

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**UM 1971**

In the Matter of

WACONDA SOLAR, LLC,  
Complainant,

v.

PORTLAND GENERAL ELECTRIC  
COMPANY,

Defendant.

WACONDA SOLAR’S REPLY IN  
SUPPORT OF ITS MOTION TO  
STAY OR, IN THE ALTERNATIVE,  
TO EXTEND THE FILING  
DEADLINE OF WACONDA  
SOLAR’S RESPONSE TO  
PORTLAND GENERAL  
ELECTRIC’S MODIFIED SECOND  
MOTION FOR SUMMARY  
JUDGMENT

**I. INTRODUCTION**

Waconda Solar, LLC (“Waconda Solar”) respectfully files this reply in support of its Motion to Stay or, in the alternative, to extend the filing deadline of Waconda Solar’s response to Portland General Electric Company’s (“PGE”) Modified Second Motion for Summary Judgment (generally, the “Motion to Stay”). Waconda Solar is requesting a stay until three weeks after the Oregon Public Utility Commission (the “Commission”) makes a decision on the Petition for Declaratory Ruling recently filed by the Renewable Energy Coalition, Community Renewable Energy Association, and Oregon Solar + Storage Industries Association (collectively the “Interconnection Trade Associations”) in Docket No. DR 57. In the alternative, Waconda Solar is requesting an extension of three weeks from the date of the Commission’s ruling on its Motion to Stay. PGE agrees that a

three-week extension from the current filing due date, October 19, 2021, is appropriate, but otherwise PGE's response to Waconda Solar's Motion to Stay on October 12, 2021 requests that the motion be denied.<sup>1</sup> Waconda Solar provides this reply to explain its disagreement with PGE's position and respectfully requests that the Commission grant the Motion to Stay.

PGE claims the issues in this proceeding and the declaratory ruling docket do not overlap. That is not the case. The declaratory ruling docket addresses a broader set of issues related to Independent System Impact Studies ("iSISs"), but both proceedings address the same core legal issues surrounding what are an interconnection customer's rights to have an iSIS. The specific issues in both proceedings include: 1) whether an interconnection customer has the right to conduct an iSIS; 2) whether the utility must provide sufficient information to the interconnection customer to conduct the iSIS; 3) whether the utility must provide the interconnection customer access to its system to conduct the iSIS; and 4) whether the rules that require a utility to act in a reasonable, non-discriminatory manner consistent with Good Utility Practice and contractual duty of good faith apply to utility decisions in the iSIS process. These core legal issues are relevant to both proceedings, and resolution of them in the declaratory ruling will resolve them here.

A stay in this proceeding is warranted because the same core legal issues are addressed in both proceedings, judicial economy supports the stay, neither party would be unduly prejudiced by a stay, and the declaratory ruling docket is a more appropriate

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<sup>1</sup> PGE's Response to Waconda Solar's Motion to Stay at 1 (Oct. 12, 2021).

venue to address these legal issues so all interested parties can participate in the proceeding and the issues can be resolved. Thus, Waconda Solar requests the Commission grant the Motion to Stay.

By filing this Reply, Waconda Solar is responding only to PGE's arguments. Waconda Solar maintains any and all arguments raised in its original Motion to Stay.

## **II. ARGUMENT**

### **A. A Stay of this Proceeding is Warranted**

#### **1. This Proceeding and Docket No. DR 57 Both Raise the Same Key Legal Issues Regarding Independent System Impact Studies**

The core issue in this proceeding is whether the utility must allow an interconnection customer to conduct an iSIS, and, if so, whether the Oregon rules and contract provisions require the utility to act in a reasonable, good faith, and non-discriminatory manner. This includes whether the utility must truly allow an interconnection customer the ability to perform their own iSIS, including but not limited to providing an interconnection customer sufficient information to fully conduct the study. These issues are also raised in the petition for declaratory ruling, therefore the Commission should stay this proceeding.

In Waconda Solar's Amended Complaint, Waconda Solar raised three issues related to an iSIS: 1) whether the utility needs to allow an interconnection customer to conduct an iSIS; 2) whether the utility needs to provide the interconnection customer with sufficient information to complete the iSIS; and 3) whether PGE should be required

to provide reasonable information and access so that an iSIS can be performed.<sup>2</sup> PGE admits that these issues are present in this case but claims they are not in dispute.<sup>3</sup>

The declaratory ruling also raises similar issues related to whether: 1) interconnection customers have a unilateral right to conduct an iSIS; 2) whether a utility must provide the interconnection customer with sufficient information for an iSIS to be performed such that the interconnection customer may exercise its unilateral right to conduct an iSIS; and 3) whether a utility must provide the interconnection customer access to the utility's system that is sufficient for the interconnection customer to complete its iSIS.<sup>4</sup> PGE also admits that these issues are present in that case.<sup>5</sup>

A core issue in the declaratory ruling is whether Oregon rules and contract provisions regarding reasonableness, non-discrimination, and contractual good faith apply to the iSIS process for providing information to the interconnection customer *and* reviewing the iSIS. Contrary to PGE's assertions, Waconda Solar is similarly requesting Commission guidance on what legal standard and rules apply when a utility is required to provide information to an interconnection customer to conduct an iSIS. Waconda Solar

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<sup>2</sup> Waconda Solar's First Amended Complaint at 21-25, Prayer for Relief 3, 4, 10 and 11 (July 31, 2019).

<sup>3</sup> PGE's Response to Waconda Solar's Motion to Stay at 9-10 (Oct. 12, 2021). Waconda Solar disagrees that they are not in dispute or are moot because, among other reasons, PGE will not agree that it will review Waconda Solar's iSIS consistent with the rules.

<sup>4</sup> *In re Renewable Energy Coalition, Community Renewable Energy Association, and Oregon Solar + Storage Industries Association*, Docket No. DR 57, Petition for Declaratory Ruling at 2-3 (Oct. 5, 2021).

<sup>5</sup> PGE's Response to Waconda Solar's Motion to Stay at 9-10 (Oct. 12, 2021).

is also requesting that the Commission decide if Oregon rules and contract provisions regarding reasonableness, non-discrimination, and contractual good faith principles apply to the iSIS process. Thus, this is an issue in both proceedings.

**2. The Fact that the Declaratory Ruling Raises More Issues Is Not a Reason to Deny the Motion to Stay**

The declaratory ruling raises additional issues related to the standard that PGE will use to review an iSIS, and which of the Commission's rules apply to the iSIS process.<sup>6</sup> PGE claims that the standard that a utility will use to review the iSIS is not at issue here.<sup>7</sup> However, the standard of review issue is directly linked to the issues in this proceeding in that they all ask whether the rules and contract policies apply to the iSIS process, which means that the issues in this proceeding and the declaratory ruling overlap.

The declaratory ruling raises this issue of what information the utility must provide, but also the issue regarding the standard the utility must use to *review* the completed iSIS. Just because the declaratory ruling raises an additional, related issue does not merit continuing to resolve half the issue in this proceeding. Further, the declaratory ruling may be broader than this proceeding, but that does not mean the issues do not overlap. Issues can overlap and proceedings address similar legal issues even though the issues are not aligned perfectly. Thus, the declaratory ruling and this proceeding raise similar legal issues.

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<sup>6</sup> Docket No. DR 57, Petition for Declaratory Ruling at 3.

<sup>7</sup> PGE's Response to Waconda Solar's Motion to Stay at 10 (Oct. 12, 2021).

The fact that a generic docket raises broader issues than a utility specific matter is analogous to Docket No. UM 1987 where a stay was granted.<sup>8</sup> In UM 1987, PGE was proposing changes to its Schedule 201 and standard PPA while the Commission is undergoing broader rulemaking in Docket No. AR 631 for standard contracts for all utilities.<sup>9</sup> Docket No. AR 631 is much broader than UM 1987, but the Commission still granted the stay.

This is also analogous to the *Threemile Canyon Wind* case where another stay was granted.<sup>10</sup> In the *Threemile Canyon Wind* case, Threemile Canyon Wind I, LLC (“Threemile Canyon Wind”) brought a complaint against PacifiCorp because PacifiCorp wanted to charge Threemile Canyon Wind costs associated with PacifiCorp’s purchase of third-party transmission to move output from Threemile Canyon Wind’s facilities.<sup>11</sup> A similar legal issue regarding whether provisions of the Public Utility Regulatory Policies Act prohibit a utility from paying both avoided cost rates for a qualifying facility’s output and related transmission costs to a third-party to move that output was being addressed in Docket No. UM 1610 applicable to all utilities and qualifying facilities.<sup>12</sup> Docket No. UM 1610 was much broader than the *Threemile Canyon Wind* case as it addressed a wide

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<sup>8</sup> *Portland General Electric Company Request to Update its Schedule 201 and Standard Power Purchase Agreements*, Docket No. UM 1987, Ruling at 1 (Dec. 23, 2019).

<sup>9</sup> Docket No. UM 1987, Ruling at 1.

<sup>10</sup> *Threemile Canyon Wind I LLC v. PacifiCorp*, Docket No. UM 1546, Order No. 12-475 at 4 (Dec. 10, 2012).

<sup>11</sup> Docket No. UM 1546, Order No. 12-475 at 1.

<sup>12</sup> Docket No. UM 1546, Order No. 12-475 at 3.

range of generic issues related to qualifying facilities and applied to all utilities.<sup>13</sup> The Commission still granted the stay.<sup>14</sup> Thus, the declaratory ruling being broader than the issues raised here should not preclude the Commission from granting the stay in this proceeding.

**3. The Core Legal Issue in Both Cases Is Whether the Oregon Rules and Contract Principles Apply to the iSIS Process**

The issues also overlap because both Waconda Solar's and the Interconnection Trade Associations' core legal determination that they ask the Commission to decide is that the Oregon rules and contract principles apply to the iSIS process. It would not make sense for the interconnection rules or the duty of good faith and fair dealing to apply to the utility providing information (the issue PGE agrees that Waconda Solar raised), but not how the utility reviews the iSIS (the additional issue raised by the Interconnection Trade Associations). If the rules and contract principles apply to the information a utility is required to provide an interconnection customer, those standards should also apply to the utility's review of the iSIS. In other words, if the utility is obligated to act in a reasonable, non-discriminatory manner consistent with Good Utility Practice and consistent with the duty of good faith and fair dealing when providing information and access to the interconnection customer, then those standards of review also apply to how the utility reviews the iSIS.

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<sup>13</sup> Docket No. UM 1546, Order No. 12-475 at 2.

<sup>14</sup> Docket No. UM 1546, Order No. 12-475 at 4.

**4. PGE Has Not Agreed to Allow Waconda Solar to Perform an iSIS Consistent with the Oregon Rules and its Duty of Good Faith and Fair Dealing**

The two proceedings are also linked regarding the legal and contractual issues because Waconda Solar's right to an iSIS has not be resolved in this proceeding because PGE has not really agreed to allow Waconda Solar to conduct an iSIS. PGE has conditioned its agreement to Waconda Solar being able to conduct the iSIS upon, in effect, Waconda Solar dropping its request that PGE review the iSIS in a reasonable, non-discriminatory manner consistent with Good Utility Practice and the contractual duty of good faith and fair dealing.<sup>15</sup> Thus, there is an overlap regarding the legal issues.

PGE's offer to have Waconda Solar conduct an iSIS is not a real offer if the utility will not review the study consistent with the law. PGE states that the declaratory ruling "seeks to expand the utility's existing obligation under [OAR 860-082-0060(7)(h)]—to 'evaluate and address' alternative findings in an applicant's iSIS—to also require the utility to do so reasonably, in a non-discriminatory manner, consistent with the utility's contractual duty of good faith and fair dealing, and consistent with Good Utility Practice."<sup>16</sup> While Waconda Solar disagrees that this is an "expansion" of its rights, PGE is correct that the issue in the declaratory ruling case is what are the interconnection customers' current legal rights regarding the utility's obligations in the iSIS process. A remaining issue in dispute before the Commission in this complaint case is whether PGE

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<sup>15</sup> PGE's Declaration of Rebecca Dodd in Support of PGE's Modified Second Motion for Summary Judgment, Exhibit 7 at 2-3 (Sept. 15, 2021).

<sup>16</sup> PGE's Response to Waconda Solar's Motion to Stay at 2 (Oct. 12, 2021).



can really be seen as “offering” Waconda Solar the opportunity to conduct an iSIS when PGE claims that Waconda Solar does not have any legal rights that limit PGE’s discretion when reviewing the iSIS.

PGE claims it is not interfering with Waconda Solar’s right to conduct an iSIS.<sup>17</sup> But that is exactly what PGE is doing and PGE is effectively preventing Waconda Solar from conducting an iSIS. PGE’s legal position is that it can receive the iSIS, briefly review it, completely ignore the results of the iSIS, and then throw it in the trash. In other words, PGE has told Waconda Solar that it can conduct an iSIS, but that study may be worthless because PGE will not agree that its review is consistent with the law.

PGE’s position is that Waconda Solar ought to accept PGE’s non-real offer, but Waconda Solar disagrees that this is a commercially reasonable pathway. Waconda Solar is not willing to pay to conduct a study that has no value. An interconnection customer cannot make a reasoned business decision about whether to spend its money on a study if it does not know what its legal rights are. Waconda Solar does not want to have to pay a third party to conduct a study and then litigate what its legal rights are after PGE ignores the study results.

Waconda Solar’s situation is illustrated by comparisons to other real world circumstances. Would someone pay a contractor to build them an office space not knowing what the legal rights they have if the contractor is negligent (and knowing the contractor’s position that the office owner has no legal rights)? Would someone consent

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<sup>17</sup> PGE’s Response to Waconda Solar’s Motion to Stay at 11 (Oct. 12, 2021).

to an arbitrator not knowing whether the arbitration would provide them with due process (and knowing that the opposing party has stated that you have no due process rights)? And would either person agree if the contractor was known to build negligent office spaces or if the arbitrator was known to not provide due process? In addition, would the person agree to such terms if the contractor or arbitrator had an economic interest in putting the person out of business?

In *Sandy River Solar v. PGE*, PGE made a similar argument that a utility did not have to agree to allow an interconnection customer to hire third-party consultants in part because OAR 860-080-0060(8)(f) did not contain any reasonableness standard.<sup>18</sup> PGE then did not review Sandy River's request in a reasonable manner and Sandy River was not able to hire third party contractors. Waconda Solar is not aware of PGE allowing any small interconnection customers to hire third party consultants to perform the interconnection work. Thus, OAR 860-080-0060(8)(f) has become an effective dead-letter law, at least as it pertains to PGE.

Similarly, by not agreeing to abide by the standards of review in Oregon rules and contractual duties, the interconnection customer's right to conduct an iSIS becomes useless. Therefore, PGE is preventing Waconda Solar from exercising its right to conduct an iSIS because PGE has clearly stated that its review does not need to be consistent with Oregon rules and contractual duties (and experience has demonstrated

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<sup>18</sup> *Sandy River Solar LLC v. PGE*, Docket No. UM 1967, PGE's Motion for Partial Summary Judgment at 3, 10-12 (Feb. 27, 2019).

that if the rules do not require PGE to act reasonably, then it will exercise its rights to act unreasonably).

PGE's terms could constitute an illegal agreement, and courts have refused to enforce agreements that are illegal.<sup>19</sup> Courts have stated "[a]n agreement is illegal if it is contrary to law, morality or public policy. Plain examples of illegality are found in agreements made in violation of some statute; and, stating the rule broadly, an agreement is illegal if it violates a statute or cannot be performed without violating a statute."<sup>20</sup> It follows that offers to form an agreement also cannot contain provisions that would make the agreement illegal. Here, PGE's offer to allow Waconda Solar to conduct an iSIS without assurances it will review the iSIS in a reasonable, non-discriminatory manner consistent with Good Utility Practice and contractual duty of good faith could be an illegal offer (and illegal contract, if Waconda Solar accepted PGE's offer as PGE suggests) if the Commission rules those standards do apply. Thus, the issue regarding what standards of review apply when a utility reviews an iSIS is central to both proceedings, including whether PGE has truly offered Waconda Solar the opportunity to conduct an iSIS.

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<sup>19</sup> *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543, 552, 340 P.3d 27, 34 (2014) (citing *Uhlmann v. Kin Daw*, 97 Or 681, 688, 193 P 435 (1920)).

<sup>20</sup> *Bagley*, 356 Or at 552 (citing *Uhlmann*, 97 Or at 689) (internal quotes omitted).

**5. Both Waconda Solar and Threemile Canyon Wind's Proceedings Involved Factual Issues**

PGE also argues the Motion to Stay should be denied because this proceeding involves the application of facts to law while the *Threemile Canyon Wind* case only involves policy issues.<sup>21</sup> This is not the case. This proceeding does involve the application of facts to the law, but so did *Threemile Canyon Wind*. In *Threemile Canyon Wind*, a complaint was brought against PacifiCorp requesting the Commission require PacifiCorp to purchase the output of its facility.<sup>22</sup> The complaint involved case specific facts just like Waconda Solar's complaint.<sup>23</sup>

Thus, PGE's assertion that *Threemile Canyon Wind* underscores Waconda Solar's claim that this proceeding and the declaratory ruling docket involve similar legal issues is unfounded. *Threemile Canyon Wind* also involved application of law to facts, so this proceeding also involving an application of law to facts should not preclude the Commission from granting the Motion to Stay.

**6. Waconda Solar and Interconnection Customers in General Need Resolution on What Standards of Review Apply When a Utility Reviews an Independent System Impact Study and the Declaratory Ruling Docket is the Most Appropriate Venue**

The declaratory ruling docket is the more appropriate venue to resolve the issues regarding iSISs because it serves judicial economy and more stakeholders can be

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<sup>21</sup> PGE's Response to Waconda Solar's Motion to Stay at 14-15 (Oct. 12, 2021).

<sup>22</sup> Docket No. UM 1546, Initial Complaint at 2 (July 1, 2011).

<sup>23</sup> See generally Docket No. UM 1546, Initial Complaint (July 1, 2011).

involved.<sup>24</sup> First, PGE wants the parties to draft pleadings and conduct oral argument in this complaint, when at the same time PGE is seeking to ensure that the core legal issues are not addressed by claiming that they are moot or the legal issues are outside the scope of the case. Second, the declaratory ruling will review the core legal issues in this case and the broader set of issues regarding the applicability of the rules and contractual principles. Third, the declaratory ruling will allow more interested parties to provide their legal and policy positions.

PGE is seeking to ensure the Commission does not address any of the legal issues in this proceeding, which, if PGE succeeds, may result in significant legal briefing on the core legal issues. The declaratory ruling docket is more appropriate to resolve these issues because PGE is seeking summary judgment on the grounds that Waconda Solar's claims for relief are moot.<sup>25</sup> If the Commission agrees, then Waconda Solar and PGE will expend significant resources litigating issues without resolution. Moreover, PGE is asserting the issue of whether Oregon's rules and contracting principles do not apply to this proceeding.<sup>26</sup>

If PGE's motion for summary judgment was granted on the grounds of mootness or issues being outside the scope of the proceeding, then interconnection customers will not know their rights regarding an iSIS. Interconnection customers will be less likely to

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<sup>24</sup> This section only responds to PGE's Response, and does not repeat all the reasons that judicial economy is better served that Waconda Solar raised in its Motion to Stay.

<sup>25</sup> PGE's Modified Second Motion for Summary Judgment at 64 (Sept. 15, 2021).

<sup>26</sup> PGE's Response to Waconda Solar's Motion to Stay at 2, 8-9 (Oct. 12, 2021).

conduct an iSIS if they do not know how the utility will review it. An interconnection customer needs to know how the utility will review the iSIS to make informed business decisions. Thus, the declaratory ruling docket is a more appropriate venue because Waconda Solar and other interconnection customers need resolution of these issues, which may not occur here if the Commission agrees the claims for relief are moot.

Second, the declaratory ruling docket is a more appropriate venue to serve judicial economy because it will examine all the issues comprehensively from all facets. PGE claims this proceeding does not address what standard of review applies to iSISs and so the declaratory ruling docket is not more appropriate.<sup>27</sup> As explained previously, the issues do overlap so the declaratory ruling docket would be more appropriate. In the declaratory ruling docket the Commission will be able to examine all issues related to iSISs including: 1) whether an interconnection customer has a right to conduct an iSIS; 2) whether the utility must provide information to the interconnection customer so it can conduct the iSIS; 3) whether the utility must provide access to its system so the interconnection customer can conduct the iSIS; and 4) whether the utility must act in a reasonable, non-discriminatory manner consistent with Good Utility Practice and contractual duty of good faith and fair dealing when reviewing an iSIS.

Third, more parties can intervene to provide comments and the Commission would not have to resolve these issues against a backdrop of a complex set of facts. If the Commission does not stay this case, then other parties that want to provide their input to

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<sup>27</sup> PGE's Response to Waconda Solar's Motion to Stay at 16-17 (Oct. 12, 2021).

the Commission will need intervene in this case to provide their legal and policy recommendations. PGE would likely object to those petitions to intervene.<sup>28</sup>

Thus, the declaratory ruling docket is a more appropriate venue to resolve these issues so the Commission should grant Waconda Solar's Motion to Stay.

**B. The Commission Should Further Extend the Deadline for Waconda Solar to Respond to PGE's Modified Second Motion for Summary Judgment**

PGE argues Waconda Solar's alternative request for extension should not be granted because it would prejudice PGE, not aid the Commission in resolving the motion for summary judgment, and provide unnecessary extra time for Waconda Solar to respond to PGE's motion for summary judgment. Waconda Solar disagrees. Good cause exists to extend the filing deadline, because doing so will enable Waconda Solar to avoid wasting time and resources to prepare a response while the Commission decides whether or not to proceed with potentially duplicative litigation in the declaratory ruling docket. It would also result in a fair and impartial proceeding to allow Waconda Solar to not have to prepare a legal pleading which may not be necessary. There is no prejudice to PGE greater than PGE experienced in UM 1987 or PacifiCorp experienced in the *Threemile Canyon Wind* case. As the legal issues overlap, the resolution of the declaratory ruling would aid the Commission in resolving the motion for summary judgment.

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<sup>28</sup> See generally Docket No. UM 1967, Renewable Energy Coalition's Petition to Intervene (Jan. 29, 2019); Docket No. UM 1967, PGE's Objection to Renewable Energy Coalition's Petition to Intervene (Feb. 8, 2019); Docket No. UM 1967, Petition to Intervene Granted (Feb. 20, 2019).

### III. CONCLUSION

For all the reasons herein, Waconda Solar requests that the Commission either: 1) stay this proceeding until three weeks after the Commission issues a final order on the Petition for Declaratory Ruling; or, in the alternative, 2) extend the filing deadline for Waconda Solar's response to PGE's Second Modified Motion for Summary Judgment until three weeks after the date of the ruling on this motion. The issues raised in the declaratory ruling regarding the standards of review applied when a utility reviews an iSIS is directly linked to the issues in this proceeding because it affects an interconnection customer's right to conduct an iSIS. Thus, PGE is incorrect that issues in these two proceedings do not overlap.

Dated this 19th day of October 2021.

Respectfully submitted,

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