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May 6, 2018

Via Electronic Filing

Public Utility Commission of Oregon
Filing Center
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Re: 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); and HARRIER SOLAR LLC (UM 1890) v. PORTLAND GENERAL ELECTRIC COMPANY

Attention Filing Center:

Enclosed for filing is Portland General Electric Company's Response in Opposition to Complainants' Motion for Leave to Amend Complaints in the above-captioned dockets, with an effective filing date of May 7, 2018.

Thank you for your assistance.

Sincerely,

Donald J. Light
Assistant General Counsel

DJL:bp

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 IN OPPOSITION TO COMPLAINANTS' MOTION FOR LEAVE TO AMEND COMPLAINTS**

I. INTRODUCTION

Pursuant to OAR 860-001-0420(4), Portland General Electric Company ("PGE") respectfully responds in opposition to Complainants' April 20, 2018, motion for leave to amend the complaints in the above-captioned dockets. For the reasons detailed below, the Public Utility Commission of Oregon ("Commission") should deny the motion for leave to amend. In the alternative, the Commission should defer action on the motion for leave to amend until after the Commission resolves PGE's pending and fully briefed motion for summary judgment.

II. BACKGROUND

These cases are about whether each Complainant established a legally enforceable obligation ("LEO") before PGE's avoided cost rates decreased on June 1, 2017. Each complaint alleges a LEO was formed before the June 1 rate change.[1] At the time the complaints were filed in August 2017, it was clear that PGE's rates would decrease again in September or October of 2017.[2] As it turned out, PGE's rates decreased on September 18, 2017.[3] Complainants all knew such a rate decrease would occur,[4] but they did not include in their complaints an alternative allegation that they established LEOs at the rates that went into effect on June 1, 2017. And Complainants did not continue in the standard contracting process after June 1, 2017 or take the actions necessary to establish a LEO after June 1, 2017.

On January 24, 2018 – more than five months after Complainants filed their initial complaints – PGE filed a motion for summary judgment and demonstrated that none of the Complainants established a LEO before June 1, 2017.[5] On April 6, 2018, Complainants filed a cross-motion for summary judgment.[6] Apparently recognizing the merit of PGE's arguments, the cross-motion states that if the Commission concludes no LEO was formed before June 1, 2017, then the Commission should find that each

[1] *See e.g., Valhalla Solar LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1878, Complaint at 3 ("Valhalla Complaint"); *see also* Docket No. UM 1878, Complainants' Motion for Leave to Amend Complaints at 2 (Apr. 20, 2018) ("The original complaint requests that the Commission find that this obligation was formed prior to June 1, 2017.") ("Complainants' Motion for Leave to Amend Complaints").
[2] Valhalla Complaint at ¶13 (alleging Complainant was aware PGE's integrated resource plan would be acknowledged in August 2017 and PGE's rates were expected to be revised again by the end of October 2017).
[3] *In the Matter of Portland Gen. Elec. Co. Application to Update Schedule 201 Qualifying Facility Information*, Docket No. UM 1728, Order No. 17-347 (Sep. 14, 2017) (approving rate update).
[4] *See* footnote 2 *supra*.
[5] *See e.g.*, Docket No. UM 1878, PGE's Motion for Summary Judgment (Jan. 24, 2018) ("PGE's Motion for Summary Judgment").
[6] *See e.g.*, Docket No. UM 1878, Complainants' Cross-Motion for Summary Judgment (Apr. 6, 2018) ("Complainants' Cross-Motion for Summary Judgment").

Complainant established a LEO before the September 18, 2017 rate change.[7] The cross-motion acknowledged that this alternative claim for relief is not requested in the original complaints and indicated that Complainants intended to amend their complaints to request the alternative relief.[8]

On April 20, 2018, Complainants filed a motion for leave to amend their complaints. Complainants ask leave to add a new claim for relief asserting that they established LEOs before the September 18, 2017 rate change.[9] Complainants also ask leave to add "factual" allegations that fall into two categories. First, they seek to add an allegation that PGE has entered into standard contracts after approximately 30 business days of process in prior cases.[10] Second, they seek to add a series of vague and ambiguous allegations that PGE officers have adopted a policy against entering into QF contacts.[11]

III. RESPONSE

Complainants were free to amend their complaints once as a matter of right before PGE filed its answers in October 2017.[12] Now—eight months after the complaints were filed and six months after PGE filed its answers in response—the Complainants must obtain the leave of the Commission before they can amend their complaints.[13] In general, the Commission may grant leave to amend if justice requires *provided* leave to amend will not prejudice the defendant or needlessly delay the resolution the case.[14]

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[7] Complainants' Cross-Motion for Summary Judgment at 2 and 34-35.
[8] *Id.* at 3.
[9] Complainants' Motion for Leave to Amend Complaint at 2 and Attachment A, ¶¶ 103-105.
[10] *Id.* at Attachment A, ¶ 16.
[11] *Id.* at Attachment A, ¶¶ 10-14.
[12] ORCP 23 A.
[13] *Id.*
[14] *See e.g., The Northwest Public Communications Council v. Qwest Corp.*, Docket Nos. DR 26 and UC 600, Order No. 09-155 at 6-7 (May 4, 2009).

Here, the Commission should deny leave to amend. The key dispute in these cases is about when a LEO arises in Oregon and whether PGE is allowed to take 15 business days to complete the steps in the standard contracting process. Resolution of these key questions will both resolve these 12 cases and minimize the opportunity for dispute between PGE and other QFs. Without a rapid resolution of these key questions, it is likely that more QFs will file complaints alleging that they established LEOs before PGE's recent May 1, 2018 rate change can take effect. In fact, five QFs filed such complaints last week.[15]

There is no reason to grant leave to amend or to delay the resolution of these cases. PGE's motion for summary judgment and Complainants' cross-motion for summary judgment are both fully briefed. Complainants could have alleged their new alternative claim for relief when they filed their original complaints but chose not to do so. Complainants new "factual" allegations do not alter the analysis to be conducted by the Commission under the pending motions for summary judgment, and Complainants have made no showing that these "factual" allegations could not have been made at the time the original complaints were filed. Allowing Complainants to amend their complaints at this stage would prejudice PGE's defense, significantly delay the resolution of these cases and unnecessarily complicate the procedural status and evidentiary record of these cases.

A. PGE is entitled to rely on the claims and facts alleged at the time it moved for summary judgment.

By seeking leave to amend their complaints in response to PGE's motion for summary judgment, Complainants are attempting to "move the target" after PGE has

[15] *See* Docket Nos. UM 1941 to UM 1945 (five QF complaints alleging the formation of LEOs before PGE's May 1, 2018 rate update can become effective, each complaint was filed on April 30, 2018).

filed its dispositive motion. Oregon courts have recognized that a defendant has the right to rely on the claims and allegations made in the complaint and to have a dispositive motion decided without having those claims and allegations modified in response to the dispositive motion.[16]

In *MT&M Gaming, Inc. v. City of Portland*, 360 Or. 544, 551-552 (2016), the Supreme Court of Oregon upheld a trial court decision granting summary judgment and denying a motion for leave to amend the complaint that was filed in response to a motion for summary judgment. In that case, the Oregon Supreme Court noted with approval that the trial court's denial of the motion for leave to amend was based on the trial court's conclusion that the defendant "was 'entitled to an order and judgment on the pleadings that were operative at the time of the motion [for summary judgment], particularly with respect to the relief requested.'" [17] Under the circumstances of these cases, the Commission can and should deny Complainants' motion for leave to amend their complaints.

B. The Motion for Leave to Amend should be denied under the factors articulated by the Oregon Court of Appeals in *Alexander*.

In *Alexander v. State*, the Oregon Court of Appeals recently articulated the considerations that apply when a plaintiff seeks leave to amend its complaint.[18] The *Alexander* case involved a procedural posture that was similar to the procedural posture of the instant cases. In *Alexander* the parties filed cross-motions for summary judgment

[16] *See e.g., Marineau v. A.P. Green Refractories Co.*, 201 Or. App. 590, 599-600 (2005) (wrongful death action related to alleged asbestos exposure dismissed on summary judgment in favor of defendants, plaintiffs motion for leave to amend was denied and court of appeals upheld the denial of the motion for leave to amend where plaintiff failed to allege element of claim ahead of motion for summary judgment).
[17] *MT&M Gaming, Inc. v. City of Portland*, 360 Or. 544, 551-552 (2016).
[18] *Alexander v. State*, 283 Or. App. 582 (2017) ("*Alexander*").

and the plaintiff then filed a motion for leave to amend his complaint.[19] The trial court deferred a ruling on plaintiff's motion for leave to amend and proceeded to hear and decide the parties' cross-motions for summary judgment.[20] The trial court ultimately denied plaintiff's motion for summary judgment, granted the defendant's motion for summary judgment, and then denied the motion for leave to amend the complaint.[21]

On appeal, plaintiff assigned error to the trial court's decision to deny the motion for leave to amend the complaint.[22] In considering this argument, the Court of Appeals articulated the relevant test for whether to grant leave to amend a complaint. The Court of Appeals stated:

> Under ORCP 23 A, a party may amend a complaint after a responsive pleading has been served with leave of the court, which "shall be freely given when justice so requires." We review a trial court's ruling on a motion for leave to file an amended complaint for abuse of discretion. *Mitchell v. The Timbers*, 163 Or.App. 312, 317, 987 P.2d 1236 (1999). In applying that standard, we uphold the trial court's decision unless it exercises its discretion in a manner that is unjustified by, and clearly against, reason and evidence. *Quillen v. Roseburg Forest Products, Inc.*, 159 Or.App. 6, 10, 976 P.2d 91 (1999). In evaluating whether the trial court abused its discretion, we consider the following four factors: (1) the proposed amendment's nature and its relationship to the existing pleadings; (2) the prejudice, if any, to the opposing party; (3) the timing of the proposed amendment; and (4) the colorable merit of the proposed amendment. *Safeport, Inc. v. Equipment Roundup & Mfg.*, 184 Or.App. 690, 699, 60 P.3d 1076 (2002), *rev. den.*, 335 Or. 255, 66 P.3d 1025 (2003).[23]

If any of the factors identified in *Alexander* are present, a trial court (or the Commission) is justified in denying leave to amend.[24] The Commission has previously applied the *Alexander* factors when deciding whether to grant or deny

[19] *Alexander* at 584-585.
[20] *Id.* at 585.
[21] *Id.*
[22] *Id.* at 589.
[23] *Id.* at 590.
[24] *Id.* (Court of Appeals upheld trial court's decision to deny leave to amend the complaint when the first two *Alexander* factors were absent but the last two factors were present).

a motion for leave to amend a complaint.[25]

1. The Motion for Leave to Amend should be denied under the first *Alexander* factor because Complainants seek to modify their cause of action or inject a new element of damage.

Regarding the first factor to be considered—"the proposed amendment's nature and its relationship to the existing pleadings"—in *Alexander* the Court of Appeals noted: "trial courts have 'ample discretionary authority to allow amendments, **provided the proffered amendment does not substantially change the cause of action or inject an entire new element of damage.**'"[26] In the instant cases, Complainants seek to amend their complaints to add an entirely new claim for relief. Specifically, they ask the Commission to allow them to amend their complaints after PGE has filed a fully dispositive motion for summary judgment so that Complainants can add an alternative claim for relief to the effect that they established LEOs between June 1, 2017, and September 17, 2017, when such a claim could have been asserted in the original complaints but was not.

This amendment, if allowed, would expose PGE to a new element of damage—specifically a claim for the superseded rates that were in effect between July 1, 2017 and September 17, 2017. The Commission can and should deny Complainants' motion for leave to amend the complaints to insert a new, alternative claim for relief on the grounds that such an amendment would substantially change the cause of action or inject an entire new element of damage.

[25] *See* Order No. 09-155 at 4 (referring to the *Alexander* factors as the *Forsi* factors and citing *Forsi v. Hildahl*, 194 Or. 667 (1974) as support for the four factors).
[26] *Alexander* at 590 (quoting *Cutsforth v. Kinzua Corp.*, 267 Or. 423, 433-434 (1973)) (emphasis added).

2. The Motion for Leave to Amend should be denied under the second *Alexander* factor because it would prejudice PGE and unreasonably delay the resolution of these cases.

Regarding the second factor—the prejudice to the opposing party—allowing Complainants to amend their complaints at this stage would prejudice PGE's defense and unreasonably delay the resolution of these cases. All three claims for relief contained in the original complaints are based on an allegation that Complainants each established a LEO on or before May 31, 2017.[27] There is no allegation that Complainants established a LEO between June 1, 2017 and September 17, 2017, even though Complainants could have included such alternative allegations at the time they filed their complaints. PGE has invested considerable time and resources into preparing and briefing a comprehensive motion for summary judgment based on the three claims for relief alleged in the original complaints. That motion for summary judgment has been fully briefed. Allowing Complainants to amend their complaints at this stage to insert a new, alternative claim for relief would prejudice PGE and unreasonably delay the resolution of its pending motion for summary judgment.

If Complainants are allowed to amend their complaints, then PGE will need to be allowed an opportunity to file answers to the amended complaints and to file a motion for summary judgment against the new alternative claim for relief. And Complainants should be required to submit any cross-motion for summary judgment based on the new alternative claim for relief only **after** leave has been granted to amend the complaints. PGE should then be granted an opportunity to respond to any such cross-motion for summary judgment **after** a motion for leave to amend is granted. In short, granting the motion for leave to amend complaints will substantially delay the resolution of PGE's

[27] *See* footnote 1 *supra*.

pending and fully briefed motion for summary judgment. It will also further complicate these cases and add confusion to the proceedings, all to the prejudice of PGE's defense.

The key questions in these cases that require Commission resolution have all been framed and presented in PGE's motion for summary judgment. Specifically: (1) what test applies to determining when a LEO is established (the Commission's LEO test articulated in Order No. 16-174 or Complainants' LEO test which they purport to divine from several advisory opinions issued by FERC); and (2) how does PGE's standard contracting process work (is a utility allowed to take up to 15 business days to complete each stage of the process even if it might be possible for the utility to complete a stage more quickly)? The Commission should either deny the motion for leave to amend, or defer action on that motion, and resolve PGE's motion for summary judgment.

By ruling on PGE's motion for summary judgment, the Commission can resolve these cases, and provide PGE and all QF applicants for standard contracts with clarity regarding how the standard contracting process works and when a LEO is established. This is especially important now, as PGE has just filed its May 1, 2018 rate update and QF applicants for standard contracts are already filing complaints claiming to have established a LEO before the May 2018 rate update can become effective.

3. The Motion for Leave to Amend should be denied under the third and fourth *Alexander* factors.

Finally, the *Alexander* court noted that under the third and fourth factors—the timing of plaintiff's motion for leave to amend and the colorable merit of plaintiff's proposed amendment—a trial court is justified in denying leave to amend where the proposed amendments would not have cured the deficiencies that allow the court to grant

summary judgment in favor of the defendant.[28] Here, the proposal to amend the complaints to add allegations regarding PGE's officers' alleged positions on QF contracts and to add an allegation that PGE has completed the standard contracting process in 30 business days or less would make no difference to the outcome of the summary judgment analysis.[29]

Complainants have alleged that they established LEOs before June 1, 2017. PGE has moved for summary judgment and demonstrated that – even considering the facts in the light most favorable to Complainants – none of the Complainants established a LEO before June 1, 2017 under the applicable LEO rule articulated by the Commission in Order No. 16-174. None of the additional allegations that Complainants seek to insert into their complaints impact the summary judgment argument or analysis, and indeed most if not all of them have been raised and discussed as part of the briefing on summary

[28] *Alexander* at 590.

[29] In their proposed First Amended Complaints, the Complainants have added allegations that PGE's officers promoted policies that disfavored QF contracts and allegations that PGE has completed the standard contracting process in approximately 30 business days in previous cases. See footnotes 10 and 11 *supra.* These allegations appear to be intended to support Complainants' contention that PGE should not be allowed to take up to 15 business days to complete each stage of the standard contracting process. But this issue has already been addressed by the parties in the briefing on summary judgment. *See* Complainants' Response in Opposition to PGE's Motion for Summary Judgment at 25-26 (asserting it was unreasonable for PGE to take 15 business days to respond to each stage of the standard contracting process) and PGE's Reply in Support of its Motion for Summary Judgment at 20-21 (refuting Complainants' assertion that it is unreasonable for PGE to take 15 business days to conduct each step of the standard contracting process). PGE has argued that it is entitled to take up to 15 business days to complete each stage of the process as a matter of law and that it does not matter why it might take PGE that period of time or whether it was possible for PGE to complete a particular stage for a particular project more rapidly. PGE has also noted that it did not always take 15 business days to complete each stage of the process and that PGE was processing approximately 45 requests for contract and that it was therefore understandable that it would take PGE most, if not all, of the 15 business day period to complete each stage of the standard contracting process. *Id*. In any event, the new factual allegations which Complainants seek to add to their complaints do not appear to alter the key legal issues to be resolved by the Commission through the pending motions for summary judgment and there is no reason to allow amendment of the complaints prior to resolution of the motions for summary judgment (if at all).

judgment.[30] The Commission should deny the motion for leave to amend based on the third and fourth factors articulated by the *Alexander* court.

In sum, under the four-factor analysis articulated by the *Alexander* court, the Commission can and should deny Complainants' motion for leave to amend their complaints. The Commission can deny the motion for leave to amend if any one of the four factors discussed in *Alexander* is satisfied (in *Alexander*, denial of the motion for leave to amend was upheld when the third and fourth factors were satisfied). Here, all four factors are satisfied and the Commission can and should deny the motion for leave to amend.

C. The Motion for Leave to Amend should be denied because Complainants have failed to make any showing to support their assertion that amendment is necessary to reflect facts or claims that were not apparent when the original complaints were filed.

The Commission should deny the motions for leave to amend the complaints because Complainants were aware, or should have been aware, of their additional allegations and alternative claim for relief when they filed their original complaints but chose not to assert them at that time and should not now be allowed to raise such claims or allegations after PGE has moved for summary judgment.[31]

[30] For example, whether PGE has processed prior standard contract requests in 30 business days is irrelevant because the applicable standard contracting process allows PGE up to 15 business days to complete each stage of the process. As a further example, Complainants' allegations that PGE officers disfavored QF contracts does not alter the relevant analysis under PGE's motion for summary judgment which must focus on whether, under the standard contracting process Complainants were entitled to an executable PPA before June 1, 2017, and PGE prevented that from happening through delays or obstruction. The relevant question is whether PGE delayed or obstructed, not whether PGE's officers favored or disfavored QF contracts.

[31] *Quirk v. Ross*, 257 Or. 80, 83-84 (1970) ("Where the party seeking the amendment has reasonable means of learning or has knowledge prior to trial of the circumstances which make it desirable for him to amend, a slight chance that the other party will be prejudiced will justify a refusal of the requested amendment"); Edwards *v. Lewis*, 76 Or. App. 94 (1985) (Trial court upheld for refusing to grant motion for leave to amend when plaintiff was aware of claim and could have included it earlier).

In their two-page motion for leave to amend the complaints, Complainants assert in perfunctory and conclusory fashion that the "First Amended Complaint also contains additional factual allegations that have come to light after the filing of the initial complaint. As such, just[ice] requires that leave be granted to amend the complaint."[32] But Complainants have provided absolutely no evidence or testimony to support their naked and abstract assertion that additional factual allegations "have come to light after the filing of the initial complaint." Complainants have not bothered to identify which "factual allegations" allegedly "came to light" after the initial complaints were filed, when and how such allegations allegedly "came to light" nor explained why such allegations were not known or knowable to Complainants before the initial complaints were filed.

D. At a minimum, the Commission should defer action on the Motion for Leave to Amend until it has resolved PGE's Motion for Summary Judgment.

As an alternative to denying the motion for leave to amend at this time, the Commission should defer action on the motion for leave to amend and first resolve PGE's pending and fully briefed motion for summary judgment. When a defendant files a motion for summary judgment and the plaintiff responds by seeking leave to amend its complaint, Oregon trial courts have repeatedly deferred action on the motion for leave to amend and first ruled on the motion for summary judgment, and the Oregon Court of Appeals has repeatedly affirmed this approach.[33]

[32] Complainants' Motion for Leave to Amend Complaints at 2.

[33] *Stevens v. First Interstate Bank of California*, 167 Or. App. 280 (2000) (Trial court affirmed where it deferred resolution of motion for leave to amend until after resolution of previously filed motion for summary judgment); *MacLand v. Allen Family Trust*, 207 Or. App. 420, fn. 9 (2006) (Trial court affirmed where it granted motion for summary judgment and did not rule on motion for leave to amend that was mooted by summary judgment); *Alexander v. State*, 283 Or. App. 582 (2017) (Trail court affirmed where it deferred resolution of motion for leave to amend until after resolution of motions for summary judgment).

Doing so in these cases would allow for the efficient resolution of the key issues in dispute in these cases—i.e., what LEO analysis should be applied and is PGE is allowed to take up to 15 business days to accomplish each stage of the standard contracting process? Such determinations will not only resolve these 12 cases but will provide PGE and its QF counterparties with valuable guidance that may reduce the number of complaint proceedings arising out of PGE's May 1, 2018 rate update.

IV. CONCLUSION

For the reasons stated above, the Commission should deny Complainants' motion for leave to amend their complaints. In the alternative, the Commission should defer action on the motions for leave to amend complaints until after the Commission has decided PGE's pending motion for summary judgment which was filed before the motion for leave to amend.

DATED this 7th day of May, 2018.

Respectfully submitted,

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