



**Portland General Electric Company**  
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**David F. White**  
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September 17, 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 1931 – Portland General Electric Company vs. Alfalfa Solar I LLC, et al.**

Attention Filing Center:

Enclosed for filing in Docket UM 1931 is PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, REQUEST FOR CERTIFICATION FOR THE COMMISSION'S CONSIDERATION.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in blue ink that reads "David F. White". The signature is written in a cursive, flowing style.

David F. White  
Associate General Counsel

DFW:jlm

Enclosures

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1931**

PORTLAND GENERAL ELECTRIC  
COMPANY,

Complainant,

vs.

ALFALFA SOLAR I LLC, DAYTON  
SOLAR I LLC, FORT ROCK SOLAR I LLC,  
FORT ROCK SOLAR II LLC, FORT ROCK  
SOLAR IV LLC, HARNEY SOLAR I LLC,  
RILEY SOLAR I LLC, STARVATION  
SOLAR I LLC, TYGH VALLEY SOLAR I  
LLC, WASCO SOLAR I LLC,

Defendants.

**PORTLAND GENERAL  
ELECTRIC COMPANY'S  
RESPONSE IN OPPOSITION TO  
DEFENDANTS' MOTION FOR  
CLARIFICATION OR, IN THE  
ALTERNATIVE, REQUEST  
FOR CERTIFICATION FOR  
THE COMMISSION'S  
CONSIDERATION**

**I. INTRODUCTION**

Portland General Electric Company (“PGE”) respectfully submits this response in opposition to Defendants’ August 31, 2018, motion for clarification or, in the alternative, for certification for the Commission’s consideration (the “August 31 Motion”). As discussed below, under well-settled principles of Oregon law, Administrative Law Judge (“ALJ”) Allan Arlow’s August 23, 2018 ruling in this matter (the “August 23 Ruling”) does not preclude the parties from filing additional motions for summary judgment and does not preclude the Public Utility Commission of Oregon (“Commission”) from making its own determination regarding whether the Defendants’ power purchase agreements (“PPAs”) are ambiguous. As a result, there is no need to clarify or to certify the August 23 Ruling and PGE respectfully requests that Defendants’ motion be denied. The August 23 Ruling was correct in denying Defendants’ motion for summary disposition and requires no clarification, and Defendants fail to offer any reason for certification of the ruling to the Commission.

## II. ARGUMENT

Defendants in their motion for clarification cite *no* Oregon case law on the two questions Defendants raise (whether a subsequent motion for summary judgment is available and whether the ruling on contract ambiguity is final) and instead re-argue their underlying substantive motion which was denied. The narrow questions in the motion for clarification are already settled and require no further clarification.

### A. **Subsequent motions for summary judgment are allowed under ORCP 47 and OAR 860-001-0420.**

The Oregon Rules of Civil Procedure (“ORCP”), as incorporated by Commission-specific regulations, permit the filing of multiple summary judgment motions. ORCP 47 permits a party to file a motion for summary judgment “at any time” 20 days after commencement of the action and at least 60 days before the date set for trial.<sup>1</sup> ORCP 47 puts no limitation on successive motions for summary judgment. Case law confirms that filing a second motion for summary judgment after the court denies a prior motion is accepted practice in Oregon. Thirty-five years ago, the Court of Appeals ruled that the law of the case doctrine did not bar a trial court from granting a motion for summary judgment after it denied an earlier motion for summary judgment on the same legal issue.<sup>2</sup> Further, Oregon courts consider motions for summary judgment notwithstanding a previous denial if additional evidentiary material obtained through discovery resolves a factual dispute that existed at the time of the denial.<sup>3</sup>

The Commission applies the Oregon Rules of Civil Procedure to contested cases “unless inconsistent with these [administrative] rules, a Commission order, or an

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<sup>1</sup> ORCP 47 A, B, C.

<sup>2</sup> *Office Servs. Corp. of Am. v. CAS Sys., Inc.*, 63 Or. App. 842, 845 (1983); *see also Ortega v. Martin*, 293 Or. App. 180, 186 (2018) (reviewing successive motion for summary judgment on legal issue).

<sup>3</sup> *See, e.g., Matter of Marriage of Sipe*, 30 Or. App. 151, 154 (1977) (considering new discovery materials when deciding second motion for summary judgment).

Administrative Law Judge (ALJ) ruling.”<sup>4</sup> The Commission’s Administrative Rules for the filing of motions make no mention of summary judgment motions and place no explicit limitations on the filing of successive motions on the same issue.<sup>5</sup> The ALJ’s August 23 Ruling denied the Defendants’ pending motion for summary disposition, but placed no limitations on the filing of a successive motion.<sup>6</sup> Nothing prevents the Defendants from re-raising their previously-rejected arguments again after the parties have completed initial discovery and filed testimony relevant to the contract interpretation issues (and, if needed to make relevant facts undisputed, after additional discovery on facts raised in that testimony and the filing of responsive testimony).<sup>7</sup>

**B. Motions for reconsideration of earlier rulings in the same case are not precluded by the Oregon Rules of Civil Procedure or the Oregon Administrative Rules.**

Second, Defendants seek clarification that the ALJ’s conclusion in the August 23 Ruling that the PPAs are ambiguous is not final and can be re-visited at a later date. The Oregon Rules of Civil Procedure do not mention motions for reconsideration of interlocutory orders. Oregon courts permit lower courts to reconsider their own earlier decisions such as denials of motions for summary judgment.<sup>8</sup> Thus, motions for reconsideration are permitted in Oregon except where specifically barred by a local rule.<sup>9</sup>

No Commission-specific rule bars reconsideration of an ALJ’s interlocutory rulings. The only Commission rule regarding motions for reconsideration applies to

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<sup>4</sup> OAR 860-001-0000(1).

<sup>5</sup> See OAR 860-001-0420.

<sup>6</sup> See Ruling at 6 (“The motion for summary disposition is denied.”).

<sup>7</sup> PGE notes that under the Commission’s regular process for deciding contested case proceedings, parties are typically allowed to conduct initial discovery, then to file opening testimony, then to conduct any required additional discovery based on the other parties’ opening testimony, and are then allowed to file responsive testimony, all prior to hearing and the filing of pre-hearing and/or post-hearing briefs.

<sup>8</sup> See, e.g., *Christy v. Campbell*, 57 Or. App. 491, 494 (1982) (reviewing a circuit court order reconsidering a previous denial of a motion for summary judgment).

<sup>9</sup> See Mult. Co. SLR 5.045 (barring motions for reconsideration).

*“order[s] entered by the Commission.”*<sup>10</sup> The August 23 Ruling by the ALJ is not an order entered by the Commission. Thus, the legal conclusion and findings of fact in the August 23 Ruling can be reconsidered by the Commission at a later point in this proceeding and does not preclude the Commission from ultimately determining that the contracts are unambiguous (and that they unambiguously limit the availability of fixed prices to the first 15 years following contract execution).

Because the ALJ concluded on the current, limited, pre-discovery record that the PPAs are ambiguous, the ALJ correctly ruled that it is necessary to allow for discovery and submission of extrinsic evidence regarding the formation of the PPAs. Defendants are free to re-raise their arguments in defense of their reading of the PPAs, either through a new motion for summary disposition or through a motion for reconsideration, after the parties have completed initial discovery and submitted any relevant facts regarding contract formation (through pre-filed testimony or otherwise).

To be clear, Defendants should not re-litigate arguments the ALJ has rightly rejected, but (subject to the good faith restrictions in ORCP 17 C) they can. Because Oregon law is clear that a denial of a motion for summary judgment is not necessarily a “final determination,” and the ALJ’s August 23 Ruling did nothing to limit the filing of a subsequent motion after the parties file testimony, further clarification is not needed and the ALJ should deny Defendant’s August 31 Motion.

**C. There is no good cause for certification to the Commission.**

Because the issues that Defendants raised do not need clarification, there is no good cause for certification. PGE agrees, though, that if the August 23 Ruling precludes

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<sup>10</sup> OAR 860-001-0720(1) (emphasis added).

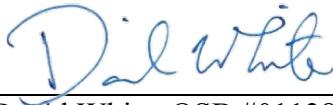
reconsideration of whether the PPAs are ambiguous, then the ruling should be certified to the Commission for its consideration.

### III. CONCLUSION

Because well settled principles of administrative law make it clear that the August 23 Ruling does not preclude subsequent motions for summary judgment and does not preclude the Commission from making its own determination regarding whether the contracts are ambiguous, there is no need to clarify or certify the August 23 Ruling and the Defendants' motion should be denied. Alternatively, the August 23 ruling should be clarified consistent with the principles discussed above. Alternatively, if the August 23 Ruling is intended to preclude reconsideration of whether the PPAs are ambiguous, then the August 23 Ruling should be certified to the Commission for its consideration.

DATED this 17<sup>th</sup> day of September, 2018.

Respectfully submitted,



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