

**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, LLC'S  
RESPONSE TO PORTLAND  
GENERAL ELECTRIC  
COMPANY'S MOTION TO  
CLARIFY PROCEDURAL  
SCHEDULE AND TO MODIFY  
MOTION RESPONSE DATE

**I. INTRODUCTION**

Pursuant to OAR 860-001-0420 and the Administrative Law Judge's ("ALJ's") February 14, 2022 Ruling,<sup>1</sup> Waconda Solar, LLC ("Waconda Solar") respectfully files this Response to Portland General Electric Company's ("PGE's") Motion to Clarify Procedural Schedule and to Modify Motion Response Date ("Motion to Modify"). On February 4, 2022, Waconda Solar submitted a Motion for Partial Summary Judgment. In response, PGE filed its Motion to Modify.<sup>2</sup> In its Motion to Modify, PGE submitted two motions. First, PGE requested the ALJ clarify or modify the existing procedural schedule to rule that PGE is not required to respond to Waconda Solar's Motion for Partial Summary Judgment until after the Oregon Public Utility Commission (the "Commission")

---

<sup>1</sup> ALJ Ruling at 2 (Feb. 14, 2022).

<sup>2</sup> Motion to Modify (Feb. 10, 2022).

or “OPUC”) issues a decision on PGE’s Motion for Summary Judgment and a prehearing conference is held to resolve claims unresolved after the Commission rules on PGE’s Motion for Summary Judgment.<sup>3</sup> Second, PGE requests that if its first motion is denied, then the ALJ rule PGE is not required to respond to Waconda Solar’s Motion for Partial Summary Judgment until 15 days after the ALJ issues a substantive ruling denying the first motion.<sup>4</sup>

Waconda Solar objects to both requests in PGE’s Motion to Modify. Waconda Solar has agreed to an extension until March 9, 2022 for PGE to file its response to Waconda Solar’s Motion for Partial Summary Judgment.<sup>5</sup> However, Waconda Solar does not agree that PGE’s response to Waconda Solar’s Motion for Partial Summary Judgment should be delayed until after the Commission issues a decision on PGE’s Motion for Summary Judgment or until 15 days after the ALJ issues a substantive ruling denying PGE’s Motion to Modify.

PGE’s motion to clarify is inappropriate because the joint motion to modify the procedural schedule did not preclude Waconda Solar from filing its own motion for summary judgment while PGE’s Motion for Summary Judgment was pending as PGE claims. PGE’s motion to modify should be denied because: 1) cross motions for summary judgment are common practice and do not produce duplicative briefing; 2) responding to Waconda Solar’s Motion for Partial Summary Judgment would not result

---

<sup>3</sup> Motion to Modify at 1-2.

<sup>4</sup> Motion to Modify at 2.

<sup>5</sup> Waconda Solar’s Letter Responding to PGE’s Motion at 1 (Feb. 11, 2022).

in duplicative briefing because it is different and more expansive than Waconda Solar's response to PGE's Motion for Summary Judgment; 3) it is more efficient to resolve both motions for summary judgment at the same time otherwise Waconda Solar could be harmed from the delay in resolution of its Motion for Partial Summary Judgment; and 4) Waconda Solar is entitled to the final, responsive pleading addressing its request for partial summary judgment. Therefore, the Commission should deny PGE's Motion to Modify and issue a ruling that PGE is required to respond to Waconda Solar's Motion for Partial Summary Judgment by March 9, 2022.

## **II. BACKGROUND**

Waconda Solar filed its original unamended complaint on September 28, 2018, and PGE filed its answer on November 1, 2018. The parties engaged in settlement negotiations.<sup>6</sup> After settlement failed, Waconda Solar and PGE tried to reach agreement on a procedural schedule.<sup>7</sup> Initially, Waconda Solar preferred to have full discovery, hearing, and legal briefing. Then when it was clear PGE would not agree to such a schedule, Waconda Solar sought to get PGE's agreement to allow Waconda Solar to have a limited opportunity for discovery followed by both parties filing simultaneous cross

---

<sup>6</sup> PGE's Request to Cancel Mar. 7, 2019 Prehearing Conference (Mar. 5, 2019).

<sup>7</sup> Waconda Solar's Request to Cancel Prehearing Conference (May 13, 2019); Waconda Solar's Request to Reschedule Prehearing Conference (June 19, 2019); Waconda Solar's Request to Cancel Prehearing Conference (June 27, 2019).

motions for summary judgment.<sup>8</sup> Waconda Solar sought to have a well-ordered process for resolving summary judgment requests:

PGE should provide an opportunity for discovery for Waconda, prior to filing a motion for summary judgment, and expressed that Waconda's position was that the case would be processed more efficiently under such an approach, and that such an approach would allow the parties to synchronize motions for summary judgment for the Commission's consideration.<sup>9</sup>

PGE was not willing to agree to this process, including the normal approach of cross motions for summary judgment that would "synchronize motions for summary judgment for the Commission's consideration..." The parties were again unable to reach agreement.

Instead, PGE unilaterally filed its Motion for Summary Judgment.<sup>10</sup> Later, the parties once again began settlement negotiations, and the parties jointly filed 18 Joint Motions to Extend Time, effectively holding in abeyance Waconda Solar's response to PGE's Motion for Summary Judgment.<sup>11</sup> Despite PGE's refusal to agree to a coordinated process to allow a more well-ordered cross motions process, Waconda Solar intended to file its own motion for summary judgment. However, Waconda Solar did not immediately file its own motion for summary judgment because: 1) Waconda Solar

---

<sup>8</sup> Declaration of Mark Thompson in Support of Complainant's Reply in Support of Motion Seeking Leave to Amend Complaint at 1-2 (July 30, 2019).

<sup>9</sup> Declaration of Mark Thompson in Support of Complainant's Reply in Support of Motion Seeking Leave to Amend Complaint at 1-2.

<sup>10</sup> PGE Motion for Summary Judgment (July 23, 2019).

<sup>11</sup> *E.g.*, Joint Motion to Extend Time at 1 (Sept. 26, 2019).

needed to review and prepare to respond to PGE’s Motion for Summary Judgment; and 2) Waconda Solar sought to have discovery, including depositions. The parties then engaged in settlement discussions, under which it would have been inappropriate for Waconda Solar to file a motion for summary judgment.

After settlement negotiations failed again, the parties submitted a Joint Motion to Modify Procedural Schedule to “facilitate a return to litigation and the resolution of PGE’s pending Second Motion for Summary Judgment.”<sup>12</sup> Waconda Solar explicitly reserved its right to file its own motion for summary judgment or to move to file a sur-response to PGE’s reply in support of PGE’s Motion for Summary Judgment.<sup>13</sup> Waconda Solar was reconsidering its earlier decision to file its own motion for summary judgment because, *inter alia*, of the passage of time, that PGE raised additional arguments that would require higher litigation expense and risk,<sup>14</sup> and similar issues could be addressed in other Commission proceedings that could have resolved one of the two issues it would request summary judgment on. The ALJ granted the joint motion and adopted the parties’ proposed procedural schedule.<sup>15</sup>

---

<sup>12</sup> Joint Motion to Modify Procedural Schedule at 1 (Aug. 4, 2021).

<sup>13</sup> Joint Motion to Modify Procedural Schedule at 2.

<sup>14</sup> See PGE’s Second Motion for Summary Judgment at 1-2, 5-10, 51-53 (Aug. 20, 2019) *compared to* PGE’s Modified Second Motion for Summary Judgment at 3, 6, 15, 61-64 (Sept. 15, 2021) (PGE removed Waconda Solar from the interconnection queue, filed a notice of termination of its PPA, and published an independent System Impact Study process, all of which Waconda Solar did not agree with. However, each of these may require additional substantive litigation, including that PGE has argued that Waconda Solar’s Amended Complaint is moot).

<sup>15</sup> ALJ Ruling (Aug. 4, 2021).

In summary, Waconda Solar sought early on in this case to facilitate an efficient resolution through simultaneous cross motions for summary judgment. After PGE unilaterally filed its motion for summary judgment, Waconda Solar reserved its rights to file its own motion for summary judgment. Now, PGE is seeking to use its own past refusal to cooperate with Waconda Solar as a weapon to prevent the Commission from reviewing Waconda Solar's own motion for summary judgment that Waconda Solar communicated to PGE in July 2019 that Waconda Solar intended to file.

On October 5, 2021, Waconda Solar filed a Motion to Stay its response to PGE's Motion for Summary Judgment until after a ruling in Docket No. DR 57.<sup>16</sup> Resolution of the substantive issues in DR 57 would have addressed one of the two issues in Waconda Solar's Motion for Partial Summary Judgment. PGE responded objecting to Waconda Solar's Motion to Stay.<sup>17</sup> PGE argued a stay in the proceedings would "not promote judicial economy or prevent duplicative rulings in multiple dockets, and a delay of this proceeding will unduly prejudice PGE" and "result in unnecessary delay."<sup>18</sup> PGE argued it would be unduly prejudiced because "a stay of this docket will significantly delay the resolution of PGE's motion for summary judgment and will create additional unnecessary litigation expenses for PGE" and it would "[prolong] the time in which PGE would be

---

<sup>16</sup> See generally Waconda Solar's Motion to Stay or, in the Alternative, to Extend the Filing Deadline of Waconda Solar's Response to PGE's Modified Second Motion for Summary Judgment (Oct. 5, 2021).

<sup>17</sup> See generally PGE's Response to Waconda Solar's Motion to Stay (Oct. 12, 2021).

<sup>18</sup> PGE's Response to Waconda Solar's Motion to Stay at 8, 15.

obligated to pay above-market rates to Waconda if Waconda prevails on its argument that the Commission should extend its [commercial operation date (“COD”)].”<sup>19</sup>

PGE’s Motion to Modify is essentially a motion to stay or hold in abeyance PGE’s response to Waconda Solar’s Motion for Partial Summary Judgment. PGE is seeking the same type of extension Waconda Solar sought with its Motion to Stay. All of those arguments PGE made in opposition to Waconda Solar’s Motion to Stay outlined above would apply here in response to PGE’s Motion to Modify. In short, PGE seeks to hold Waconda Solar to a different and harder standard than it holds itself.

### **III. ARGUMENT ON MOTION TO “CLARIFY”**

PGE’s first motion seeks a clarification of the ALJ’s August 4, 2021 Ruling that PGE is not required to respond to Waconda Solar’s Motion for Partial Summary Judgment until after the Commission issues a decision on PGE’s Motion for Summary Judgment.<sup>20</sup> PGE argues the Commission should grant its motion in order “to enforce the procedural schedule proposed by the parties and approved by the ALJ on August 4, 2021.”<sup>21</sup> PGE claims the parties “agreed in a joint motion to modify the procedural schedule [so] that the Commission would consider and rule on PGE’s motion for summary judgment before moving forward with resolving any claims that might survive PGE’s motion.”<sup>22</sup> PGE asserts the “ALJ then approved a procedural schedule that

---

<sup>19</sup> PGE’s Response to Waconda Solar’s Motion to Stay at 17.

<sup>20</sup> Motion to Modify at 1.

<sup>21</sup> Motion to Modify at 6.

<sup>22</sup> Motion to Modify at 7.

provides for briefing and resolution of PGE’s motion for summary judgment before proceeding with resolution of any claims that may survive PGE’s motion for summary judgment.”<sup>23</sup> PGE is essentially asserting that the ALJ Ruling prevents Waconda Solar from filing its own motion for summary judgment until after the Commission resolves PGE’s Motion for Summary Judgment.

This is inappropriate and inaccurate characterization of the ALJ Ruling and the joint motion preceding the ALJ Ruling. After settlement negotiations failed, the parties filed a joint motion to modify the procedural schedule to “facilitate a return to litigation and the resolution of PGE’s pending Second Motion for Summary Judgment.”<sup>24</sup> The joint motion specifically reserved the rights for both parties to file additional motions.<sup>25</sup> Specifically, it stated “[f]or example, and *without limitation*, *Waconda Solar reserves its right to file its own motion for summary judgment* or to move to file a sur-response to PGE’s reply in support of PGE’s motion for summary judgment.”<sup>26</sup> PGE did reserve the right to oppose a motion for summary judgment,<sup>27</sup> but nowhere in the joint motion did it state Waconda Solar could not file a motion for summary judgment during resolution of PGE’s Motion for Summary Judgment. Additionally, the parties did not state that if Waconda Solar filed a motion for summary judgment while PGE’s Motion for Summary

---

<sup>23</sup> Motion to Modify at 7.

<sup>24</sup> Joint Motion to Modify Procedural Schedule at 1.

<sup>25</sup> Joint Motion to Modify Procedural Schedule at 2.

<sup>26</sup> Joint Motion to Modify Procedural Schedule at 2 n.2 (emphasis added).

<sup>27</sup> Joint Motion to Modify Procedural Schedule at 2 n.2.



Judgment was pending, then resolution of Waconda Solar’s motion would not be resolved until after resolution of PGE’s Motion for Summary Judgment.

PGE may oppose Waconda Solar’s Motion for Partial Summary Judgment, but it is inappropriate to argue that the ALJ Ruling should be “clarified” to read that: 1) Waconda Solar could not file a motion for summary judgment during resolution of PGE’s Motion for Summary Judgment; or 2) if Waconda Solar filed a motion for summary judgment while PGE’s Motion for Summary Judgment was pending, then resolution of Waconda Solar’s motion would not be resolved until resolution of PGE’s Motion for Summary Judgment.<sup>28</sup>

Thus, the Commission should deny PGE’s Motion to Modify as PGE’s request for clarification as inappropriate and inconsistent with the joint motion.

#### **IV. ARGUMENT ON MOTION TO MODIFY**

The August 4, 2021 procedural schedule does not control as explained above, and thus, the Commission should require PGE to follow Commission rules regarding the timeline to respond to substantive motions. For substantive motions (which includes a motion for summary judgment),<sup>29</sup> a party must respond to the motion within 15 days.<sup>30</sup> The Commission or ALJ can modify or waive any of the rules for good cause.<sup>31</sup>

---

<sup>28</sup> Waconda Solar is no longer willing to file joint motions with PGE in this proceeding because PGE has misconstrued and seeks inappropriate clarification of a joint motion or ruling that is contrary to the intent of the parties.

<sup>29</sup> OAR 860-001-0390(2)(a).

<sup>30</sup> OAR 860-001-0420(4).

<sup>31</sup> OAR 860-001-0000(2).

However, PGE has not demonstrated good cause to grant its motion to modify the procedural schedule. PGE has not demonstrated good cause because: 1) cross motions for summary judgment are common practice at the Commission and result in efficient resolution of issues; 2) duplicative briefing will not result as Waconda Solar's Motion for Partial Summary Judgment is different and more expansive which PGE should be required to respond to now; 3) judicial economy is served by resolving both motions now; 4) it would be unduly prejudicial to Waconda Solar if its Motion for Partial Summary Judgment cannot be considered in a timely manner merely because PGE prevented the parties from filing simultaneous cross motions for summary judgment earlier in the proceedings; and 5) PGE has not stated that it has any need related to the press of business, previously planned time off, or other reasonable business or personal grounds that would warrant more than the current two-week extension.<sup>32</sup>

**A. It is Common Practice for Parties to Submit Simultaneous Cross Motions for Summary Judgment**

PGE should be required to respond to Waconda Solar's Motion for Partial Summary Judgment before the Commission issues a ruling on PGE's Motion for Summary Judgment because it is common practice for parties to file cross motions for summary judgment. PGE argues the Commission should grant its Motion to Modify in order to avoid duplicative briefing and unnecessary effort by the Commission to review

---

<sup>32</sup> Waconda Solar is willing to consider any reasonable requests for extension of time at any point in this proceeding if PGE requests additional time related to business or personal needs.

the duplicative briefing.<sup>33</sup> However, PGE does not once cite to any OPUC dockets where the Commission delayed briefing of a motion for summary judgment because another motion for summary judgment was pending.<sup>34</sup> To the contrary, it is common practice for the Commission to review cross motions for summary judgment.

There are several examples where parties have filed cross motions for summary judgment and the Commission has addressed both motions for summary judgment. In *PGE v. Alfalfa Solar I LLC, et. al* (“Alfalfa Solar”), Alfalfa Solar,<sup>35</sup> PGE,<sup>36</sup> and intervenors<sup>37</sup> filed motions for summary judgment. The Commission reviewed all the motions for summary judgment at once and issued an order on all the motions for summary judgment.<sup>38</sup> In *Fossil Lakes Solar LLC v. PGE*, once again the parties filed cross motions for summary judgment.<sup>39</sup> The Commission reviewed all the motions for summary judgment and responses at once and issued an order on both motions.<sup>40</sup> A third example is *PGE v. Pacific Northwest Solar LLC* (“PNW Solar”). Once again, the parties

---

<sup>33</sup> Motion to Modify at 6.

<sup>34</sup> See generally Motion to Modify.

<sup>35</sup> *PGE v. Alfalfa Solar I LLC, et. al*, Docket No. UM 1931, Defendants’ Motion for Summary Judgment (Jan. 29, 2019).

<sup>36</sup> Docket No. UM 1931, PGE’s Motion for Summary Judgment (Jan. 29, 2019).

<sup>37</sup> Docket No. UM 1931, Northwest & Intermountain Power Producers Coalition, Renewable Energy Coalition, and Community Renewable Energy Association’s Motion for Summary Judgment (Jan. 29, 2019).

<sup>38</sup> Docket No. UM 1931, Order No. 19-255 (Aug. 2, 2019).

<sup>39</sup> *Fossil Lakes Solar LLC v. PGE*, Docket No. UM 2051, PGE’s Motion for Summary Judgment (May 19, 2020); Docket No. 2051, Fossil Lake Solar LLC’s Motion for Summary Judgment (May 19, 2020).

<sup>40</sup> Docket No. UM 2051, Order No. 20-340 (Oct. 12, 2020).

filed simultaneous motions for summary judgment,<sup>41</sup> and the Commission reviewed both motions before issuing a decision on both motions.<sup>42</sup> Thus, it is common practice before the Commission to file cross motions for summary judgment and for the Commission to review both motions for summary judgment before issuing a decision.

Further, it is efficient and appropriate for the Commission to entertain cross-motions for summary judgment. While one party (“Party A”) moves for judgment in their favor, an opposing party (“Party B”) moves for judgment in their favor instead. If the Commission only considers a motion in Party A’s favor but does not rule in Party A’s favor, then it is possible that nothing was resolved. The Commission would not be issuing an order in favor of Party B, because Party B did not make a request. More likely, the Commission may simply find that there is a lack of evidence to support the Party A’s motion. In contrast, if the Commission considers cross-motions and decides not to rule in Party A’s favor, then there is a greater possibility for resolution. The Commission may decline to rule in favor of Party A, but the Commission may also decide to rule in favor of Party B.

While Waconda Solar did not file its Motion for Partial Summary Judgment at the same time as PGE, that should not preclude PGE from being required to respond to Waconda Solar’s Motion for Partial Summary Judgment and should not preclude the

---

<sup>41</sup> *PGE v. Pacific Northwest Solar LLC*, Docket No. UM 1894, PGE’s Motion for Summary Judgment (Mar. 23, 2018); Docket No. UM 1894, PNW Solar’s Cross-Motion for Summary Judgment (Mar. 23, 2018).

<sup>42</sup> Docket No. UM 1894, Order No. 18-284 (Aug. 2, 2018).

Commission from reviewing both motions at the same time. There is nothing in the Oregon Rules of Civil Procedure (“ORCP”) or the Commission rules that requires parties to file motions for summary judgment at the same time.<sup>43</sup> To the contrary, ORCP 47A states

**A For claimant.** A party seeking to recover on any type of claim or to obtain a declaratory judgment *may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party*, move, with or without supporting affidavits or declarations, for a summary judgment in that party’s favor as to all or any part of any claim or defense.<sup>44</sup>

Thus, Waconda Solar has a right to file its own motion for summary judgment at any point before a hearing. Waconda Solar preferred to file simultaneous motions for summary judgment, but PGE went ahead and unilaterally filed its Motion for Summary Judgment. That should not preclude Waconda Solar from filing its own motion for summary judgment, requiring PGE to respond to Waconda Solar’s motion, and the Commission reviewing both motions for summary judgment at the same time.

PGE also argues that it should not be required to respond to Waconda Solar’s Motion for Partial Summary Judgment because there would be duplicative briefing.<sup>45</sup> This is not a persuasive argument because cross motions for summary judgment normally raise similar issues that require the parties to make similar arguments as raised in the parties’ own motion for summary judgment. For example, in *PGE v. PNW Solar*, both

---

<sup>43</sup> See generally ORCP 47; see generally OAR 860-001-0390, -0420.

<sup>44</sup> ORCP 47A (emphasis added).

<sup>45</sup> Motion to Modify at 6.

parties filed motions for summary judgment on the issue of whether PGE's standard power purchase agreement permitted PNW Solar to alter nameplate capacities of its qualifying facilities prior to construction of the facilities and to amend the executed power purchase agreements.<sup>46</sup> PGE argued such action was not permitted,<sup>47</sup> while PNW Solar argued it did have the ability to increase nameplate capacity for one project and decrease capacity for two other projects.<sup>48</sup> The issues were exactly the same even though the arguments were opposite and the parties still submitted replies to each other's motion for summary judgment.<sup>49</sup> With cross motions for summary judgment it is common to address similar issues and repeat arguments made in the motion in a reply against the other party's motion. PGE should not be precluded from responding to Waconda Solar's Motion for Partial Summary Judgment. Thus, the Commission should deny PGE's Motion to Modify and require PGE to respond to Waconda Solar's Motion for Partial Summary Judgment by March 9, 2022.

**B. Waconda Solar's Motion for Partial Summary Judgment is Different and More Expansive than Previous Filings in the Docket**

PGE also argues it should not be required to respond to Waconda Solar's Motion for Partial Summary Judgment until after the Commission resolves PGE's Motion for

---

<sup>46</sup> Docket No. UM 1894, PGE's Motion for Summary Judgment at 1; Docket No. UM 1894, PNW Solar's Cross-Motion for Summary Judgment at 1.

<sup>47</sup> Docket No. UM 1894, PGE's Motion for Summary Judgment at 1-2.

<sup>48</sup> Docket No. UM 1894, PNW Solar's Cross-Motion for Summary Judgment at 1-2.

<sup>49</sup> Docket No. UM 1894, PNW Solar's Reply to PGE's Motion for Summary Judgment (Apr. 13, 2018); Docket No. UM 1894, PGE's Reply to PNW Solar's Cross-Motion for Summary Judgment (Apr. 13, 2018).

Summary Judgment because the briefing would be duplicative and Waconda Solar's Motion for Partial Summary Judgment "reiterates two arguments that Waconda already briefed in its 73-page response to PGE's motion for summary judgment."<sup>50</sup> While Waconda Solar's Motion for Partial Summary Judgment does contain many of the same arguments as in Waconda Solar's response to PGE's Motion for Summary Judgment, these arguments are different and more expansive.

In Waconda Solar's response to PGE's Motion for Summary Judgment, Waconda Solar stated it believed PGE was required to review an independent System Impact Study ("iSIS") in a reasonable, non-discriminatory manner consistent with Good Utility Practice, contractual duty of good faith and fair dealing, and Commission rules.<sup>51</sup> However, Waconda Solar did not go into as much detail on the legal requirements for those standards of review.<sup>52</sup> In Waconda Solar's Motion for Partial Summary Judgment, Waconda Solar goes into great detail explaining why the law, Commission rules, and contractual duties require a utility to review an iSIS in a reasonable, non-discriminatory manner consistent with Good Utility Practice, the contractual duty of good faith and fair dealing, and the utility's obligation to identify system upgrades necessary to mitigate adverse system impacts caused by the interconnection of the generating facility.<sup>53</sup>

---

<sup>50</sup> Motion to Modify at 6, 9-12.

<sup>51</sup> Waconda Solar's Response to PGE's Modified Second Motion for Summary Judgment at 25 (Nov. 22, 2021).

<sup>52</sup> *See generally* Waconda Solar's Response to PGE's Modified Second Motion for Summary Judgment at 25-29.

<sup>53</sup> Waconda Solar's Motion for Partial Summary Judgment at 2-5, 24-37.

Additionally, Waconda Solar's argument on an illegal agreement was only half a page in its response to PGE's Motion for Summary Judgment,<sup>54</sup> but that analysis is much more expanded at four pages.<sup>55</sup>

In PGE's Motion for Summary Judgment and reply in support of its Motion for Summary Judgment, PGE has not stated what standard of review it believes applies to a utility's review of an iSIS and PGE has not disputed or explained its disagreement with Waconda Solar's conclusions.<sup>56</sup> Additionally, in PGE's Motion for Summary Judgment the issue of whether the Commission has authority to modify an executed power purchase agreement was only briefed for one page<sup>57</sup> while it was a little over five pages in PGE's reply.<sup>58</sup> Thus, PGE reserved its arguments for its Reply rather than Motion for Summary Judgment.

Waconda Solar's Motion for Partial Summary Judgment may contain similar issues as Waconda Solar's response to PGE's Motion for Summary Judgment, but Waconda Solar's motion is different and more expansive than its response. Just because Waconda Solar's Motion for Partial Summary Judgment raises similar issues as its responses should not excuse PGE from responding to Waconda Solar's Motion for Partial

---

<sup>54</sup> Waconda Solar's Response to PGE's Modified Second Motion for Summary Judgment at 28.

<sup>55</sup> Waconda Solar's Motion for Partial Summary Judgment at 20-23.

<sup>56</sup> *See generally* PGE's Modified Second Motion for Summary Judgment at 36-42; *see generally* PGE's Reply in Support of Modified Second Motion for Summary Judgment at 17-23 (Dec. 15, 2021).

<sup>57</sup> PGE's Modified Second Motion for Summary Judgment at 53.

<sup>58</sup> PGE's Reply in Support of Modified Second Motion for Summary Judgment at 27-33.



Summary Judgment now. Thus, the Commission should deny PGE's Motion to Modify and require PGE to respond to Waconda Solar's Motion for Partial Summary Judgment by March 9, 2022.

**C. It is More Efficient to Address Waconda Solar's Motion for Partial Summary Judgment Now**

**1. It is More Efficient to Have PGE Respond to Waconda Solar's Motion for Partial Summary Judgment Now Because the Commission Has Not Issued a Ruling on PGE's Motion for Summary Judgment and Waiting to Resolve Waconda Solar's Motion for Partial Summary Judgment Could Result in a Prolonged Delay**

PGE argues its Motion to Modify should be granted because it would ensure “just, speedy, and inexpensive resolution of issues presented” and resolution of PGE's Motion for Summary Judgment could render Waconda Solar's issues moot and result in a dismissal of the complaint.<sup>59</sup> PGE had the different perspective when Waconda Solar sought the same relief in Waconda Solar's Motion to Stay. It is very possible the Commission could deny PGE's Motion for Summary Judgment, which would not resolve any of the issues raised in the complaint. If that was the case and PGE was not required to respond to Waconda Solar's Motion for Partial Summary Judgment until after resolution of PGE's Motion for Summary Judgment, then the parties, ALJ, and Commission would have to go through the summary judgment process a second time. That would be a waste of resources and time when Waconda Solar's Motion for Partial Summary Judgment is already pending, and PGE could respond by March 9, 2022.

---

<sup>59</sup> Motion to Modify at 6-8.

In the dockets mentioned above, it took between four and a half to seven months for the Commission to issue a decision on cross motions for summary judgment.<sup>60</sup> Thus, it could take an additional seven months to resolve Waconda Solar's Motion for Partial Summary Judgment (after ruling on PGE's Motion for Summary Judgment) if PGE is not required to respond now and the Commission denies PGE's Motion for Summary Judgment or not all issues are resolved. Because there is no order yet on PGE's Motion for Summary Judgment, it is more efficient to have PGE respond to Waconda Solar's Motion for Partial Summary Judgment now and the Commission issue a decision on both motions rather than waiting for resolution of PGE's Motion for Summary Judgment.

Additionally, it should not be too burdensome for PGE to respond to Waconda Solar's Motion for Partial Summary Judgment now if, as PGE claims, "briefing [would] be duplicative because Waconda's motion for partial summary judgment reiterates two arguments that Waconda already brief in its 73-page response to PGE's motion for summary judgment."<sup>61</sup> Parties would normally do this in cross motions for summary judgment anyway. The issues raised in Waconda Solar's Motion for Partial Summary Judgment should be addressed at the same time as PGE's Motion for Summary Judgment just like typical cross motions for summary judgment.

---

<sup>60</sup> See generally Docket Nos. UM 1931, UM 2051, & UM 1894.

<sup>61</sup> Motion to Modify at 6.

**2. Granting PGE’s Motion to Modify Would Result in Duplicative Proceedings Rather Than Requiring PGE to Respond to Waconda Solar’s Motion for Partial Summary Judgment Now**

In opposition to Waconda Solar’s Motion to Stay, PGE argued a stay in the proceedings would “not promote judicial economy or prevent duplicative rulings in multiple dockets, and a delay of this proceeding will unduly prejudice PGE” and “result in unnecessary delay.”<sup>62</sup> PGE argued it would be unduly prejudiced because “a stay of this docket will significantly delay the resolution of PGE’s motion for summary judgment and will create additional unnecessary litigation expenses for PGE” and it would “[prolong] the time in which PGE would be obligated to pay above-market rates to Waconda if Waconda prevails on its argument that the Commission should extend its COD.”<sup>63</sup>

Those same arguments can be applied here because, if PGE is allowed to respond to Waconda Solar’s Motion for Partial Summary after resolution of PGE’s Motion for Summary Judgment, then it will create duplicative proceedings as the Commission might have to hear two oral arguments and issue two orders. If PGE is required to respond now, then it promotes judicial economy because it saves time and resources of all parties because the Commission could resolve both motions for summary judgment at the same time. Further, if PGE is required to respond after resolution of its Motion for Summary Judgment, then that is more time PGE could be required to pay “stale rates” if the

---

<sup>62</sup> PGE’s Response to Waconda Solar’s Motion to Stay at 8, 15.

<sup>63</sup> PGE’s Response to Waconda Solar’s Motion to Stay at 17.

Commission issues a decision in favor of Waconda Solar or it is more Waconda Solar could owe to PGE under default of its power purchase agreement. Thus, it serves judicial economy to require PGE to respond to Waconda Solar's Motion for Partial Summary Judgment by March 9, 2022 and allow the Commission to resolve both motions for summary judgment at the same time. Therefore, PGE's Motion to Modify should be denied, and PGE should be required to respond by March 9, 2022.

**D. It Would Be Unduly Prejudicial to Waconda Solar if its Motion for Partial Summary Judgment Cannot be Considered in a Timely Manner Merely Because PGE Prevented the Parties from Filing Simultaneous Cross Motions for Summary Judgment Earlier in the Proceedings**

Finally, the Commission should deny PGE's Motion to Modify because doing otherwise would be unduly prejudicial to Waconda Solar. As noted earlier, Waconda Solar sought to facilitate an opportunity for simultaneous cross motions for summary judgment very early on in this case. PGE did not agree and instead unilaterally filed its motion for summary judgment. In effect, PGE prevented Waconda Solar from filing a simultaneous cross motion for summary judgment. Waconda Solar filed after PGE, because Waconda Solar could not file at the same time as PGE when PGE did not agree on a schedule beforehand. If Waconda Solar is penalized for filing late, Waconda Solar will be unduly prejudiced. Further, the Commission will ultimately be rewarding PGE for procedural misbehavior.

In a cross motion for summary judgment situation, PGE would respond to Waconda Solar's motion and Waconda Solar would have an opportunity to reply to PGE just as PGE has had with its Motion for Summary Judgment. Waconda Solar should be

afforded the same opportunity. That is, before the Commission makes a decision on any issue addressed in both PGE's and Waconda Solar's motions for summary judgment, each party should have the opportunity to state their case at least twice (the initial filing and a reply). PGE has had this opportunity, and Waconda Solar should have this opportunity as well. To do otherwise would be unduly prejudicial.


## **V. CONCLUSION**

For all the reasons herein, Waconda Solar requests that the Commission deny PGE's Motion to Modify and rule PGE is required to respond to Waconda Solar's Motion for Partial Summary Judgment by March 9, 2022.

Dated this 17th day of February 2022.

Respectfully submitted,

Sanger Law, PC



Irion A. Sanger  
Ellie Hardwick  
Sanger Law, PC  
4031 SE Hawthorne Blvd.  
Portland, Oregon 97214  
Telephone: 503-756-7533  
Fax: 503-334-2235  
irion@sanger-law.com

Of Attorneys for Waconda Solar, LLC