

ENTERED SEP 24 2018

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1877-UM 1882, UM 1884-UM 1886, UM 1888-UM 1890

In the Matters of

BOTTLENOSE SOLAR, LLC;
VALHALLA SOLAR, LLC;
WHIPSNAKE SOLAR, LLC;
SKYWARD SOLAR, LLC;
LEATHERBACK SOLAR, LLC; PIKA
SOLAR, LLC; COTTONTAIL SOLAR,
LLC; OSPREY SOLAR, LLC; WAPITI
SOLAR, LLC; BIGHORN SOLAR,
LLC; MINKE SOLAR LLC; HARRIER
SOLAR LLC,

Complainants,

v.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

ORDER

DISPOSITION: MOTIONS TO AMEND COMPLAINTS DENIED

We deny the motions to amend complaints filed by Bottlenose Solar, LLC; Valhalla Solar, LLC; Whipsnake Solar, LLC; Skyward Solar, LLC; Leatherback Solar, LLC; Pika Solar, LLC; Cottontail Solar, LLC; Osprey Solar, LLC; Wapiti Solar, LLC; Bighorn Solar, LLC; Minke Solar LLC; and Harrier Solar LLC (complainants) against Portland General Electric (PGE).¹

I. BACKGROUND

The 12 complaints, all filed in August, 2017, originally addressed whether each complainant established a legally enforceable obligation (LEO) to enter into a power

¹ As allowed under OAR 860-001-0090, the presiding administrative law judge has certified the matters set forth by the parties in this matter for our consideration and disposition.

purchase agreement (PPA) under the Public Utility Regulatory Policies Act (PURPA) before PGE's avoided cost prices decreased on June 1, 2017.² A prehearing conference was held on August 30, 2017, and a schedule for filing answers to the various complaints was set.

During the pendency of the proceedings, PGE's avoided cost prices further decreased on September 18, 2017.³ Another prehearing conference was held on November 13, 2017, but neither the procedural schedule adopted at the second conference, nor any recorded statements made at the conference by the parties, referenced the September change to PGE's avoided cost prices. The record did note, however, that PGE reserved its rights to file motions for summary judgment against the complainants in their respective dockets.

PGE filed motions for summary judgment on January 24, 2018, and after several rounds of pleadings, complainants responded to PGE's motion for summary judgment on March 9, 2018, and filed a cross-motion for summary judgment on April 6, 2018. That same day, PGE filed a reply in support of its motion for summary judgment, to which complainants responded on April 20, 2018. On April 23, 2018, PGE filed an opposition to the cross-motion for summary judgment to which complainants replied on April 30, 2018. Absent the intercession of other events, the motion and cross-motion for summary judgment were fully briefed and ripe for our disposition.

On April 20, 2018, while the parties were trading summary judgment pleadings, the complainants filed motions for leave to amend their complaints. The complainants seek to modify the factual bases for the complaints, add new allegations with respect to PGE's behavior, and add a request for alternative relief.

II. DISCUSSION

A. Motion to Amend

The complainants seek to amend their original complaints by adding additional facts and allegations, and to add an alternative request for relief. In seven of the complaints,⁴ they seek to include the following additional facts:

- On December 8, 2016, [Bottlenose/Whipsnake/ Leatherback/Pika/ Bighorn/ Minke/Harrier] Solar contacted PGE regarding its project and committed to sell power under the then-current rates.

² *In the Matter of Portland General Electric Company Application to Update Schedule 201 Qualifying Facility Information*, Docket No. UM 1728, Order No. 17-177 (May 19, 2017).

³ *In re PGE Application to Update Schedule 201*, Docket No. UM 1728, Order No. 17-347 (Sep 14, 2017).

⁴ Dockets UM 1877, UM 1879, UM 1881, UM 1882, UM 1888, UM 1898, and UM 1890.

- On December 8, 2016, [Bottlenose /Whipsnake/ Leatherback/Pika/ Bighorn/ Minke/Harrier] Solar wrote to confirm the establishment of a legally enforceable obligation pursuant to PGE's standard renewable Schedule 201 and power purchase agreement.

In all the complaints, they also seek to add the following allegations:

- PGE's Senior Vice President of Power Supply, Operations and Resource Strategy and/or other PGE executives changed PGE's business practices to do the minimum required with the purpose of preventing QFs from entering into contracts.
- PGE's Senior Vice President of Power Supply, Operations and Resource Strategy and/or other PGE executives explained to PGE's employees that PGE does not favor QFs.
- PGE's Senior Vice President of Power Supply, Operations and Resource Strategy and/or other PGE executives directed PGE's employees to revise their business practices to do the minimum required with the purpose of preventing QFs from entering into contracts.
- PGE's Senior Vice President of Power Supply, Operations and Resource Strategy and/or other PGE executives have represented that PGE does not favor QFs.
- PGE retained a new attorney to work alongside the PPA group to make sure they only do what is necessary and the minimum required with the purpose of preventing QFs from entering into contracts.
- [Bottlenose/Vahalla/Whipsnake/Leatherback/Pika/Bighorn/Minke/Harrier/Skyward/Cottontail/Osprey/Wapiti] Solar is aware that PGE previously executed Standard PPAs with solar projects in about 30 business days from date the QF first contacted PGE about the project.

Finally, they seek to add an alternative request for relief. Each complainant asks to add the request that, "[i]f the Commission finds that [complainant] has not formed a legally enforceable obligation prior to June 1, 2017, then, at the very least, [complainant] has formed a legally enforceable obligation after June 1, 2017, as of the time this Complaint was filed, or at least before PGE's avoided costs changed again on September 18, 2017."

B. Positions of the Parties

Complainants state that they are concerned that, if the Commission rules against them on the June 1, 2017 LEO date, the Commission may adopt PGE's position that the applicable prices are those in effect at the time the Commission issues a final order in these dockets, rather than the pre-September 18, 2017 prices. They argue that PGE has not been in any way prejudiced by the amendments and that, in light of all circumstances, they acted reasonably in the timing relative to filing amended complaints.

PGE responds that complainants do not have a unilateral right at this stage of the proceedings to amend their complaints and seek alternative relief. It argues that, when complainants filed their original complaints, they all knew that further price reductions were going to occur very soon, and were free to amend their complaints up until PGE filed its answers to the motions for summary judgment in October 2017 but chose not to do so. PGE also notes that five months elapsed since the filing of the complaints before PGE filed a motion for summary judgment.

PGE argues that we may grant leave to amend only when the request will not prejudice the defendant or needlessly delay resolution of the case. From PGE's perspective, these amendments do both. PGE states that it is entitled to a decision on the facts as set forth in the summary judgment motions, and complainants should not be allowed to "move the target" now because they realize that they would likely lose.

C. Resolution

We deny complainants' motions to amend. Under ORCP 23A, a party may freely amend its complaint at any time prior to the defendant's filing of an answer, but once the defendant files its answer, a party may amend the pleading only by consent of the other party or by leave of the court. ORCP 23A further provides that leave will be freely given "when justice so requires."

In balancing the need to grant leave "when justice so requires" against the need for procedural order and stability, the courts look at 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.⁵

With respect to the first factor, the complainants here seek to add new paragraphs alleging that unnamed PGE executives engaged in a concerted effort to thwart the complainants' efforts to obtain PPAs and that complainants received treatment inferior to

⁵ See *Alexander v. State*, 283 Or App 582, 590 (2017).

other QF solar projects. These new allegations constitute a new element of damage and, theoretically, could ultimately impact the cause of action via an allegation of discrimination. Although courts have discretionary authority to allow amendments, a party is not allowed to “substantially change the cause of action or inject an entire new element of damage.”⁶

With respect to the second factor, there is a good argument that the proposed amendments prejudice PGE. In this case, after the motions for summary judgment have been fully briefed, complainants seek to amend their complaints to assert a LEO was formed at a time subsequent to June 1, 2017, but prior to September 17, 2017. The delay and effective diminishment in value of the defendant’s work product in moving for summary judgment is thus prejudicial to the defendant.

With respect to the third factor relating to the timing of the proposed amendments, complainants offer no explanation to justify filing the motions to amend well into the summary judgment briefing schedule. Complainants merely state that the new allegations “have come to light” at no specific time, only “after the filing of the initial complaint.”⁷ Furthermore, the newly-offered amendments contain alleged facts that complainants knew or should have known well in advance of the filing of the original complaints in August 2017. In particular, in seven of the original complaints, the complainants seek to add alleged facts that on December 8, 2016, complainants contacted and also wrote to PGE to confirm establishment of a LEO. The inadequately explained tardiness in filing the amendment weighs heavily against complainants under this criterion.

Finally, with respect to the fourth element relating to the colorable claim of the amendments, the complainant seek to add new allegations of actions taken by PGE executives to thwart the PPA process. Complainants fail, however, to support these allegations by any declarations or other evidence to help support a late-filed amendment.

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 the complaints should be denied.

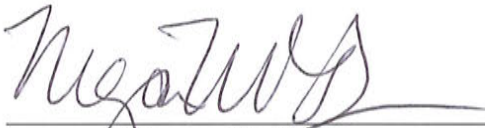
⁶ *Cutsforth v. Kinzua Corp.*, 267 Or 423, 433-34 (1973).

⁷ Motion at 2.

III. ORDER

IT IS ORDERED that the motions to amend the complaints filed by Bottlenose Solar, LLC; Valhalla Solar, LLC; Whipsnake Solar, LLC; Skyward Solar, LLC; Leatherback Solar, LLC; Pika Solar, LLC; Cottontail Solar, LLC; Osprey Solar, LLC; Wapiti Solar, LLC; Bighorn Solar, LLC; Minke Solar LLC; and Harrier Solar LLC, are denied.

Made, entered, and effective SEP 24 2018.



Megan W. Decker
Chair



Stephen M. Bloom
Commissioner





Letha Tawney
Commissioner