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February 7, 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 Reply in Support of its Motion to Stay Discovery and Procedural Schedule.

Thank you for your assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read "V. Denise Saunders".

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.

**PORLAND GENERAL ELECTRIC
COMPANY'S REPLY IN SUPPORT
OF ITS MOTION TO STAY
DISCOVERY AND PROCEDURAL
SCHEDULE**

Pursuant to OAR 860-001-0420(5), Portland General Electric Company (PGE) respectfully files this reply in support of its motion to stay discovery and the procedural schedule pending resolution of PGE's motion for summary judgment.

I. INTRODUCTION

PGE filed a motion for summary judgment on January 24, 2018. At the same time, PGE moved to stay discovery and to stay the procedural schedule in these cases pending resolution of its motion for summary judgment. A stay serves the interest of administrative efficiency and would allow the parties, the Administrative Law Judge, and the Commission to focus on the critical legal issues at the core of these cases rather than on discovery disputes.

Complainants oppose PGE’s motion to stay discovery.¹ Complainants also state that they plan to seek leave to amend at least some of their complaints to allege additional facts and new claims.² However, rather than simply filing a motion to amend their complaints, Complainants urge the ALJ to: 1) deny PGE’s motion to stay discovery; and 2) hold a prehearing conference to set a new procedural schedule.³ In effect, Complainants urge a delay in the procedural schedule, no action on PGE’s pending motion for summary judgment, and continued discovery. PGE objects to this approach.

Under the Commission’s rules, Complainants’ response to PGE’s motion for summary judgment is due within 15 days of the motion or by February 8, 2018.⁴ On Monday, February 5, 2018—three days before their response is due—Complainants asked PGE to agree to an indefinite extension of time to respond while Complainants’ seek the new procedural schedule involving dates to file amended complaints, dates to file amended answers, and dates to file dispositive motions and/or testimony. PGE is willing to grant reasonable extensions of time when needed to address a specified need for additional time to prepare a response. But Complainants have not indicated that they need a few more days to prepare a response or specified any reason why they need more time. Rather Complainants appear to be seeking to nullify PGE’s motion for summary judgment by refusing to respond to it and by suggesting that they might file for leave to amend some complaints at a future date. The Commission should reject these tactics, require Complainants to respond to PGE’s motion for summary judgment (or deem a response waived), and proceed to resolve PGE’s dispositive motion. In an attempt to

¹ *Bottlenose Solar, LLC, et al. v. PGE*, Docket Nos. UM 1877-UM 1882, UM 1884-UM1886, UM 1888-UM 1890 (hereinafter Docket Nos. UM 1877 *et al.*), Complainants’ Response in Opposition to PGE’s Motion to Stay Discovery and Procedural Schedule at 1-2 (Feb. 2, 2018).

² *Id.* at 2.

³ *Id.*

⁴ OAR 860-001-0420(4).

provide reasonable accommodate to Complainants' needs, PGE has offered to extend the deadline for Complainants' response to PGE's motion for summary judgment by one week (new deadline: February 15, 2018) even though Complainants have not identified any specific reason why they need an extension of time.

If Complainants ultimately decide to seek leave to amend some of the complaints, they should be required to file a motion for leave to amend. The mere suggestion that Complainants might seek leave to amend an undisclosed number of complaints in an undisclosed manner should not be sufficient to halt the regular processing of PGE's dispositive motion.

II. REPLY

A. The Stay Should Be Granted and the Motion for Summary Judgment Should be Resolved Notwithstanding Complainants' Suggestion that They May Seek Leave to Amend Some of Their Complaints.

Complainants indicate that they have additional facts and claims in some of the cases and that they had planned to present these facts and claims through testimony. However, now that PGE has filed a motion for summary judgment, Complainants state they are now planning to amend some of their complaints to allege these additional facts and new claims.⁵ Complainants have not disclosed how many complaints they propose to amend, what new facts or claims they intend to allege, or why they could not have alleged these facts and claims in the original complaints or before PGE filed answers in October and then prepared and filed an extensive motion for summary judgment in January. Complainants should not be allowed to "hide the ball" and wait to assert new facts or new claims either in testimony or in amended pleadings filed months after PGE filed its answers and weeks after PGE has prepared and filed a comprehensive motion for summary judgment.

⁵ Docket Nos. UM 1877 *et al.*, Complainants' Response in Opposition to PGE's Motion to Stay Discovery and Procedural Schedule at 2 and 6-8 (Feb. 2, 2018).

If Complainants seek to amend their complaints at this late date, they should be required to file motions for leave to amend and PGE should be allowed a regular 15-day period to respond. No assumption should be made at this point that amendment of the complaints is proper or would be allowed. Indeed, upon first review, the three “LEO letters” that Complainants attached to their February 2, 2018 filing do not appear to change the complexion of these cases. The Commission should proceed with its regular process for considering PGE’s pending motion for summary judgment which addresses the legal issue at the core of all of the above-captioned cases and all of the QF complaints filed against PGE in August of 2017.

In addition, if only a few Complainants move to amend, then even if the Commission grants that request, PGE’s current motion for summary judgment and current motion to stay discovery would continue to apply to those complaints that are not amended. And discovery should certainly be stayed if a complaint is going to be amended and a new answer will be required.

B. The Motion for Summary Judgment Was Not An Unexpected Motion.

Complainants characterize PGE’s motion for summary judgment as an unexpected filing,⁶ but this is disingenuous. Administrative Law Judge (ALJ) Allan Arlow held a prehearing conference to establish a procedural schedule in these cases on November 13, 2017. Ahead of that conference, counsel for PGE and counsel for Complainants consulted regarding a proposed schedule. PGE indicated that it was interested in scheduling dates for a motion for summary judgment. Counsel for Complainants refused to agree to build dates for a motion for summary judgment into the procedural schedule. As a result, the parties proposed a procedural schedule that did not identify any specific dates for a motion for summary judgment and PGE made it

⁶ Docket Nos. UM 1877 *et al.*, Complainants’ Response in Opposition to PGE’s Motion to Stay Discovery and Procedural Schedule at 2 (Feb. 2, 2018).

clear to ALJ Arlow and Complainants that it was reserving its right to file a motion for summary judgment. In his November 14, 2017 ruling establishing a procedural schedule, ALJ Arlow specifically noted that PGE had reserved its right to file a motion for summary judgment “with respect to the disposition of the complaints subject to this prehearing conference.”⁷

The Commission’s rules incorporate the Oregon Rules of Civil Procedure (ORCP) to fill gaps in the Commission’s procedural rules.⁸ Under ORCP 47(C), PGE is required to file a motion for summary judgment at least 60 days before the date set for trial (or in this case the date set for hearing). The hearing date is April 26, 2018, which means that PGE was required to file its motion for summary judgment no later than February 23, 2018. Given the fact that Complainants were scheduled to submit testimony on February 12, 2018, it should not come as a surprise that PGE would choose to file its motion for summary judgment by late January 2018.

C. A Discovery Stay Will Not Cause Undue Delay and It Will Not Prejudice the Complainants.

Complainants argue that a stay of discovery pending resolution of PGE’s motion for summary judgment would delay resolution of these cases;⁹ but that is not necessarily true. First, staying discovery results in no delay if PGE’s motion for summary judgment is granted in full. Rather, staying discovery would simply relieve the parties, the ALJ and the Commission of unnecessary effort. Second, even if some cases or claims survive summary judgment, staying discovery would not necessarily delay the resolution of the cases because the issues on which discovery must occur will presumably be narrowed after an order on summary judgment and the Commission will be in a much better position to resolve disputes regarding the relevance of data

⁷ Docket Nos. UM 1877 *et al.*, ALJ Ruling at 2 (Nov. 14, 2017).

⁸ OAR 860-001-0000(1).

⁹ Docket Nos. UM 1877 *et al.*, Complainants’ Response in Opposition to PGE’s Motion to Stay Discovery and Procedural Schedule at 6 (Feb. 2, 2018) (“Any additional, unnecessary delay in discovery harms Complainants by postponing the ultimate resolution of its cases.”).

requests. Third, if the cases are not resolved through summary judgment, then they are at a stage where discovery could be reinitiated without prejudicing the remainder of the proceeding. Fourth, PGE objects to the unfounded assertion that it seeks to delay these cases.¹⁰ PGE has expended significant resources on these cases and would like to see them resolved as efficiently and rapidly as possible. PGE believes the most efficient and rapid way to resolve these cases is through summary judgment. Finally, Complainants assert that they intend to seek leave to amend an undisclosed number of their complaints and they urge the ALJ to set a new procedural schedule with dates to file new complaints, new answers, and new dispositive motions¹¹—this approach would cause substantially more delay than a stay of discovery and resolution of PGE’s pending motion for summary judgment and would unduly prejudice PGE.

Complainants argue that a stay of discovery and any resulting delay would harm them.¹² But Complainants provide no specifics regarding the alleged harm they would suffer. And their claim of harm caused by delay is contradicted by the fact that they seek to slow these proceedings down even more by seeking leave to amend their complaints to add new facts and new claims which they should have alleged in their original complaints or added through amended complaints filed before PGE answered and prepared an extensive dispositive motion more than five months after the initial complaints were filed.

D. The Commission has the Authority to Stay Discovery.

Complainants argue that a stay of discovery is inappropriate during the resolution of a dispositive motion.¹³ In support, Complainants cite to decisions of the federal district courts.¹⁴

¹⁰ *Id.* at 6 (asserting that PGE is attempting to create delays to “run out the clock” and increase the possibility that Complainants’ projects become uneconomic).

¹¹ *Id.* at 2.

¹² *Id.* at 6.

¹³ *Id.* at 4-5.

¹⁴ *Id.* (see especially footnote 1).

But federal case law does not prohibit a stay of discovery; it simply articulates a set of factors that the federal courts consider when deciding whether to grant a stay.¹⁵ PGE’s request for stay satisfies those federal factors.

In the *Ciuffitelli* case cited by Complainants, the federal district court in Oregon acknowledged that the Ninth Circuit has not articulated a controlling standard for when a federal district court may stay discovery pending resolution of a dispositive motion.¹⁶ The *Ciuffitelli* court noted that the Ninth Circuit’s dicta suggests it is appropriate to stay discovery if the district court is convinced the plaintiff will be unable to make out a viable claim for relief.¹⁷ And the *Ciuffitelli* court noted that the federal district court in California has employed a case-by-case analysis when deciding whether to stay discovery and has stated that factors to consider include: (i) the type of motion—whether it is a challenge as a matter of law or merely a challenge to the sufficiency of the allegations; (ii) the nature and complexity of the action; (iii) whether counterclaims and/or cross claims have been interposed; (iv) whether some or all of the defendants join the request for stay; (v) the posture or stage of the litigation; (vii) the expected extent of discovery and the complexity of the issues in the case; and (viii) any other relevant factors.¹⁸

PGE’s request for stay of discovery satisfies the *Skellerup* factors considered by the federal district courts. PGE’s motion for summary judgment would resolve the cases as a matter of law and is not merely a motion against the pleadings that would require Complainants to amend their complaints and therefore result in continued discovery. The nature and complexity

¹⁵ *Id.* (see especially footnote 3 and the factors listed in the last paragraph on page 4).

¹⁶ *Ciuffitelli v. Deloitte & Touche, LLC*, 2016 WL 6963039, *4, U.S. Dist. LEXIS 163546 (D.Or. 2016).

¹⁷ *Id.* citing *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988) (“Staying discovery when a court is convinced that the plaintiff will be unable to state a claim for relief furthers the goal of efficiency for the court and the litigants.”).

¹⁸ *Skellerup Indus. Ltd. v. City of L.A.*, 163 F.R.D. 598, 601 (C.D. Cal 1995).

of these cases also supports a stay while summary judgment is resolved. If summary judgment is granted, the Commission will not be required to resolve the complex issues of relevancy raised by the pending motion to compel discovery. And if any claims survive summary judgment, then the Commission will be in a more informed position from which to decide the relevancy questions raised by the pending motion to compel. There are no cross-claims or counter-claims in these cases that would be delayed by a stay in discovery while the primary claims are subjected to PGE’s motion for summary judgment. And there are no other defendants who oppose a stay of discovery. If these cases are not resolved through summary judgment, then they are at a stage where discovery could be reinitiated regarding any surviving claims without prejudicing the remainder of the proceeding. Finally, discovery has already been contentious and already involves a complex question of relevance which is related to the legal issues addressed by PGE’s motion for summary judgment; it would serve the interests of administrative efficiency to stay discovery and resolve the motion for summary judgment first.

While PGE’s request to stay discovery satisfies the federal *Skellerup* factors, the Commission is not bound by the rules that the federal court imposes on itself. The Commission has ample authority and discretion to stay discovery while it resolves PGE’s motion for summary judgment.

The Commission’s procedural rules expressly provide that the Commission “will liberally construe these rules to ensure just, speedy, and inexpensive resolution of the issues presented” and authorize “the Commission or ALJ to modify or waive any of the rules in this division for good cause shown.”¹⁹ The Commission and its ALJs have not hesitated to stay specific aspects of a proceeding as necessary to ensure the efficient resolution of issues and to avoid confusion or unnecessary or unproductive process.

¹⁹ OAR 860-001-0000.

For example, in Docket No. UM 1805, ALJ Arlow imposed a temporary but indefinite stay on PGE’s obligation to respond to two applications for rehearing or reconsideration until after the Commission had an opportunity to resolve a pending compliance dispute. ALJ Arlow noted that staying the proceeding until the Commission could rule on the pending compliance issue would provide guidance that could have a substantial impact on the issues raised in the applications for rehearing or reconsideration.²⁰

As another example, in *Wah Chang v. PacifiCorp*, petitioner Wah Chang sought discovery from respondent PacifiCorp and filed multiple data requests, deposition notices, and motions to compel.²¹ The case involved a docket reopened by the Commission in response to a letter ruling by the Marion County Circuit Court. In response to the motions to compel, PacifiCorp moved to dismiss the case and moved for clarification on the scope of a circuit court’s order to reopen the Commission docket.²² PacifiCorp also moved to stay discovery and to stay the proceeding pending resolution of its motion to dismiss and its challenge as to the scope of the proceeding.²³

ALJ Kirkpatrick granted the stay over Wah Chang’s objection.²⁴ She found that Wah Chang had not presented a compelling reason why it would be prejudiced by a relatively short delay to resolve the dispositive issues raised by PacifiCorp, especially in light of the fact that the case was approximately six months old and Wah Chang had previously requested delays in the case.²⁵ Under such circumstances the ALJ agreed with PacifiCorp’s assertion that administrative

²⁰ *NIPPC; CREA; and REC v. PGE*, Docket No. UM 1805, Ruling Issuing Stay (Sep. 20, 2017).

²¹ *Wah Chang v. PacifiCorp*, Docket No. UM 1002, Ruling at 1-2 (Nov. 16, 2004).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 3-4

²⁵ *Id.* at 4.

efficiency was served by staying discovery and the procedural schedule while PacifiCorp's dispositive motions were resolved.

In the instant cases, PGE put Complainants and the ALJ on notice in November that PGE was contemplating filing a motion for summary judgment.²⁶ The motion for summary judgment, if granted, will completely resolve these cases and eliminate the need for further discovery and eliminate the need to resolve the pending motion to compel. The delay associated with waiting to resolve the motion for summary judgment is minimal. And any delay in discovery would not prejudice the ultimate resolution of any claims that may survive summary judgment because the parties have not yet submitted testimony. Staying discovery during the resolution of summary judgment will allow the parties and the Commission to focus on the key legal issues and disputes at the heart of these cases and to avoid a potentially unnecessary discovery process. In the event some cases and claims survive summary judgment, discovery should be more efficient because the scope of the remaining legal issues will be narrower and the Commission will be more familiar with the cases and in a better position to resolve any disputes regarding the relevance of any disputed data requests.

III. CONCLUSION

PGE urges the Commission to grant a temporary, indefinite stay of discovery and of the existing procedural schedule in these cases pending resolution of PGE's motion for summary judgment. PGE believes its motion for summary judgment will either resolve these cases entirely or significantly narrow the issues and decrease the number of cases and claims before the Commission. If any of the cases continue after a partial grant of summary judgment, then the remaining discovery and any associated discovery disputes should be simpler to resolve:

²⁶ See Docket Nos. UM 1877 *et al.*, Prehearing Conference Report at 2 (Nov. 14, 2017) ("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.").

(1) because the Commission's order on summary judgment will have focused and narrowed the issues; and (2) because the Commission will have greater familiarity with the facts of the cases and with the applicable Schedule 201 process and will be in a better position to make well-reasoned determinations regarding whether a particular data request seeks relevant information. And, if PGE's summary judgment motion is not successful, then the complaints are at a stage where discovery could be reinitiated without prejudicing the remainder of the proceeding.

PGE urges the Commission not to adopt any new procedural schedule involving amended complaints or deferring Complainants' response to PGE's motion for summary judgment. If Complainants seek to amend their complaints then they should be required to demonstrate the necessity and propriety of amending their complaints at this stage of the proceeding and PGE should be given the opportunity to respond. Their threat to amend their complaints at some unspecified time in the future is no basis to delay resolution of PGE's motion for summary judgment.

The Commission should require Complainants to file a response within 15 days of the motion for summary judgment as required by the Commission's rules. PGE has informed Complainants that it is willing to grant a short extension of time to respond if Complainants have a specific reason why they need an extension of time. However, PGE is not willing to agree to an indefinite stay of the deadline to respond while Complainants move for leave to amend their complaints. PGE is interested in the rapid and efficient resolution of these cases. PGE has filed a motion for summary judgment, as is its right. PGE respectfully submits that the Complainants should be required to respond (or be deemed to have waived their opportunity to respond) and the motion for summary judgment should be resolved as soon as possible. For the reasons set

forth above, PGE requests that the Commission stay discovery pending resolution of PGE's motion for summary judgment.

DATED this 7th day of February, 2018.

Respectfully submitted,

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