

**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 AND OBJECTION
TO COMPLAINANTS' NOTICE
OF DISMISSAL WITHOUT
PREJUDICE**

**ALTERNATIVELY, PORTLAND
GENERAL ELECTRIC
COMPANY'S MOTION FOR
WAIVER OF ORCP 54 A(1)**

Portland General Electric Company (“PGE”) respectfully responds and objects to the Notices of Dismissal Without Prejudice filed by Complainants on October 22, 2018. For the reasons detailed below, PGE requests the Public Utility Commission of Oregon (“Commission”) issue an order: 1) holding that ORCP 54 A(1) does not apply under the circumstances of these cases; 2) stating that the Notices of Dismissal Without Prejudice are without force or effect and that the cases remain active (or, if Complainants prefer, that the cases are dismissed with prejudice); and 3) in the event Complainants do not wish to dismiss with prejudice, stating that the Commission intends to continue with its consideration of the pending cross-motions for summary judgment.

In the alternative, PGE respectfully moves the Commission for waiver of ORCP 54 A(1) for good cause shown, as the Commission is specifically authorized to do under OAR 860-001-0000(2).

I. INTRODUCTION

These cases are about whether each of 12 qualifying facilities (“QFs”) established a legally enforceable obligation (“LEO”) to sell power to PGE at standard avoided cost rates in effect before June 1, 2017. Answering this question is important. The answer will have a direct impact on PGE’s customers of at least \$5.9 million dollars.¹ As important, the answer will clarify the Commission’s application of its LEO policy established in Order No. 16-174.²

PGE moved for summary judgment in these cases on January 24, 2018. In response, Complainants filed cross-motions for summary judgment. Then, on April 20, 2018, Complainants moved for leave to amend their complaints. Complainants sought to modify the factual basis for the complaints, to add new allegations with respect to PGE’s behavior, and to add a request for alternative relief. PGE opposed the motions to amend on several grounds. On September 24, 2018, the Commission issued Order No. 18-348, a carefully reasoned decision denying Complainants’ motions for leave to amend. In Order No. 18-348, the Commission held:

¹ See, PGE’s Motion for Summary Judgment at 2 (Jan. 24, 2018) and Declaration of Rebecca Brown in Support at ¶¶ 3-5 (Jan. 24, 2018) (indicating that the likely cost difference over 15 years between the pre-June 1, 2017 rates and the rates that went into effect on June 1, 2017, for the 12 power purchase agreements in question would be approximately \$5.9 million). The actual amount in controversy in these cases is likely to be significantly higher than \$5.9 million because PGE’s currently effective standard renewable avoided cost rates have decreased two more times since June 1, 2017.

² *In the Matter of Public Utility Commission of Oregon Investigation into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 16-174 at 23-28 (May 13, 2017) (Commission articulates its standard for when a LEO is formed in section entitled: “Legally Enforceable Obligation (LEO) Formation”).

Based on our findings that the proposed amendments would change the cause of action and prejudice PGE, and failure of complainants to adequately explain the delay of their requests or support them beyond mere allegations, we conclude that complainants' motions to amend the complaints should be denied.³

Following denial of their motions for leave to amend, Complainants each filed a Notice of Dismissal Without Prejudice pursuant to ORCP 54 A(1). Complainants argue that ORCP 54 A(1) applies to contested case proceedings before the Commission by operation of OAR 860-001-0000(1). Complainants argue that ORCP 54 A(1) gives Complainants a unilateral right to dismiss without prejudice by filing a notice of dismissal (provided the notice is filed at least five days before trial and the defendant has not filed a counterclaim).

In effect, Complainants take the position that they have the unilateral right to make an "end run" around Order No. 18-348 by withdrawing their complaints without prejudice. Under Complainants' position, they would remain free to refile some or all of the complaints with any additional facts, additional claims for relief, and new causes of action that they care to advance; in other words, they would be free to do exactly what the Commission ruled they *could not* do in Order No. 18-348.

Complainants believe they can start these dockets over, despite the parties having litigated these matters for more than a year, and the parties and the Commission having expended significant time and resources moving these complaints toward resolution. Complainants argue that the Commission is powerless to prevent this procedural maneuver, stating:

³ *Bottlenose Solar, LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1877, Order No. 18-348 at 5 (Sep. 24, 2018).

This Notice of Dismissal is sufficient to dismiss the cases without prejudice ... the Commission does not have the authority or jurisdiction to do anything different here other than simply close these dockets. The cases are over.⁴

But the Complainants are simply wrong. The Commission is not powerless to prevent Complainants from abusing the Commission's process, nor is the Commission powerless to enforce Order No. 18-348. There are several bases upon which the Commission can hold that the Notice of Dismissal is without force or effect.

First, the Commission can rule that under the facts of these cases ORCP 54 A(1) does not apply because its application would be inconsistent with Order No. 18-348 and, under OAR 860-001-0000(1), the Commission has incorporated ORCP 54 A(1) only to the extent it is not inconsistent with the Commission's orders.

Second, even if the Commission had incorporated ORCP 54 A(1) without limitation, the civil rule itself does not allow for dismissal without prejudice under these circumstances because the Oregon Supreme Court has held that ORCP 54 A(1) may not be used by a plaintiff to avoid the effect of an adverse decision obtained earlier in a proceeding.

Third, even if the Commission has incorporated ORCP 54 A(1) under the circumstances of these cases and even if the Commission determined that the Oregon Supreme Court's precedent did not apply for some reason, the Commission has reserved to itself in OAR 860-001-0000(2) the power to waive the application of any of its rules of procedure upon motion of a party for good cause shown. In the event the Commission decides that ORCP 54 A(1) otherwise applies, then PGE respectfully moves the

⁴ 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).

Commission to waive the application of ORCP 54 A(1) in these cases because there is good cause to do so as detailed below.

II. RESPONSE AND OBJECTION

Under the facts of these cases, the Commission should conclude that ORCP 54 A(1) does not apply.

A. **Application of ORCP 54 A(1) would be inconsistent with Order No. 18-348 and therefore inappropriate under OAR 860-001-0000(1).**

Complainants do not have a fundamental right to dismiss their complaints without prejudice after PGE has filed an answer and moved for summary judgment. For example, in the federal courts, there is no unilateral right to dismiss without prejudice once the defendant has filed an answer or moved for summary judgment.⁵ Likewise, under the Oregon model rules of procedure for administrative agencies, there is no unilateral right to dismiss without prejudice once the defendant has filed an answer or moved for summary judgment.⁶ In contrast, the Oregon Rules of Civil Procedure do allow a plaintiff to unilaterally dismiss a complaint even after the defendant has filed an answer or a motion for summary judgment, provided the plaintiff does so more than five days before trial and provided the defendant has not filed a counterclaim.⁷

⁵ See Federal Rule of Civil Procedure 41(a)(1)(A)(i) (providing that a plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party either serves an answer or a motion for summary judgment); *see also* Notes of Advisory Committee on Rules—1946 Amendment, noting: “Since [a motion for summary judgment] may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval.”

⁶ See OAR Chapter 137, Divisions 3 (the Oregon Department of Justice’s Model Rules of Procedure for Contested Cases before administrative agencies; they contain no provision authorizing a plaintiff or complainants to dismiss without prejudice upon filing a unilateral notice of dismissal).

⁷ ORCP 54 A(1) (... a plaintiff may dismiss an action ... without court order by filing a notice of dismissal with the court and serving 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”).

However, unlike Oregon trial courts, the Commission is not directly bound to apply ORCP 54 A(1) at all, let alone required to apply it strictly. Rather, the Commission has been empowered by the legislature to adopt its own rules of practice and procedure.⁸ In doing so, the Commission adopted OAR 860-001-0000, which effectively incorporates the ORCP by reference, but not as strictly as Complainants allege. Specifically, the Commission's rule states:

(1) These rules govern practice and procedure before the Public Utility Commission of Oregon (Commission). The Commission will liberally construe these rules to ensure just, speedy, and inexpensive resolution of the issues presented. 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.

(2) For limited purposes in specific proceedings, the Commission or ALJ may modify or waive any of the rules in this division for good cause shown. A request for exemption must be made in writing, unless otherwise allowed by the Commission or ALJ.⁹

Importantly, the Commission has not incorporated the ORCP as controlling in all circumstances. The Commission specifically stated that the ORCP apply *unless inconsistent with a Commission order*.

In these cases, application of ORCP 54 A(1) would be inconsistent with Order No. 18-348. Complainants have already sought leave to amend their complaints and the Commission denied leave in Order No. 18-348. If Complainants were now allowed to make use of ORCP 54 A(1) to dismiss their complaint *without prejudice*, then they would be free to refile the very complaints that the Commission refused to allow in

⁸ ORS 756.060.

⁹ OAR 860-001-0000.

Order No. 18-348.¹⁰ In other words, application of ORCP 54 A(1) would be inconsistent with Order No. 18-348. Because OAR 860-001-0000(1) specifically provides that the ORCP do not apply if they are inconsistent with a Commission order, the Commission can and should hold that ORCP 54 A(1) does not apply and that the Notices of Dismissal Without Prejudice are without force or effect.

B. Application of ORCP 54 A(1) would be inconsistent with Oregon Supreme Court precedent.

Even if ORCP 54 A(1) did apply, the Oregon Supreme Court has noted that a plaintiff's right to dismiss without prejudice under ORCP 54 A(1) is not without judicially imposed limits.¹¹ The Oregon Supreme Court has held that a plaintiff may not use ORCP 54 A(1) to avoid the effects of an adverse ruling earlier in the proceeding.¹²

For example, in *Garrison v. Cook*, the Oregon Supreme Court held that where a defendant has prevailed on a motion for summary judgment, the court is not required to allow the plaintiff to dismiss the case without prejudice and thereby avoid a decision on defendant's motion for an award of attorney fees.¹³ Likewise, in *Village at Main Street*

¹⁰ The circumstances in which Complainants find themselves are of their own making. As the Commission found in Order No. 18-348, Complainants could have made their additional factual allegations, or asserted their additional legal claims, in their original complaints. In addition, Complainants could have amended their complaints as of right at any time before PGE filed its answers in October 2017, approximately two months after the complaints were filed in August 2017. More, Complainants could have used ORCP 54 I(A) to dismiss their complaints without prejudice rather than moving the Commission for leave to amend their complaints; however, after having moved for leave to amend, after having required PGE to respond to that motion, and after having required the Commission to decide the question, the Complaints can not now resort to ORCP 54 A(1) to avoided the results of the Commission's decision denying leave to amend the complaints.

¹¹ *Village at Main Street Phase II, LLC v. Department of Revenue*, 360 Or 738, 749 (2016) (“[W]e note that a plaintiff's right to voluntarily dismiss an action is subject to judicially created limitations.”).

¹² *Id.* at 749-750.

¹³ *Garrison v. Cook*, 280 Or 205. 211 (1977) (the case involved ORS 18.230, a predecessor to ORCP 54 A(1); the Oregon Supreme Court decided that plaintiff could not obtain judgment of nonsuit (i.e., dismiss its complaint without prejudice) for the purpose of avoiding an adverse decision on summary judgment or to avoid a decision on an award of attorney fees; *see also* discussion of *Garrison* in *Village at Main Street*, 360 Or at 749-750 (“In *Garrison*, the plaintiff, to avoid litigating the issue of attorney fees, sought to terminate his action after he lost a summary judgment motion ... He filed a motion ... [under] a

Phase II LLC v. Dept. of Revenue, the Oregon Supreme Court held 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 amending its answer because that would allow plaintiff to avoid the effects of a prior adverse decision in the proceeding.¹⁴

In the same way, in these cases where the Commission has previously decided in Order No. 18-348 that Complainants are not allowed to amend their complaints and that the cases should proceed to decision on the cross motions for summary judgment, Complainants are not now free to avoid the effects of that adverse decision by resorting to ORCP 54 A(1) to dismiss the complaints without prejudice and then refile new complaints. For the reasons articulated in Order No. 18-348, PGE would be prejudiced by this result in the same way it would have been prejudiced by Complainants being free to amend their complaints at this late stage in this litigation.

For the reasons discussed above, the Commission has ample authority to rule that ORCP 54 A(1) does not apply, either because: 1) application of ORCP 54 A(1) would be inconsistent with Order No. 18-348; or 2) application of ORCP 54 A(1) would allow Complainants to avoid the effect of a prior adverse decision and ORCP 54 A(1) is therefore unavailable under the rule articulated by the Oregon Supreme Court in *Village at Main Street*.

predecessor to ORCP 54 A(1) ... 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 ... [because] to conclude otherwise would allow plaintiff to ‘avoid the effect of an adverse summary judgment.’”).

¹⁴ *Village at Main Street*, 360 Or at 749-50 (Oregon Supreme Court interprets Oregon Tax Court Rule 54 A(1) as identical to ORCP 54 A(1) and holds that plaintiff cannot use Rule 54 A(1) to avoid the effect of a prior adverse ruling in the case).

III. ALTERNATIVE MOTION FOR WAIVER OF ORCP 54 A(1)

For the reasons discussed above, the Commission has sufficient authority to determine that ORCP 54 A(1) does not apply under the circumstances of these cases. In the alternative, OAR 860-001-0000(2) provides a third source of authority for the Commission to hold that Complainants may not use ORCP 54 A(1) to dismiss these cases without prejudice. Under OAR 860-001-0000(2), the Commission or ALJ may modify or waive any of the Commission's rules of procedure, including any Oregon Rule of Civil Procedure incorporated by reference under OAR 860-001-0000(1), for good cause shown.

In the instant cases, there is good cause to waive the application of ORCP 54 A(1) and to proceed to decision on the pending cross-motions for summary judgment. It would be inequitable to allow Complainants to withdraw their complaints and re-file new complaints when the Commission has already decided that Complainants should not be allowed to amend their complaints because allowing Complainants to do so would prejudice PGE. In addition, 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. Waiving ORCP 54 A(1) in this case would serve the purpose underlying the Commission's rules of procedure, as set forth in OAR 860-001-0000(1), "to ensure just, speedy, and inexpensive resolution of the issues presented." On the other hand, requiring PGE to start this litigation over again under new complaints would clearly run contrary to this stated purpose.

IV. CONCLUSION

For the reasons stated above, the Commission should hold that ORCP 54 A(1) does not apply under the circumstances of these cases or, alternatively, that the Commission is waiving the application of ORCP 54 A(1) for good cause shown, and that the Notices of Dismissal Without Prejudice are without force or effect. Assuming Complainants do not elect to dismiss with prejudice, PGE respectfully requests that the Commission proceed to decide the pending cross motions for summary judgment.

DATED this 6th day of November, 2018.

Respectfully submitted,



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