even if it might otherwise apply; arguing that there is generally an automatic right to dismiss does not defeat the good cause PGE has asserted for waiver of ORCP 54 A(1).

Likewise, arguing that PGE and the Commission can recycle their previous efforts if Complainants refile is disingenuous. The Commission already decided that allowing Complainants to file revised complaints and requiring PGE to restart its defense of these claims would prejudice PGE and that there has been no showing why Complainants could not have asserted their favored facts or claims earlier in this proceeding.²⁴ The Commission has already concluded in Order No. 18-348 that there was good cause to deny leave to amend the complaints and there is therefore good cause to waive application of ORCP 54 A(1)—which would otherwise work an “end run” around Order No. 18-348—and to hold that the October 22, 2018 Notices of Dismissal are without force or effect.

III. CONCLUSION

For the reasons discussed above, the Commission should reject the arguments raised in Complainants’ November 8, 2018 Reply, hold that ORCP 54 A(1) is not applicable under the circumstances of these cases, and hold that Complainants’ Notices of Dismissal Without Prejudice are without any force or effect.

//

//

//

²⁴ Order No. 18-348 at 5.

DATED this 14th day of November, 2018.

Respectfully submitted,



Donald Light, OSB #025415
Assistant General Counsel
Portland General Electric Company
121 SW Salmon Street, 1WTC1301
Portland, Oregon 97204
(503) 464-8315 (phone)
(503) 464-2200 (fax)
donald.light@pgn.com



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