BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

Docket No. UM 2074

ZENA SOLAR, LLC, Complainant, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	ZENA SOLAR'S MOTION FOR INTERIM RELIEF AND PRELIMINARY INJUNCTION Expedited Consideration Requested

I. INTRODUCTION

Pursuant to OAR 860-001-0420 and ORCP 79,[1] Zena Solar, LLC ("Zena Solar") hereby moves the Oregon Public Utility Commission ("OPUC" or the "Commission") for interim relief preventing substantial and irreparable harm to Zena Solar by enjoining Portland General Electric Company ("PGE") from removing Zena Solar from the interconnection queue during the pendency of this case. In support of this motion, Zena Solar submits the Declaration of Jonathan Nelson.

Zena Solar seeks to interconnect a solar generating facility to PGE's system. Zena Solar and PGE have not executed an interconnection agreement due to an overarching dispute that is the subject matter of this proceeding. Zena Solar has

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

endeavored to resolve this dispute directly with PGE, and was corresponding with PGE regarding the disagreement until yesterday. PGE has threatened to deem Zena Solar to have withdrawn from the interconnection queue if Zena Solar does not execute the interconnection agreement on or before March 27, 2020.[2] PGE renewed this threat in its most recent letter to Zena Solar dated March 26, 2020. PGE claims that this action is necessary to protect a lower queued project, SPQ0240.

SPQ0240, which is currently in the feasibility study stage. SPQ0240 is in the early stages of its interconnection and it will not be unduly harmed by any delay arising from the resolution of Zena Solar's complaint against PGE. According to the PGE Oregon Small Generator Interconnection Queue posted on PGE's OASIS website, SPQ0240 entered into PGE's interconnection queue on December 13, 2019 with a requested in-service date of March 17, 2021. PGE's queue shows that the project is still in the feasibility study stage and no completed feasibility study for the project has been posted on PGE's OASIS website. The substance of the Zena Solar's complaint is a straightforward matter pertaining to Zena Solar's explicit rights under the Oregon Small Generator Interconnection Rules. Therefore Zena Solar does not anticipate lengthy resolution of the complaint that would harm SPQ0240. In fact, a favorable outcome for

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[2] As a general matter, Zena Solar is not sure that PGE properly can deem Zena Solar to have withdrawn its application when Zena Solar is actively seeking interconnection service but is unable to obtain interconnection service because of a dispute with PGE. Although the Commission's small generator interconnection rules allow a utility to deem an applicant to have withdrawn fifteen days after receiving and not executing an interconnection agreement, OAR 860-082-0025(7)(e), Zena Solar reads that provision as allowing a utility to act when an applicant fails to respond. In this case, Zena Solar has been actively engaging with PGE regarding Zena Solar's continuing desire to be interconnected.

Zena Solar would likely benefit and uphold the rights of subsequent interconnection customers in the queue.

Zena Solar seeks interconnection service, to which Zena Solar is entitled at a fair, just, and reasonable rate. The purpose of this proceeding is to ascertain whether the rate that PGE proposes is fair, just, and reasonable, and otherwise complies with the Commission's small generation interconnection rules. If Zena Solar is forced to forfeit its first-place position in the interconnection queue, Zena Solar will suffer irreparable harm. Zena Solar would face the choice of re-applying or abandoning its project. If Zena Solar re-applies, it will join the serial queue behind other projects. Interconnecting after those projects could be technologically impossible and/or prohibitively expensive. In short, if Zena Solar is forced to forfeit its current position, it will be forced to abandon its project. In either case, if Zena Solar must abandon its project, then this proceeding may provide no relief to Zena Solar from the harms of PGE's actions in the interconnection process. Zena Solar will have no revenue, be unable to recover sunk costs, and could go out of business. Zena Solar seeks interim injunctive relief in this motion so that it can pursue the relief it seeks in its complaint without being removed from the queue.

Expedited consideration of this motion is requested. PGE threatened to deem Zena Solar to have withdrawn from the queue effective on March 27, 2020. Zena Solar is filing this motion on the same date in which PGE may deem Zena Solar to have withdrawn, because Zena Solar has been working in good faith to convince PGE to allow Zena Solar to maintain its interconnection queue position during the pendency of this case. PGE has refused. Zena Solar did not file a complaint or this motion earlier because it was working with PGE to resolve this matter until yesterday at noon. Zena Solar asks

that the Commission issue an immediate order to preserve Zena Solar's interconnection position, at a minimum, while this motion is considered.

Earlier today, Zena Solar filed a Motion for Conference in this docket requesting that a conference be scheduled on an expedited basis on account of PGE's threat to have Zena Solar withdrawn from the queue effective today.[3] Zena Solar has requested that both the Motion for Conference and this Motion for Interim Relief and Preliminary Injunction be granted on an expedited basis. Pursuant to OAR 860-001-0420(6), Zena Solar certifies that it attempted to contact PGE to discuss this motion and state whether PGE supports the motion. PGE opposes expedited consideration. Zena Solar also requests that the Commission shorten the time for responses to this Motion so that the Commission may issue a ruling today.[4] Zena Solar respectfully requests that the Commission grant this Motion for Interim Relief and Preliminary Injunction regardless of whether it grants the Motion for Conference.

II. ARGUMENT

A. Preliminary Injunctive Relief is Allowed Where Monetary Damages are Insufficient

A preliminary injunction may be allowed either:

1) When it appears that a party is entitled to relief demanded in a pleading, and such relief, or any part thereof, consists of restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the party seeking the relief; or

2) When it appears that the party against whom a judgment is sought is doing or threatens, or is about to do, or is procuring or suffering

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3 *See* OAR 860-001-0590.

4 OAR 860-001-0420(6).

> to be done, some act in violation of the rights of a party seeking judgment concerning the subject matter of the action, and tending to render the judgment ineffectual.[5]

In determining whether to grant a preliminary injunction: 1) there must be an irreparable harm for which there is no adequate remedy at law;[6] 2) the threatened injury must be real and substantial[7] rather than to simply allay fears and apprehensions;[8] and 3) the court may consider the balance of the equities between the parties.[9]

A harm is irreparable and without legal remedy essentially where there is no amount of monetary damages that can provide a complete recovery. It "depends not upon the magnitude of the injury, but upon the completeness of the remedy in law."[10] To be "adequate," the legal remedy must be "practical, efficient, and adequate, as a full remedy as that which can be obtained in equity."[11]

Specifically, injunctive relief may be appropriate in the following circumstances:

1) Where there is a possibility of being forced out of business;[12] or

2) Where there is a statutory right to injunctive relief.[13]

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5 ORCP 79A.

6 *Knight v. Nyara*, 240 Or App 586, 597 (2011) (citing *Wilson v. Parent*, 228 Or 354, 369-370 (1961)).

7 *Wilson v. Parent*, 228 Or 354, 370 (1961).

8 *Knight* at 597.

9 *Hickman v. Six Dimension Custom Homes Inc.*, 273 Or 894, 898 (1975) (citations omitted).

10 *Winslow v. Fleischner*, 110 Or 554, 563 (1924), *cited by Arlington Sch. Dist. No. 3 v. Arlington Educ. Ass'n*, 184 Or App 97, 101–102 (2002).

11 *Alsea Veneer, Inc. v. State*, 318 Or 33, 43 (1993).

12 *Los Angeles Mem'l Coliseum Com. v. Nat'l Football League*, 634 F2d 1197, 1203 (9th Cir 1980).

13 *See Napolski v. Champney*, 295 Or 408, 415–416 (1983) (Oregon landlord tenant law allows a tenant to bring an action for damages or injunctive relief).

B. The Commission Also Allows Interim Relief Where the Only Impacts are Monetary

The Commission follows the ORCP only where it is not inconsistent with Commission rules, orders, or ALJ rulings.[14] The Commission has allowed interim relief on a more permissive standard than that of the ORCP. For example, when each of the three investor-owned utilities asked the Commission for interim relief to protect the utility and its ratepayers from the potential significant cost impacts of increased growth of solar QFs in the state, the Commission granted such relief.[15] Therefore, the Commission will allow interim relief upon a showing that there is a potential for significant costs.

C. Zena Solar Should Be Allowed Interim Relief Because Not Only Will It Incur Significant Costs, But It Will Be Forced Out of Business

Here, interim relief is warranted because not only will deeming Zena Solar to have withdrawn from the interconnection queue result in significant sunk costs or future costs for Zena Solar, but it will cause Zena Solar to go out of business. Under the Commission's interim relief standard, there is a potential for significant costs to Zena Solar should PGE deem Zena Solar to have withdrawn from the interconnection queue during the pendency of this case.

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14 OAR 860-001-0000(1).

15 *In re Portland Gen. Elec. Co. Application to Lower the Standard Price and Standard Contract Eligibility Cap for Solar Qualifying Facilities*, Docket No. UM 1854, Order No. 17-310 at 7 (Aug. 18, 2017) ("[W]e are convinced that this interim relief is appropriate to protect ratepayers from the potential significant cost impacts.")

Additionally, under the ORCP standard, Zena Solar is entitled to relief sought in the Complaint, and the harm to Zena Solar is real and irreparable. First, because PGE is statutorily required to offer interconnection service on fair, just, and reasonable rates and terms, and the cause of Zena Solar's inability to execute the interconnection agreement is of PGE's own doing by offering service at rates and on terms that are not fair, just, and reasonable, Zena Solar is entitled to the relief warranted.

Second, Zena Solar will experience irreparable harm if interim relief is not granted. Should PGE deem Zena Solar to have withdrawn from the interconnection queue, Zena Solar will suffer significant sunk costs that it cannot recover, likely face prohibitively expensive costs in the future, lose the opportunity to develop its project, and could go out of business.[16] Therefore, PGE will cause irreparable harm if it deems Zena Solar to have withdrawn from the queue effective today by forcing Zena Solar out of business.[17]

Third, the threatened injury is real and substantial because PGE has informed Zena Solar that PGE will withdraw it from the queue effective March 27, 2020, and PGE has refused to grant any extension or stay, notwithstanding Zena Solar's request that PGE do so. Therefore, the injunctive relief will not simply allay some fears and apprehensions but will prevent a probable and threatened injury.

Finally, the balance of hardships weighs in favor of granting interim relief. If PGE deems Zena Solar to have withdrawn from the interconnection queue during the

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16 Declaration of Jonathan Nelson at 2.

17 *Id.*

pendency of this case, Zena Solar will suffer significant sunk costs that it cannot recover, likely face prohibitively expensive costs in the future, lose the opportunity to develop its project, and go out of business. If the Commission grants injunctive relief, PGE will be no worse off than it currently is. PGE will simply be obligated to continue working to provide interconnection service. Given the current status of SPQ0240, Zena Solar does not expect this complaint to unreasonably delay SPQ0240's interconnection. Therefore, the balance of hardships favors granting interim relief.

D. Interim Relief Is Appropriate Because Removing Zena Solar From the Queue for Challenging PGE's Interconnection Decision Would Be Discriminatory and Unduly Prejudicial.

Granting Zena Solar's request for interim relief is warranted because challenging a utility's interconnection decision should not be a basis for removal from the interconnection queue. ORS 757.325 provides, "[n]o public utility shall . . . subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect." In addition, interconnection costs imposed on a qualifying facility must be assessed on a nondiscriminatory basis.[18] As described further in Zena Solar's Complaint, Zena Solar has had significant concerns with the interconnection studies performed by PGE and the resulting interconnection costs—which have varied from study to study in a manner that cannot be reconciled with other studies upon which they are based. Zena Solar has been raising those concerns with PGE since November 2019. Instead of addressing those concerns, PGE has continued to insist that Zena Solar execute an interconnection agreement with PGE or be deemed withdrawn from the interconnection

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[18] 18 C.F.R. 292.306(a).

queue. In essence, PGE is saying, "If you disagree with us, we will kick you out of the queue."

PGE's approach subjects Zena Solar to undue and unreasonable prejudice and disadvantage by requiring it to choose between: 1) executing an interconnection agreement based on erroneous studies with conflicting cost estimates; or 2) losing its queue position and potentially going out of business. Such an approach would also discriminate against Zena Solar by forcing it to accept interconnection costs higher than those imposed on other similarly situated projects in the queue or lose its place in the queue for questioning those costs. Allowing such an approach would set a dangerous precedent of penalizing interconnection customers by removing them from the queue for challenging a utility decision. Accordingly, the Commission should grant Zena Solar's request for interim relief to prevent PGE from removing Zena Solar from the queue pending the resolution of the parties' interconnection dispute.

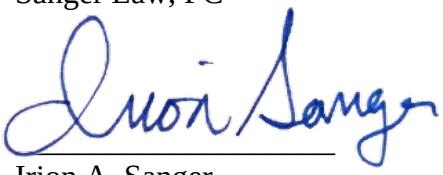
III. CONCLUSION

For the reasons articulated above, the Commission should grant Zena Solar's request for interim relief and order PGE not to deem Zena Solar to have withdrawn from the interconnection queue during the pendency of this case.

Dated this 27th day of March 2020.

Respectfully submitted,

Sanger Law, PC



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