

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1967

SANDY RIVER SOLAR, LLC,

Complainant,

v.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

COMPLAINANT’S RESPONSE
TO PGE’S MOTION FOR
EXTENSION OF TIME TO FILE A
REPLY IN SUPPORT OF ITS
MOTION FOR PARTIAL
SUMMARY JUDGMENT

I. INTRODUCTION

Complainant Sandy River Solar (“Sandy River”) files this response in objection to Portland General Electric Company’s (“PGE”) motion for extension of time to file a reply in support of its motion for partial summary judgment. While Sandy River is sympathetic that PGE’s attorneys are half way through their spring break week, the stay in this proceeding is likely to cause irreparable damage to Sandy River, which is only exacerbated by additional delays. In this response, Sandy River acknowledges that the Administrative Law Judge (“ALJ”) has stayed the case, but urges the ALJ to process the cases expeditiously and provide Sandy River with an opportunity to fully respond to PGE’s arguments. Sandy River had already been preparing the Response to PGE’s Motion for Partial Summary Judgment in anticipation of the March 25, 2019 due date when the ALJ issued the March 19, 2019 ruling allowing for additional time. As Sandy River desires a speedy resolution of this motion, there was no need to use all of the additional time provided and Sandy River filed on March 26, 2019. Additionally, PGE waited to file its motion for partial summary judgment until a time when, even if Sandy River

wins on the legal arguments, it may put the project at risk merely because of the delay.¹

Therefore, Sandy River urges the ALJ to not shorten the time for PGE to reply to Sandy River's response to the motion for partial summary judgment.

II. BACKGROUND

On February 27, 2019, Portland General Electric Company ("PGE") filed a motion for partial summary judgment and a motion to stay discovery and the procedural schedule in this proceeding. Sandy River and REC objected to PGE's request to stay the proceeding, and argued that the Commission should not provide a separate process to resolve the question posed by PGE in its motion. The reasons for Sandy River's and REC's objection included that, among other shortcomings, PGE's motion inaccurately portrayed that it presented a legal argument responsive to Sandy River's "core" argument in the case, but mischaracterized the legal issues, and would not dispose of Sandy River's actual claims. Additionally, PGE's proposed approach to the case of staying it pending the motion would needlessly harm Sandy River, and would frustrate judicial economy and administrative efficiency, given the nature of PGE's filing.²

On March 13, 2019, the ALJ held a conference with the parties to discuss the procedural schedule and other pending motions. During that conference, Sandy River explained that it was not open to agreeing to an extension of the dates in the schedule that could delay the ultimate resolution of the case, out of concern that PGE's requested delays could cause Sandy River to essentially forego any valuable remedy for the issues it has raised in its complaint, given the project's scheduled in-service date of December 1, 2019, and various other economic detriments

¹ PGE's motion also occurred at a time such that the date for Sandy River's and Intervenor Renewable Energy Coalition's ("REC's") response would "coincidentally" fall on the exact date Sandy River and REC's attorneys would be in oral argument in another case against PGE.

² See generally Complainant's Response to PGE's Motion for Stay (March 6, 2019).

that would arise from a delay. Sandy River’s counsel explained that it would be open to moving dates related to the motion for partial summary judgment if the motion could be processed simultaneously with the rest of the proceeding, such that the ultimate resolution of the case would not be delayed due to the motions practice on the motion.

At that conference, a schedule was agreed upon for the next immediate steps—that PGE would respond to Sandy River’s 6th set of data requests on March 15, 2019 that PGE’s Response Testimony date would be unchanged, but that it could be affected by the ultimate decision on the pending motion to stay, and that PGE would respond to Sandy River’s Motion to Compel by March 22, 2019. It was also agreed that Sandy River would respond to PGE’s Motion for Partial Summary Judgment by March 25, 2019. Those determinations were set forth in a March 13, 2019 Prehearing Conference Memorandum in this docket.

On March 19, 2019, the ALJ then issued a ruling, granting in part PGE’s Motion to Stay. The effect of the ruling is that Sandy River’s case is stayed, pending the Commission’s determination on PGE’s Motion for Partial Summary Judgment.³ In that Ruling, the ALJ stayed PGE’s need to file its Reply Testimony, and gave Sandy River additional time beyond March 25 to file its reply to PGE’s motion for summary judgment—up to April 3, 2019.⁴

Because the ALJ granted the motion to stay pending the outcome of PGE’s motion for partial summary judgment, every day of processing that motion risks delaying the ultimate resolution of the case, and the can adversely impact the Sandy River project. For this reason, Sandy River is seeking to ensure that the processing of the motion for partial summary judgment

³ March 19, 2019 Ruling at 4 (“I also grant a stay with regard to the procedural schedule adopted in the first prehearing conference memorandum, dated November 14, 2018, noting that PGE need not file response testimony on March 21, 2019.”).

⁴ *Id.* at 4-5.

without undue delay, which Sandy River views as not meritorious. In an effort to expedite the case to the extent possible, Sandy River prepared and filed its response to PGE's motion for partial summary judgment and filed it earlier than required, on March 26, 2019 instead of April 3, 2019.

Under the ALJ's March 19 ruling, the time provisions under OAR 860-001-0420 continue to apply to the pending motions.⁵ Under OAR 860-001-420(5), PGE's reply to Sandy River's response to its motion for partial summary judgment is due within 7 days from when Sandy River filed its reply, or by April 2, 2019.

On March 27, 2019, PGE's counsel contacted counsel for Sandy River, seeking to determine whether Sandy River would oppose an extension of PGE's timeframe in which it must reply to Sandy River's response to its motion for partial summary judgment, given vacation schedules for PGE's counsel and PGE staff, and also given PGE's view about what would result in proportionality for the parties' timeframes. PGE sought an extension of two weeks beyond the end of the spring break vacation for Portland Public Schools, to April 12, 2019. PGE's motion seeking this extension correctly states that Sandy River opposes the extension, and this response sets forth those reasons.

III. RESPONSE

Sandy River remains opposed to extensions of time that impact the ultimate resolution of this case, and put the project at risk. This is especially true in the case of the motion for partial summary judgment—a filing which was voluntarily initiated by PGE, and the timing of which it controlled. As stated in Sandy River's response to PGE's motion for a stay of the proceedings,

⁵ *Id.* at 5.

since PGE first raised the possibility of potentially filing a dispositive motion, counsel for Sandy River has repeatedly requested that, if PGE wished the case to be resolved through dispositive motions, PGE not unilaterally file a motion for summary judgement. Instead, counsel for Sandy River requested that PGE agree to discuss what the proper schedule should be to allow for the case to administered efficiently, and to avoid the types of situations that Sandy River is now in.⁶

PGE waited to file its motion for partial summary until just weeks before its opening testimony was due, despite the fact that it could have filed that motion earlier, at a time when it would not have impacted the schedule in this case. Sandy River is concerned by this timing because it represents a procedural action that has the effect of delaying the substantive resolution of the case, and puts the project at risk.

As Sandy River has explained, it was agreeable to the schedule for this case, at the time it was set, because the target date of July 31, 2019 could allow the Sandy River project to meet important milestones toward construction. Specifically, Sandy River's Power Purchase Agreement ("PPA") with PGE specifies a commercial operation date ("COD") of December 1, 2019.⁷ Sandy River needs to keep moving toward that date to ensure that it can avoid paying damages to PGE for missing the COD⁸ or potentially being terminated after its cure period expires. In addition, financing for projects can be more difficult if the project is in litigation or unlikely to reach its specified COD. There are construction timing issues, and expiring tax credits and other cost increases that will impact Sandy River, if the facility is not completed expeditiously. For example, the Investment Tax Credit ("ITC") changes from 30% to 26% in

⁶ Complainant's Response to PGE's Motion for Stay at 4.

⁷ PGE's Answer, Exhibit D Standard Renewable In-System Variable Power Purchase Agreement at § 2.2.2 (Oct. 9, 2018).

⁸ Within the PPA, Sandy River must pay PGE damages equal to the Lost Energy Value if Sandy River does not reach its commercial operation date of December 1, 2019.

January 1, 2020. Thus, regardless of the outcome of this case, Sandy River needs a prompt resolution so that it can work toward finalization of the project. To provide Sandy River with its full practical value, a Commission order in Sandy River's favor will need to occur sufficiently far in advance of Sandy River's COD. This is because there are important events that need to occur between commercial operation and the date of the Commission's order so that Sandy River can hire a qualified and experienced third-party consultant to properly and safely construct the required interconnection upgrades. Sandy River will need to have enough time to select a qualified and experienced consultant, work with PGE to gain its reasonable approval, and then have its generation and interconnection facility constructed by December 1, 2019 or soon thereafter.

Sandy River also notes that, although it was provided more time by the ALJ's decision, Sandy River responded to PGE's motion for partial summary judgment in 27 days, and during much of that time Sandy River was required to work on other matters in cases with PGE, which constituted part of the reason why Sandy River sought additional time to respond to PGE's motion in the first instance. Thus, even recognizing intervening matters and leave schedules for PGE, Sandy River does not believe that it is appropriate that PGE be granted a full 17 days for a reply in support of its motion.

Sandy River acknowledges that the timing of this case has become problematic for PGE and its counsel, given vacation over the spring break time period. Sandy River is sympathetic to those concerns, and would prefer to be in a position to agree to extensions but cannot agree to them in light of the challenges described above. PGE is not the only party to this case with employees that have children on spring break and despite this, work still gets done even while out of town. PGE, as a much larger organization, has the ability to share responsibilities among

staff while others are out of the office. Sandy River notes that if the case was not stayed pending the determination of the motion for partial summary judgment, or if the motion for partial summary judgment had been processed earlier, there would be more flexibility with respect to the timing of the motions practice, and Sandy River would not be in the position of pushing back on extensions of time to accommodate reasonable vacation and leave schedules at this time.

IV. CONCLUSION

For the reasons described above, Sandy River objects to PGE's request to extend the schedule in this case by moving the date for its reply in support of its motion for partial summary judgment to April 12, 2019.

Dated this 28th day of March, 2019.

Respectfully submitted,



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