ORDER NO. 19-001

ENTERED Jan 02 2019

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 ELECTIRC COMPANY, Defendant.	ORDER

DISPOSITION: DISMISSAL OF COMPLAINTS ACKNOWLEDGED; DOCKETS CLOSED

I. SUMMARY

We conclude that complainants may dismiss, without prejudice, their complaints against Portland General Electric Company under Section 54 A(1) of the Oregon Rules of Civil Procedure. These dockets are closed.

II. BACKGROUND AND PROCEDURAL HISTORY

Complainants are limited liability companies organized under the laws of Oregon and owners of the prospective qualifying facilities (QFs) that seek to sell their output to PGE under the Public Utility Regulatory Policies Act (PURPA). The 12 complaints, all filed in August 2017, originally addressed whether each complainant established a legally enforceable obligation (LEO) before PGE's avoided cost prices decreased on June 1, 2017.

Following additional pleadings, conferences, and a further avoided cost price rate decrease in September 2017, PGE and complainants filed cross motions for summary judgment. While the parties were trading summary judgment pleadings, the complainants filed motions for leave to amend their complaints. They also sought to add a request for alternative relief—that is, if the Commission concludes that no LEO was formed before June 1, 2017, the Commission should alternatively find that a LEO was formed before the September 18, 2017 rate change. In Order No. 18-348, we denied the complainants' motions for leave to amend their complaints and deferred action on the request for alternative relief until such time as we addressed the motions for summary judgment.

On October 22, 2018, while the Commission's decision on the motions for summary judgment was pending, complainants filed a notice of dismissal without prejudice, to which PGE responded on November 6, 2018, and complainants replied on November 8, 2018. PGE filed a sur-response and a reply in support of its motion for waiver on November 14, 2018.

III. DISCUSSION

A. Applicable Law

We have adopted the ORCP to govern the conduct of our proceedings unless inconsistent with a Commission rule, order, or ruling. OAR 860-001-0000, which describes the applicability and purpose of our procedural rules, provides as follows:

> (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.

ORCP 54 governs dismissals and reads in part as follows:

> A(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 32 D and of any statute of this state, a plaintiff may dismiss an action in its entirety or as to one or more defendants without order of court by filing a notice of dismissal with the court and serving the 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, or by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action.

B. Positions of the Parties

Complainants rely on ORCP 54 and assert that they have the absolute right to dismiss their complaints at any point in the proceeding so long as the notice is delivered five days prior to a scheduled trial date and PGE has not filed a counterclaim. Citing *Guerin v. Beamer,* 163 Or App 172 (1999), they further assert that such a voluntary dismissal is permissible even after motions for summary judgment are fully pled. Because there are no conflicts between ORCP 54 A(1) and our rules, complainants conclude that we have no choice but to allow that the complaints be withdrawn.

In response, PGE contends that the general rule in ORCP 54 A(1) does not apply, because its application here would be inconsistent with a Commission order. Specifically, PGE contends that allowing complainants to withdraw their complaints conflicts with our Order No. 18-348 that denied complainants' motion to amend their complaints. PGE states that complainants are seeking an "end run" around the adverse ruling by withdrawing their complaints so that they can repair the infirmities in their original filings. In support of its argument, PGE relies on *Garrison v. Cook*, 280 Or 205 (1977). In that decision, the Oregon Supreme Court held that the predecessor rule to ORCP 54 A(1) may not be used by a plaintiff to avoid the effect of an adverse decision obtained earlier in a proceeding.

Alternatively, PGE argues that, even if we determine that the *Garrison* does not apply for some reason, good cause exists to waive application of the rule under OAR 860-001-0000(2). PGE notes that this matter has been litigated for over a year and that the company would be prejudiced if it was denied the opportunity to obtain a ruling on its motions for summary judgment.

C. Commission Resolution

We conclude that the complainants have permissibly withdrawn their complaints against PGE without prejudice. This is not a matter of first impression for the Commission. Both this Commission and the courts have grappled with similar questions relating to fairness to litigants and the application of ORCP 54 A(1) and its predecessors.

In past court and Commission decisions, we find a consistent and long-standing pattern of adherence to the rule that allows for a notice of withdrawal of a complaint without prejudice, even where substantial progress had been made in the litigation. In *Guerin*, the Court of Appeals held that a plaintiff may file a notice of voluntary dismissal even in the face of a pending motion for summary judgment. Complainants' argument that the courts have found that a proper ORCP 54 A(1) notice prevents a case from continuing is also buttressed by *Ramirez v. Northwest Renal Clinic*, 262 Or App 317, 320 (2014). In that case, the defendant moved for summary judgment at the hearing and the trial judge indicated that the motion would be granted. The plaintiff dismissed the action under 54 A(1) before the order could be entered. The appellate court, citing *Guerin,* noted "[o]ur case law reflects that a pending motion or even the imminent entry of an order on summary judgment does not prevent a plaintiff from exercising that option." In *Ramirez*, the court also cites *Maxwell v. Stebbins,* 180 Or App 48 (2002), where a notice of dismissal was filed one day before a hearing on the defendant's motion for judgment on the pleadings under ORCP 21 B.

We ourselves have applied ORCP 54 A(1), and acknowledged and followed that precedent, having explicitly found that it allows for a notice of withdrawal of a complaint without prejudice before the Commission, even over the objections of a defendant or intervenor.

In *PGE v. Verizon Northwest*, the Oregon Telecommunications Association (OTA), which had intervened, objected to PGE's withdrawal of its complaint after a settlement was reached with Verizon. PGE claimed that the ORCP made the dismissal automatic, which ended the proceeding so there was nowhere for OTA to file its motion. Citing the language that appears in OAR 860-001-0000, we agreed and dismissed the complaint without prejudice.[1]

More recently, we reached similar conclusions in *Columbia Basin v. Umatilla*[2] where the defendant opposed the notice of withdrawal. Columbia Basin had filed a complaint against Umatilla relating to their respective service territories. Wheatridge Wind Energy LLC, whose wind projects would extend across the territories of both parties, intervened and also became a

[1] *In the Matter of Portland General Electric Company v. Verizon Northwest*, Docket No. UM 1096, Order No. 04-653 at 3 (Nov 2, 2004).
[2] *In the Matter of Columbia Basin Electric Cooperative, Inc. v. Umatilla Electric Cooperative,* Docket No. UM 1823, Order 17-309, (Aug 11, 2017).

party to the proceedings. When Columbia Basin filed a notice of dismissal under ORCP 54 following settlement with Wheatridge, Umatilla objected. We denied Umatilla's objection:

> Because the Commission does not have a specific rule regarding withdrawal of a complaint, ORCP 54 A(1) applies. That rule provides that an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal with the court and serving such notice on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded. The courts have liberally construed a plaintiff's right to voluntary dismissal, examining the legislative history and allowing a plaintiff to unilaterally dismiss even when a defendant's motion for summary judgment is pending or has been granted.[3]
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> This notice of dismissal is effective without any Commission order. If the Commission took issue with a voluntary dismissal, we could open our own investigation.[4]

Here, we conclude that, since we have not ruled on the pending cross motions for summary judgment, application of ORCP 54 A(1) provides that complainants have the right to voluntarily withdraw their complaints. We acknowledge the substantial work of the parties and the Commission in these dockets since the complainants sought relief some 16 months ago and that a primary goal of our rules is to achieve a "just, speedy, and inexpensive resolution of the issues presented." However, we find that efficiency considerations are not significant enough in this case to warrant overriding the application of ORCP 54 A(1) and deviating from the result reached in each of the Commission and court cases discussed above. Providing a fair and predictable forum for dispute resolution is an important part of the Commission's role. Here, we conclude that the predictable and fair application of our own decisions and relevant case law outweigh our substantial concern over the inefficiency caused by our conclusion in this case.

The complainants thus have the right to withdraw their complaints without prejudice under ORCP 54 A(1) and for the reasons set forth above, we conclude that PGE has failed to establish good cause to support a waiver of ORCP 54 A(1) and prevent the withdrawals.

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[3] *Id.* at 2-3 citing *Guerin v. Beamer*, 163 Or App 172, 177-178 (1999); *Palmquist v. FLIR Systems, Inc.*, 189 Or App 552, 558, 77 P3d 637 (2003).
[4] *Id* at 3.

IV. ORDER

IT IS ORDERED that:

1. 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; or Harrier Solar LLC, (complainants) against Portland General Electric Company (PGE) have been withdrawn without prejudice.

2. Dockets UM 1877, UM 1878, UM 1879, UM 1880, UM 1881, UM 1882, UM 1884, UM 1885, UM 1886, UM 1888, UM 1889, and UM 1890 are closed.

Made, entered and effective on Jan 02 2019.

Megan W. Decker
Chair

Letha Tawney
Commissioner

Commissioner Bloom, *dissenting*:

I find that the application of ORCP 54 A(1) to allow complainants to unilaterally withdraw their complaints after 16 months of proceedings to be inconsistent with our rules requiring the "just, speedy, and inexpensive resolution of the issues presented."[5] Therefore, I dissent.

Complainants filed their initial complaints in August of 2017, and the proceedings moved forward promptly, given the Commission's workload at the time. PGE filed motions for summary judgment in January of 2018 and after several rounds of pleadings, complainants responded to PGE's motions and filed cross motions on April 6, 2018. By the end of April, absent the intercession of other events, the motion and cross motion for summary judgment were fully briefed and ripe for our disposition. However, on April 20, 2018, while the parties were

[5] OAR 860-001-0000(1).

trading summary judgment pleadings, the complainants, acknowledging the weaknesses in their original complaints, filed motions for leave to amend. The complainants sought to modify the factual bases for the complaints, add new allegations with respect to PGE's behavior, and add a request for alternative relief.

In our Order No. 18-348, we denied complainants' motions to amend, laying out the reasons why justice would not be served by allowing such amendments at that stage of the proceedings. "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] The notice of dismissal was filed less than 30 days after our order.

Our rules begin with a declaration of over-arching principle:

> (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.[7]

That is, simply put, our lodestar in applying our rules, and to which all else is subordinate.

The stated purpose of the ORCP, mentioned immediately thereafter, is, at most, to buttress and fill in any gaps in our rules as we deem useful or necessary: "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."[8] Thus, pursuant to delegated authority, even an ALJ may deem an ORCP to not be in furtherance of Commission goals in a particular case and therefore ignored.

The *PGE v. Verizon Northwest* and *Columbia Basin Electric Cooperative Inc., v. Umatilla Electric Cooperative*[9] cases cited in this order are readily distinguishable from the matter before us.

In the *PGE* case, the objecting party was an intervenor who sought to become a party to the proceedings more than six months after the initial complaint was filed and whose participation was permitted by the ALJ because it had a potential interest in the outcome of the proceeding, subject to the requirement that it not unduly delay the proceedings or burden the record. The

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[6] Order No. 18-348 at 5 (Sep 24, 2018).
[7] OAR 860-001-0000(1).
[8] OAR 860-001-0000(2).
[9] *In re PGE v. Verizon*, Docket No. UM 1096, Order No. 04-653, (Nov 2, 2004); and *In re Columbia Basin v. Umatilla*, Docket No. UM 1823 Order 17-309 (Aug 11, 2017).

complainant and defendant settled after almost six months of negotiations which had included the intervenor. We found that the settlement was presumed to be reasonable and that the intervenor had retained its own option to file a complaint to ensure that cable companies were being provided with nondiscriminatory pole attachment access, giving us no cause to involve the other parties in addressing the intervenor's concerns.

In this case, the defendant is the directly affected party. Having expended significant resources in defending itself, PGE must now face, without any blame due to its own actions or inactions, the likelihood that it will be subject to another long and contentious litigation on the very issues which it had already likely successfully defended itself.

In the *Columbia* case, Columbia claimed that Umatilla had violated the territorial allocation law, because it had entered into a development arrangement for electric transmission facilities for the Wheatridge Wind energy project. The complaint was filed in January of 2017 and the notice of dismissal was filed the following August 1, more than one month prior to the hearing and one week before complainant's initial testimony was due. In acknowledging the dismissal, we noted that we could undertake our own investigation or Umatilla could file its own complaint and have the burden of proving the requested relief should be granted.

Also in the *Columbia* case, no party had filed any testimony and fewer than eight months had passed since the initial complaint had been filed. Indeed, the entire record, including such trivia as signatory pages and service list changes, when printed out, is less than a single ream of paper. In stark contrast, the record of the current proceeding is thousands of pages in length and closing in on a year and a half of nearly continuous litigation. As noted above, a procedurally blameless defendant must now bear the brunt of a second round.

In sum, today's order leaves in its wake sixteen months of wasted time and wasted ratepayer funds. This decision rewards the complainants with yet another opportunity to reprise their actions.

Stephen M. Bloom
Commissioner