MARKOWITZ HERBOLD PC

Jeffrey S. Lovinger | Lawyer
JeffreyLovinger@MarkowitzHerbold.com

December 15, 2021

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
201 High Street SE, Suite 100
Salem, Oregon 97301-3398

Re: Waconda Solar, LLC v. Portland General Electric Company
PUC Case No. UM 1971

Dear Filing Center:

Enclosed for filing today in the above-named docket is Portland General Electric Company's Reply in Support of Modified Second Motion for Summary Judgment.

Thank you for your assistance.

Very truly yours,

Jeffrey S. Lovinger

Enclosure

1224770

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1971

WACONDA SOLAR, LLC, Complainant, vs. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	**PORTLAND GENERAL ELECTRIC COMPANY'S REPLY IN SUPPORT OF MODIFIED SECOND MOTION FOR SUMMARY JUDGMENT**

Portland General Electric Company ("PGE") submits this reply in support of PGE's Modified Second Motion for Summary Judgment ("Motion"). The Commission should grant PGE's Motion because Waconda Solar LLC's ("Waconda") response demonstrates no genuine issue of material fact, and PGE is entitled to judgment as a matter of law on each of Waconda's four claims for relief.

I. INTRODUCTION

At its core, this case is about a few immaterial errors in a feasibility study that were corrected in a revised feasibility study, which was then superseded by a system impact study ("SIS"), which was then superseded by a subsequent SIS issued after a higher-queued project withdrew from the queue. Waconda's amended complaint does not challenge any of PGE's conclusions in any of its interconnection studies and Waconda does not dispute that its interconnection necessitates the system upgrades and interconnection facilities described in the second SIS.

By making immaterial and subsequently corrected errors, PGE did not relinquish its right to conduct the remaining interconnection studies. The interconnection rules provide that the utility conducts the interconnection studies unless both parties agree otherwise. PGE did not

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

agree to surrender its role in conducting the interconnection studies, and the existence of immaterial errors in early studies did not require that PGE change that position.

PGE also did not frustrate Waconda's ability to conduct an independent system impact study ("iSIS"). PGE has offered to provide system information so that Waconda can conduct an iSIS if Waconda will execute a non-disclosure agreement ("NDA") to protect the confidentiality of PGE's system information. PGE has provided Waconda with a proposed NDA but Waconda has not executed the agreement or indicated that it objects to any of the terms of the proposed NDA. PGE has not frustrated Waconda's ability to conduct an iSIS – rather, Waconda has elected not to move forward with an independent study.

Nor did PGE delay the interconnection process. PGE has not missed any deadlines under the Public Utility Commission of Oregon's (the "Commission") interconnection rules or otherwise delayed the interconnection process. There is no basis upon which to conclude that PGE should be required to extend the commercial operation date ("COD") deadline under Waconda's power purchase agreement ("PPA"). And even if there were some reason to extend the COD under the PPA, the Public Utility Regulatory Policies Act of 1978 ("PURPA") bars the Commission from modifying the terms of an executed PPA.

Finally, PGE has not discriminated against Waconda by hiring a third-party consultant to aid PGE in conducting its interconnection studies. OAR 860-082-0060(9) allows a utility to contract with a third-party consultant to complete the utility's interconnection studies. The same rule also allows a utility and an interconnection applicant to agree in writing to allow the applicant to hire a third party to conduct the interconnection studies that would otherwise be performed by the utility. A utility does not violate this rule or discriminate against an applicant simply because the utility exercises its right to hire a third party to conduct its studies but refuses

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

to agree to allow the applicant to hire a third party to conduct the studies in lieu of the utility (or the utility's consultant). The utility has the right to retain control over the interconnection studies.

Waconda's arguments in opposition to PGE's motion for summary judgment are based on its perception of what the law and the Commission's rules should require and not on what the law and those rules actually require. The Commission should reject Waconda's arguments and grant PGE summary judgment on each of Waconda's claims.

II. ARGUMENT

Waconda's arguments are based on incorrect assumptions, mischaracterizations of the facts, and misstatements of the law and should be rejected.

A. WACONDA OVERSTATES THE IMPLICATION OF GRANTING PGE'S MOTION FOR SUMMARY JUDGMENT.

Waconda overstates the implications of granting PGE's Motion. Waconda argues that PGE's view of the Commission's rules would "invite utilities' abuse of the interconnection process," by preventing interconnection applicants from "review[ing], test[ing], and disput[ing]" the interconnection studies conducted by utilities.[1] Waconda's mischaracterizations do not withstand scrutiny.

Under the Commission's rules, the utility, not the interconnection applicant, conducts the interconnection studies. As Waconda acknowledges, an interconnection applicant may obtain information concerning the utility's study conclusions by reviewing the feasibility, system impact, and facility studies and asking the utility questions about its conclusions. If the utility agrees, the interconnection applicant can hire a third-party consultant to conduct the

[1] Waconda Solar's Response to Portland Gen. Elec. Co.'s Modified Second Mot. for Summ. J. ("Waconda's Response") at 7 (Nov. 22, 2021).

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

interconnection studies.[2] In any case, the interconnection applicant can perform an independent system impact study, and the utility must then "evaluate and address" any alternative findings in that study.[3] Nothing about applying the Commission's rules in this case will have the sweeping effect of preventing future interconnection applicants from using these methods to determine whether the utility's proposed system upgrades are necessary.

As discussed in greater detail below, PGE did not agree to Waconda's consultant conducting the interconnection studies in lieu of PGE conducting those studies. Despite PGE's multiple inquiries, Waconda never pursued an independent system impact study. By deciding not to conduct an independent system impact study, Waconda has forgone its primary tool to "review, test, and dispute"[4] PGE's interconnection studies. Waconda's own confusion and indecision has prevented Waconda from conducting an independent system impact study, not any refusal by PGE to facilitate an independent study.

Waconda's response repeatedly points to allegations from other complaint proceedings, which have never been substantiated, in an effort to make it appear that there are problems with PGE's interconnection process where there has not been any determination that a problem existed. For example, Waconda cites to pleadings and testimony in Docket No. UM 2009 to suggest that Madras Solar's complaint in that case forced PGE to address an error in its system impact study and reduce its interconnection cost estimate from $300 million to $25 million.[5] However, in that case there was no error by PGE, and Waconda only cites to Madras' unproven allegations of error. As explained in detail in testimony,[6] PGE did not make a "mistake" in its

[2] OAR 860-082-0060(9).
[3] OAR 860-082-0060(7)(h).
[4] *See* Waconda's Response to PGE's Modified Second Motion for Summary Judgment ("Waconda's Response") at 8 (Nov. 22, 2021).
[5] *Id.* at 17, n.16.
[6] S*ee Madras PV1, LLC, v. Portland Gen. Elec. Co.,* Docket No. UM 2009, PGE/500, Foster-Larson/17, 21-23 (Feb. 18, 2020), available at https://edocs.puc.state.or.us/efdocs/HTB/um2009htb173813.pdf.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

original system impact study; rather, PGE subsequently revised its interpretation of Open Access Transmission Tariff (OATT) Section 3.2.2.2 regarding how a Network Resource Interconnection Service study should be conducted. PGE's expert witness testified that he agreed with PGE's decision to alter its interpretation and explained that Madras was interconnecting in an area that presents unique challenges.[7] Docket No. UM 2009 was settled and there was no Commission finding that PGE made any errors in its interconnection studies or acted improperly in any way.[8] This is just one example of many where Waconda points to unproven allegations and assertions in other proceedings in an effort to suggest that there is a problem that must be resolved in this case. The Commission should reject this tactic of pointing to unproven allegations in other complaint proceedings rather than providing evidence of the claims actually asserted in this case. The fact that interconnection applicants file complaints that do not lead to any finding of wrongdoing by PGE is not evidence of wrongdoing by PGE.

B. PGE IS ENTITLED TO SUMMARY JUDGMENT ON WACONDA'S FIRST CLAIM FOR RELIEF.

The Commission should grant PGE's motion for summary judgment against Waconda's First Claim for Relief. Waconda's first claim asserts that Waconda is entitled to relief because PGE allegedly did not provide "accurate" or "complete" information in its feasibility study, revised feasibility study, and its first system impact study.[9] Waconda's theories fail. The trivial typographical errors Waconda identifies in its response were immaterial to the substance of the studies and have since been corrected by PGE. And the studies provided the information required by the rules.

[7] *See* Docket No. UM 2009, PGE/600, Angel/70 (Feb. 18, 2020), available at https://edocs.puc.state.or.us/efdocs/HTB/um2009htb173813.pdf.
[8] *See* Docket No. UM 2009, Order No. 21-126 (Apr. 26, 2021).
[9] First Amended Complaint ("Am. Compl.") ¶¶ 22-66, 109, 110-31 (July 31, 2019).

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

1. PGE's feasibility studies contained the information required by the Commission's rules.

As described in PGE's motion, and contrary to Waconda's amended complaint, the original and revised feasibility studies "identif[ied]" potential adverse system impacts. Waconda's response does not specify any information that the feasibility studies failed to include. Instead, Waconda asserts that every feasibility study should include "a detailed analysis" of the potential adverse system impacts.[10] Waconda is mistaken. The Commission's rules require that the system impact study, not the feasibility study, "identify *and detail*" adverse system impacts.[11]

Waconda's response in support of its position is the following confused syllogism: the rules governing the facilities study also contain the verb "identify" but not the verb "detail" and thus PGE's interpretation would have the effect of limiting the level of detail in the facilities study.[12] Waconda's argument is incorrect and irrelevant. Waconda is incorrect because it ignores the numerous other provisions of OAR 860-082-0060(8)(e), which expressly require additional information in the system impact study beyond merely "identify[ing]" facilities and system upgrades.[13] It is also irrelevant. PGE has not yet performed the facilities study for this project so Waconda's hypothetical concerns about a hypothetical *facilities* study failing to contain a "reasonable and thorough analysis" are not at issue here.

---

[10] Waconda's Response at 47.

[11] OAR 860-082-0060(6)(e) ("The feasibility study must *identify* any potential adverse system impacts[.]") (emphasis added); OAR 860-082-0060(7)(e) ("The system impact study must *identify and detail* the impacts on the public utilities' . . . system . . . that would result from the interconnection[.]") (emphasis added).

[12] Waconda's Response at 47-50.

[13] *See* OAR 860-082-0060(8)(e) ("The facilities study must identify the interconnection facilities and system upgrades required to safely interconnect the small generator facility and must determine the costs for the facilities and upgrades, including equipment, engineering, procurement, and construction costs. … The public utility must also identify the electrical switching configuration of the equipment, including transformer, switchgear, meters, and other station equipment.").

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

Waconda also argues that because it "believes" the Commission's rules require more detail, a question of fact exists.[14] Waconda is incorrect. It is black-letter law that a motion for summary judgment requires a plaintiff to offer *evidence* in support of its claims.[15] Waconda's subjective beliefs and unsupported complaint allegations are not evidence and therefore are not sufficient to survive summary judgment. Because Waconda has failed to identify a single, actual deficiency in PGE's feasibility studies, its First Claim for Relief fails.

In any event, Waconda's concerns regarding the level of detail in PGE's original feasibility study were mooted by PGE's revised feasibility study. As Waconda admits in its response, Waconda asked "clarifying questions" and PGE prepared a revised study that "included more detail."[16] Waconda further admitted that the level of detail contained in the revised feasibility study was "important to meet the requirements in the Commission's rules and the Feasibility Study Agreement."[17] But the revised feasibility study identified the "same risk of backflow and the same facilities needed to address that risk as identified in the original study."[18] Accordingly, PGE issuing the revised feasibility study rendered moot any concerns with the original study.

2. PGE's feasibility studies contained immaterial errors that have since been corrected.

The Commission should also reject Waconda's argument that it is entitled to relief because of errors in the original feasibility study. The errors Waconda identified concerning the size of the project and the proposed and existing generation on the distribution line and

[14] Waconda's Response at 48-49.
[15] *Two Two v. Fujitec Am., Inc.*, 355 Or 319, 324 (2014) ("[T]he party opposing summary judgment has the burden of producing evidence on any issue 'raised in the motion' as to which the adverse party would have the burden of persuasion at trial.") (quotation marks and citation omitted).
[16] Waconda's Response at 49.
[17] *Id.*
[18] *Id.* (quoting PGE's Modified Second Motion for Summary Judgment ("PGE's Motion") at 21-22 (Sept. 15, 2021)).

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

transformer ratings were corrected in the revised feasibility study. The errors did not affect the system and facility upgrades needed or the cost of those upgrades.

Waconda does not assert that the errors affected the results of the interconnection study process or its decision to proceed with the interconnection. Instead, Waconda asserts that under different hypothetical scenarios errors in a feasibility study "could cause" a developer to abandon a project.[19] Waconda's hypothetical situations[20] are irrelevant to Waconda's claims in this case because there is no question of fact concerning whether Waconda suffered harm here.

Waconda also identifies trivial typographical errors in the original feasibility study. Waconda alleges that PGE stated an incorrect application date and an incorrect administrative rule citation in the original feasibility study, but Waconda has identified no basis for its argument that those typographical mistakes were material errors. Waconda advances no argument in its response to PGE's Motion upon which the Commission could conclude that an incorrect application date and rule citation had any impact on PGE's conclusions concerning the potential adverse system impacts caused by Waconda's interconnection or the costs to prevent those adverse system impacts. Waconda's claims in this case do not allege that the errors in question had any impact on the conclusions of any of PGE's interconnection studies concerning the interconnection facilities and system upgrades required for Waconda to safely interconnect. Finally, the immaterial errors in question were corrected by PGE in the revised feasibility study *before* the complaint was filed. Waconda is wasting the Commission's time and resources complaining about these immaterial, and subsequently corrected, typographical errors. Waconda's pursuit of this issue is symptomatic of the unreasonable positions Waconda is taking in this litigation.

[19] Waconda's Response at 52-53.
[20] *Id*. at 52-54.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

The Commission should reject Waconda's unsupported assertion that the errors identified in the feasibility studies were material errors and grant PGE summary judgment on the portion of Waconda's First Claim for Relief that alleges errors in the feasibility study process.

3. PGE's System Impact Study is complete.

Waconda has identified no question of disputed fact that precludes summary judgment on Waconda's claim that the system impact study was incomplete. Waconda's pleadings and its response to PGE's Motion identify no areas in which the system impact study is incomplete. As described in PGE's original motion: (1) these conclusory allegations are not ultimate facts sufficient to state a claim; (2) any issues with the original SIS are moot because PGE issued a revised SIS in response to a higher-queued project withdrawing; and (3) the original SIS contained 35 pages of detailed analyses which was sufficient to comply with the Commission's rules.[21]

Waconda does not respond to any of those arguments. Instead, the only argument in Waconda's response concerning the completeness of the SIS is that a genuine issue of material fact exists because Waconda "reference[d] the deficiencies in the System Impact Study" in its first amended complaint.[22] An allegation in a complaint, unsupported by any evidence, is insufficient to preclude summary judgment.[23] The Commission should deny Waconda's claim that the SIS is incomplete because Waconda has failed to establish that it is incomplete or identify any questions of disputed fact concerning its completeness.

[21] PGE's Motion at 63; *see* Am. Compl., Attachment E (System Impact Study).
[22] Waconda's Response at 3; *see also id.* at 69-71.
[23] *See Two Two*, 355 Or at 324.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

C. PGE IS ENTITLED TO SUMMARY JUDGMENT ON WACONDA'S SECOND CLAIM FOR RELIEF.

Waconda's Second Claim for Relief has two components, both of which PGE addresses below. First, Waconda alleges that PGE may not unreasonably decline to allow Waconda to hire third-party consultants to conduct PGE's interconnection studies and that PGE unreasonably refused to do so.[24] Second, Waconda alleges that PGE effectively prevented Waconda from conducting an iSIS.[25] The Commission should grant PGE summary judgment on Waconda's Second Claim for Relief because PGE has no obligation to allow an interconnection applicant to hire a third-party consultant to conduct PGE's interconnection studies and because PGE did not interfere with Waconda's right to conduct an iSIS.

1. PGE is not obligated to allow Waconda to hire a third party to conduct interconnection studies and is not required to allow Waconda to substitute a third-party consultant's interconnection analysis for PGE's analysis.

The interconnection rules in OAR 860-082-0060 create no requirement that a utility agree that the interconnection applicant may hire a third-party consultant to conduct the interconnection studies in lieu of the utility conducting those studies. Both of the Commission's rules relied on by Waconda to support Waconda's argument to the contrary—OAR 860-082-0060(8)(f) and -0060(9)—begin with the phrase, "[a] public utility and an applicant may agree[.]"[26] The best evidence of a governing body's intent is the text of the regulation itself.[27] The permissive language "may agree" does not require PGE to agree to allow Waconda to hire contractors to perform PGE's interconnection studies.

[24] *See* Am. Compl. ¶¶ 140, 146, 148.
[25] *See id.* ¶ 164.
[26] Waconda's Response at 31 (citing OAR 860-082-0060(9) and OAR 860-082-0060(8)(f)).
[27] *State v. Gaines*, 346 Or 160, 171 ("[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes.") (cleaned up).

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

The administrative record from the rulemaking process confirms the permissive nature of the rule. The Commission's order resulting from the rulemaking proceeding states that "it is appropriate to *allow* a public utility and an interconnection customer *to agree* to allow the applicant to hire third-party contractors to complete any studies required during a Tier 4 review[.]"[28] On that rulemaking record, the Commission promulgated the rule with language stating that a utility "may agree" rather than "must agree." OAR 860-082-0060(9) does not require PGE to relinquish its right to conduct its own interconnection studies to Waconda and does not require PGE's decision to meet a reasonableness test.[29] Nor do the Commission's rules require PGE to agree to allow an interconnection applicant to conduct PGE's interconnection studies as a "remedy" for mistakes in an interconnection study. The rules provide Waconda an opportunity to test, challenge, and oppose PGE's conclusions and any alleged errors in the feasibility and system impact studies by conducting an independent system impact study,[30] and Waconda has declined to do so.

Waconda contends that under OAR 860-082-0060, an interconnection applicant that "believes" it faced unspecified "challenges" during the interconnection process can unilaterally take over the interconnection study process by having its own consultant perform the interconnection studies. [31] Waconda does not cite its reading of the rule to the text of the rule, but instead to the declaration of John Lowe.[32] Mr. Lowe's declaration establishes only that *he believed* that the interconnection rules resulting from that rulemaking proceeding would provide

[28] *In the Matter of a Rulemaking to Adopt Rules Related to Small Generator Interconnection*, Docket No. AR 521, Order No. 09-196 at 4 (June 8, 2009) (emphasis added).
[29] *See* Waconda's Response at 35-40, 37 n.58.
[30] Interconnection applicants can also test and challenge PGE's conclusions by informally discussing those conclusions with PGE. Informal discussion during the interconnection study process frequently resolves misunderstandings or disagreements and can lead to PGE modifying its conclusions.
[31] *Id.* at 31 (generally citing the Declaration of John Lowe in Support of Waconda's Response ("Lowe Declaration") (Nov. 22, 2021)).
[32] *Id.*

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

"that the QF and the utility could mutually agree to allow the QF to construct interconnection facilities, subject to the reasonable approval and supervision by the utility."[33] A witness's testimony regarding legal opinions are irrelevant and improper.[34]

Regardless, the Commission already considered Mr. Lowe's opinions and beliefs in Docket No. UM 1967, the case of *Sandy River Solar LLC v. PGE*. In that case (brought by the same developer that is developing the Waconda project), Sandy River Solar asserted that PGE had violated OAR 860-082-0060 by refusing to agree that Sandy River could hire a third-party consultant to construct the required interconnection facilities in lieu of PGE constructing those facilities. PGE argued that the operative language of OAR 860-082-0060(8)(f)—which is identical to the operative language of OAR 860-082-0060(9)—did not require PGE to agree and that the rule does not involve any "reasonableness balancing test."[35] In opposition to PGE's argument, Sandy River also filed testimony from Mr. Lowe that made many of the same arguments and presented many of the same opinions as those contained in the declaration of Mr. Lowe filed by Waconda in the instant case.[36]

In *Sandy River*, the Commission concluded that Mr. Lowe's declaration did not control the meaning of the rule and did not demonstrate that the rule imposes a *reasonableness balancing test* or *reasonableness requirement* into the rule.[37] Rather, the Commission concluded that the rule creates an option, that the utility is free to choose not to agree to that option, and that

[33] Lowe Declaration ¶ 9.
[34] *Olson v. Coats*, 78 Or App 368, 370 (1986) ("A witness may not testify regarding a legal conclusion.") (citation omitted).
[35] Waconda's Response, Attachment A at 14-27 (*Sandy River Solar, LLC, v. Portland Gen. Elec. Co.*, Docket No. UM 1967, PGE's Motion for Summary Judgment at 11-24 (Feb. 27, 2019)).
[36] *See* Docket No. UM 1967, REC/100 (Testimony of John Lowe (Feb. 7, 2019)), available at https://edocs.puc.state.or.us/efdocs/HTB/um1967htb154445.pdf.
[37] Docket No. UM 1967, Order No. 19-218 at 25 (Jun. 24, 2019) ("[Mr. Lowe's] recollections do not persuade us [] that our intent was different than the text and context of OAR 860-082-0060(8)(f) indicates.")

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

the rule does not require that the utility reasonably exercise its discretion not to agree.[38] Nothing in the Lowe Declaration filed by Waconda leads to any different conclusions from those reached by the Commission in *Sandy River*. Waconda and Mr. Lowe are simply recycling arguments that were made and rejected in the *Sandy River* case. This again demonstrates that Waconda is taking unreasonable positions and wasting the time and resources of the Commission.

The Commission carefully considered the interpretation of the operative language of these rules in the *Sandy River* case and concluded, as a matter of law, that there is not a reasonableness requirement under the language and that a public utility has the right to not agree.[39] The Commission's rules provide that the *utility* conducts interconnection studies to determine what adverse impacts an interconnection will have on its system and what upgrades or facilities are required to mitigate such impacts. The two rules under discussion here—OAR 860-082-0060(8)(f) and -0060(9)—authorize the utility and interconnection applicant to agree to a modification of this "baseline" that the utility performs the interconnection studies and constructs the system upgrades. OAR 860-082-0060(8)(f) allows the utility and interconnection applicant to agree that the applicant will hire a third-party consultant to perform the interconnection studies *in lieu* of the utility performing those studies. Under OAR 860-082-0060(8)(f), neither the utility nor the applicant is required to agree to this modification of the "baseline" under the rules, which is that the utility conducts the utility's interconnection studies. And the rules don't require the

[38] *See id.* at 23 ("[T]he linguistic context of OAR 860-082-0060(8)(f) compels us to conclude that "may," as used in the rule, connotes permission and is best interpreted as giving PGE discretion to decide whether to hire a third-party contractor to facilitate the interconnection of a small generator, either on its own or in conjunction with a small generator.") and 25 ("We do not interpret OAR 860-082-0060(8)(f) as either requiring that PGE reasonably exercise its discretion to agree to, or indicating that we have the authority to direct PGE to, hire a third-party consultant to complete Sandy River's interconnection facilities and system upgrades.").
[39] *Id.* at 1, 25.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

utility or applicant to justify its decision not to agree to modify the baseline or to apply a reasonableness test to its decision not to agree to a change in roles.[40]

2. Waconda has not demonstrated that the Commission's enabling statutes require a reasonableness test before PGE can decline to agree that the applicant will conduct interconnection studies in lieu of the utility conducting the studies.

Waconda has not provided any evidence that the Commission's general enabling statutes require a utility to justify its decision to retain its role in conducting the interconnection studies as more reasonable than allowing the interconnection applicant to take over that role. Indeed, the Commission's general enabling statutes do not address the question at all. The Commission's rules establish a scheme where the utility conducts the interconnection studies. The Commission's rules allow, *but do not require*, that the parties can agree the applicant will conduct the interconnection studies in lieu of the utility conducting those studies. The Commission's detailed rules establish no obligation for the utility to agree to surrender its role as the entity that conducts the interconnection studies. The Commission has already confirmed this in the *Sandy River* case. And there is nothing in the Commission's more generalized enabling statutes that contradicts the Commission's rules.

Waconda's response opposing the motion for summary judgment asserts a number of arguments for why the Commission should find that PGE's decision not to agree to surrender its role as the entity that conducts interconnection studies is subject to a reasonableness test.[41] But

[40] *Id.* at 25.

[41] Waconda's Response at 33-44 (Waconda's response argues: (1) the correct interpretation of OAR 860-082-0060(7)(h) "is that a utility at least is required to exercise its discretion under that rule in a manner that is reasonable[;]" (2) if the Commission disagrees with Waconda's interpretation, it is obligated under ORS 756.040 to initiate a rulemaking proceeding, and it would be a dereliction of the Commission's duty if the Commission declined to do so; (3) PGE discriminated against Waconda under ORS 757.325 by "reserving *all* of its discretion with respect to interconnections[;]"(4) the Commission did not decide in *Sandy River* that the Commission's enabling statutes do not require a utility to exercise its discretion reasonably or, alternatively, that *Sandy River* should be overruled; (5) PGE did not argue that it acted reasonably; (6) the Commission should decide in this case whether a reasonableness standard applies because it will take the Commission too long to address that issue in Docket No. UM 2000 or

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

none of those arguments further Waconda's blanket assertion that the Commission should impose a reasonableness requirement on a utility's decision whether to allow an interconnection applicant to hire third-party consultants to complete the utility's interconnection studies. As a result, the Commission should deny Waconda's Second Claim for Relief because Waconda has failed to demonstrate that the Commission's general enabling statutes, rules, and prior decisions dictate that a reasonableness requirement should be imposed in OAR 860-082-0060(9). It is clear from the plain language of OAR 860-082-0060(9) that a utility and an applicant "may agree" to allow the applicant to hire a third party to complete the interconnection studies, but there is no requirement that the utility *must* agree. As the Commission has previously noted, "the bar is high to apply [the Commission's] general obligations to circumstances in which [the Commission has] addressed a utility's obligations more directly in specific rules."[42] Waconda has failed to meet that high bar. Waconda is simply arguing that the Commission should ignore the clear holding in Order 19-218 from the *Sandy River* case (that the "may agree" language of the rule does not require that PGE reasonably exercise its discretion to agree).[43]

(a) The Commission should not overrule *Sandy River*.

The Commission should not overrule *Sandy River*. In *Sandy River*, the Commission correctly determined that OAR 860-082-0060(8)(f) does not contain a latent reasonableness test that requires a utility to accede to any request from an interconnection applicant to construct the interconnection facilities itself if the applicant can show that its request is more reasonable than the utility's denial.[44] The rule from *Sandy River* makes good sense. The interconnection studies are designed to protect the utility's transmission and distribution systems from adverse system

Docket No. UM 2111; and (7) the Commission should impose a reasonableness requirement because PGE has made mistakes in other interconnection studies) (emphasis in original).

[42] Order No. 19-218 at 25.

[43] *Id.*

[44] *See id.*

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

impacts. By extension, the studies protect utility customers from service degradation that would result from these adverse system impacts. The utility owns its system and the utility will own any system upgrades or interconnection facilities identified and constructed through the interconnection process. Because the utility and its customers will be directly affected by, and ultimately own, the interconnection facilities and system upgrades, and to ensure standardization across its system, it makes sense that the utility should perform the interconnection studies and construct the interconnection facilities itself. Adopting Waconda's contrary rule would effectively put the interconnection applicant in charge of the interconnection process even when the utility does not agree with such a change in roles. Such a rule would risk adverse system impacts and service degradation because the interconnection applicant's primary incentive is to decrease the costs of the interconnection. The interconnection applicant does not share PGE's obligation to serve its customers, does not share the PGE's interest in a standardized approach across its system, and is not obligated to maintain a safe and reliable transmission and distribution system.

Further, the rules already contain a mechanism for the interconnection applicant to scrutinize the utility's studies: the independent system impact study. Waconda argues that the Commission's decision in *Sandy River* made the option to conduct an iSIS "null" because *Sandy River* permits a utility to reject the alternative findings in an iSIS without "substantively review[ing]" the iSIS.[45] *Sandy River* said no such thing. *Sandy River* did not discuss independent system impact studies at all. OAR 860-082-0060(7)(h) explicitly requires the utility to "evaluate and address" the alternative findings in any iSIS. In this case, PGE repeatedly inquired whether Waconda was interested in performing an iSIS and repeatedly agreed to

[45] Waconda's Response at 39.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

evaluate and address any iSIS that Waconda provided in accordance with the Commission's rules.[46] It is premature and hypothetical for Waconda to argue that PGE has improperly rejected Waconda's alternative findings from an iSIS because Waconda has not conducted an iSIS or provided alternative findings to PGE. Accordingly, *Sandy River* was correctly decided, and this case presents no basis for overruling it.

(b) PGE's immaterial errors in the feasibility studies do not modify PGE's obligations under OAR 860-082-0060(7)(h).

Waconda argues that PGE violated the Commission's rules in part because PGE did not allow Waconda to hire independent contractors to perform interconnection studies when Waconda requested to do so to (1) gain insight into the interconnection process and (2) gain confidence in PGE's studies.[47] Nothing in OAR 860-082-0069(7)(h) states that a utility must agree to allow an applicant to conduct the interconnection studies in lieu of the utility if the utility has made errors in prior studies. Further, as explained in PGE's Motion, the errors in prior PGE's feasibility studies of the Waconda interconnection were immaterial and corrected before Waconda filed its complaint.

3. PGE did not interfere with Waconda's ability to conduct an independent system impact study.

The other aspect of Waconda's Second Claim for Relief alleges that PGE interfered with Waconda's right to conduct an iSIS. The Commission should grant summary judgment to PGE on this claim because the facts, when viewed in light most favorable to Waconda, establish no

[46] PGE's Motion at 13-15; *see e.g.*, Declaration of Rebecca Dodd in Support of PGE's Motion ("Dodd Decl.") ¶ 2 and Ex. 1 at 2 (June 23, 2021, letter from counsel for PGE, Jeffrey Lovinger, to counsel for Waconda, Irion Sanger, at 2) (Sept. 15, 2021) ("As recently as last week, on June 15, 2021, I inquired whether Waconda actually wants to conduct an iSIS and you indicated that you did not know and would have to discuss the question with Waconda."), ¶ 4 and Ex. 3 at 5-8 (discussing PGE's inquires as to whether Waconda sought to conduct an iSIS, reiterating PGE's willingness to provide reasonable system information and site access, and providing a proposed NDA), ¶ 6 and Ex. 5 at 2 (reiterating PGE's willingness to provide information and access if Waconda executes an NDA).
[47] Waconda's Response at 18-19.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

right to relief. PGE has no role in "allowing"[48] Waconda to conduct an iSIS beyond providing system information and access. PGE has repeatedly offered to provide system information and access once Waconda executes an NDA to protect the confidentiality of PGE's system information.[49] PGE has provided Waconda with a proposed NDA.[50] Waconda has not signed the NDA or indicated that it has any concerns with the language of the NDA. Nonetheless, Waconda argues that PGE prevented Waconda from conducting an iSIS because PGE refused to agree to apply a standard not required under the Commission's rules when it reviews any alternative findings in the iSIS.[51]

The Commission should grant PGE summary judgment on this aspect of Waconda's claims because OAR 860-082-0060(7)(h) requires only that a utility evaluate and address any alternative findings, and PGE has repeatedly told Waconda that it will do so if Waconda conducts an iSIS. PGE has indicated that it will evaluate and address any alternative findings in a Waconda iSIS consistent with applicable laws and regulations.[52] PGE has indicated that it is not taking the position that it can evaluate a Waconda iSIS in bad faith, unreasonably, or inconsistent with generally applicable principles of good utility practice.[53] PGE cannot be in violation of OAR 860-082-0060(7)(h) for refusing to agree to a standard not articulated in that rule.

---

[48] *Id.* at 21.
[49] Dodd Decl. Ex. 1 at 1-3 (June 23, 2021, letter from PGE to Waconda at 1-3); Ex. 3 at 1-2 (July 30, 2021, letter from PGE to Waconda at 1-2); Ex. 5 at 1-2 (Aug. 20, 2021, letter from PGE to Waconda at 1-2); Ex. 7 at 1-2 (Sept. 14, 2021, letter from PGE to Waconda at 1-2).
[50] Dodd Decl. Ex. 3 at 8 (July 30, 2021, letter from PGE to Waconda at 8); *see also id.* Ex. 5 at 2 (August 20, 2021, letter from PGE to Waconda at 2).
[51] Waconda's Response at 25-29.
[52] *See e.g.,* Dodd Decl. Ex. 7 at 3 (September 14, 2021 letter from PGE to Waconda at 3) ("PGE will evaluate any iSIS it receives consistent with the requirements of all applicable Commission rules and statutes.")
[53] *Id.* ("As PGE has explained in prior letter, PGE is not willing to agree to be bound by specific standards of review, or definitions, not stated in the Commission's rules … This does not mean that PGE intends to operate in bad faith or in an unreasonable fashion or inconsistent with general principles of good utility practice.")

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

OAR 860-082-0060(7)(h) requires a utility to evaluate and address any alternative findings contained in an iSIS if an interconnection applicant provides the utility with an iSIS. Waconda has not provided PGE with an iSIS. Waconda alleged that PGE (1) refused to agree to allow Waconda to hire a third-party consultant to conduct an iSIS and (2) refused to cooperate with Waconda by providing information and access necessary for Waconda to complete an iSIS.[54] Both claims fail.

(a) PGE did not refuse to agree to Waconda hiring a third-party consultant to perform an iSIS.

Waconda has offered no evidence to support the first of those two claims. Under the rule, there is no role for PGE to agree or disagree that Waconda can hire a third-party to conduct an iSIS. It is Waconda's decision whether it will hire a third-party consultant to conduct an iSIS. Waconda offers no legal basis or factual support for its claim that PGE impeded the iSIS process by failing to allow Waconda to hire a third-party contractor to perform Waconda's iSIS. As a result, PGE is entitled to summary judgment on that claim.

(b) PGE did not prevent Waconda from performing an iSIS; after Waconda filed its complaint, PGE and Waconda began settlement negotiations.

As to the second claim, Waconda argues that PGE prevented Waconda from conducting an iSIS by failing to cooperate. Specifically, Waconda argues that PGE failed to cooperate when it failed to respond to Waconda's August 24, 2018, request that PGE provide its "system configuration" so that Waconda can conduct an iSIS.[55] But Waconda's truncated version of the parties' dealings ignores an intervening three-year period in which Waconda equivocated on

[54] Am. Compl. ¶¶ 147, 164.
[55] Waconda's Response at 18 (citing PGE's Answer to Waconda's First Amended Complaint ("Answer"), Ex. I at 1 (August 24, 2018, letter from Waconda to PGE at 1) (Aug. 1, 2019)).

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

whether it intended to perform an iSIS and then affirmatively declined to perform an iSIS under the Commission's rules.

On August 24, 2018, Waconda sent PGE a letter asking PGE to agree to allow Waconda to conduct the remaining interconnection studies in lieu of PGE conducting those studies.[56] The August 24, 2018, letter was also the first time that Waconda clearly indicated that it intended to conduct an iSIS under OAR 860-082-0060(7)(h).[57] PGE responded to the August 24 letter on September 7, 2018.[58] PGE indicated that it did not agree that Waconda could hire a consultant to conduct the remaining interconnection studies in lieu of PGE conducting those studies.[59] PGE did not address Waconda's request for PGE to provide its system configuration.[60] Waconda filed its original complaint in this case three weeks later on September 28, 2018.[61]

After Waconda filed its complaint, the parties began settlement discussions. PGE has not, as Waconda suggests, refused since August 24, 2018, to provide specific system information and access for the purpose of Waconda performing an iSIS.[62] PGE has informed Waconda that PGE is willing to provide system information and system access if Waconda executes an NDA.[63] Waconda has declined to do so. In the three years since it filed its complaint, Waconda has sought to negotiate a settlement agreement with PGE, but Waconda has not taken advantage of the opportunity to simply execute an NDA and move forward with an iSIS. As Waconda

[56] Answer, Ex. I at 1 (August 24, 2018, letter from Waconda to PGE at 1).
[57] *Id.* Waconda had asked to complete "the remaining studies as allowed under 860-082-0060" as early as July 27, 2018 (*see* Answer Ex. E at 1), but PGE understood Waconda to be requesting to be allowed to conduct the SIS and feasibility study pursuant to OAR 860-082-0060(9), because Waconda did not need PGE's permission to conduct an iSIS under OAR 860-082-0060(7)(h).
[58] Answer Ex. J (Sep. 7, 2018, letter from PGE to Waconda).
[59] *Id.*
[60] *Id.*
[61] Complaint at 23 (Sep. 28, 2018).
[62] *See* Dodd Decl. Ex. 1 at 2 (Jun. 23, 2021, letter from PGE to Waconda) ("Since at least 2019, counsel for PGE has repeatedly asked counsel for Waconda whether Waconda seeks to conduct an iSIS and counsel for Waconda has responded that Waconda has not determined whether it will actually conduct an iSIS.").
[63] *See e.g.,* Dodd Decl. Ex. 3 at 8 (July 30, 2021, letter from PGE to Waconda at 8).

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

acknowledged on July 8, 2021: (1) the parties had engaged in settlement discussions since Waconda filed the complaint concerning Waconda's request for information to perform an iSIS and (2) Waconda wanted to conduct an iSIS, but only on the terms it proposed in its settlement offer.[64] Put another way, for three years after filing its complaint Waconda did not pursue an independent system impact study *under the Commission's rules*; it sought instead to perform an independent system impact study pursuant to a *separate* proposed settlement agreement on which the parties ultimately failed to reach agreement. During those settlement negotiations, PGE asked Waconda if it was interested in pursuing an iSIS outside of the settlement process and under the Commission's rules and Waconda was non-committal.

(c) After settlement negotiations fell through, despite PGE's repeated inquiries, Waconda declined to move forward with the iSIS by signing the necessary NDA.

After the settlement negotiations fell through, PGE repeatedly inquired whether Waconda was interested in performing an iSIS under the Commission's rules. As the exchange of letters between PGE and Waconda from June 23, 2021 to September 14, 2021, objectively demonstrate, PGE is willing to provide system information and system access if Waconda signs an NDA, but Waconda has continually declined to do so.[65] On August 20, 2021, PGE wrote to Waconda: "If Waconda conducts an iSIS and provides the results to PGE, then PGE will evaluate and address the alternative findings of the iSIS consistent with applicable law and regulations."[66] In contrast, Waconda has insisted that PGE agree it will review any iSIS applying a standard of review which the parties have not agreed to and which is not stated in OAR 860-082-0060(7)(h). Specifically, Waconda insists that before it will conduct an iSIS, PGE must agree that its

[64] Dodd Decl. Ex. 2 (Jul. 8, 2021, letter from Waconda to PGE).
[65] Dodd Decl. Ex 1-7 (letters and emails between PGE and Waconda from June 23, 2021, to September 14, 2021).
[66] Dodd Decl. Ex 5 at 2 (Aug. 20, 2021, letter from PGE to Waconda at 2.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

evaluation of the iSIS will be reasonable, conducted in good faith, and consistent with the defined term "Good Utility Practice."[67] PGE responded:

> PGE is not willing to agree to be bound by specific standards of review, or definitions, not stated in the Commission's rules unless such standards are part of a comprehensive settlement of Waconda's complaint in Docket No. UM 1971. This does not mean that PGE intends to operate in bad faith or in an unreasonable fashion or inconsistent with general principles of good utility practice. Rather, it means that PGE will evaluate any iSIS it receives consistent with the requirements of all applicable Commission rules and statutes. As with any requirement of a Commission rule that is not subject to an explicit standard, the Commission will need to decide what standard it will apply if the Commission is required to determine whether PGE has complied with the requirements of ORS 860-082-0060(7)(h).[68]

Resolving Waconda's Second Claim for Relief centers on what OAR 860-082-0060(7)(h) means. And that regulation states that *if presented with an iSIS*, PGE must evaluate and address any alternative findings. PGE was not a barrier to Waconda performing an iSIS – the undisputed evidence in the record establishes that PGE offered to provide system information and access so that Waconda can complete an iSIS, asked Waconda what information it needed, and asked Waconda to sign an NDA, which Waconda has declined to do.[69]

OAR 860-082-0060(7)(h) does not impose any obligation on PGE to enter into an agreement, before an iSIS is conducted, establishing the standard of review that PGE will use when it reviews any alternative findings in the iSIS. If Waconda wants to conduct an iSIS, it should do so. If it conducts an iSIS, then PGE will have an obligation, under OAR 860-082-0060(7)(h), to evaluate and address any alternative findings in the iSIS. If Waconda believes that PGE's evaluation is inadequate and inconsistent with the requirements of rule, statute, or contract—either because it is allegedly unreasonable or inconsistent with good faith or good

[67] Dodd Decl. Ex 6 at 2 (Aug. 25, 2021, letter from Waconda to PGE at 2).
[68] Dodd Decl. Ex. 7 at 3 (Sept. 14, 2021, letter from PGE to Waconda at 3).
[69] *Id.*

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

utility practice—then Waconda is free to file a complaint at that time and to ask the Commission to find that PGE has violated some duty. At this stage, Waconda speculates that it will perform an iSIS and that PGE will reject some alternative finding in the iSIS in bad faith, in an unreasonable manner, or in a manner that is inconsistent with good utility practice. Such speculation by Waconda is not a valid basis to assert that PGE has violated the rule. The Commission should reject Waconda's arguments based on this entirely speculative future dispute.

Further, if Waconda is correct that its favored standards of review apply, then the standards will apply regardless of whether PGE agrees to them ahead of time. Waconda has manufactured a dispute to justify its refusal to proceed with an iSIS and is attempting to blame PGE for Waconda's own decision not to proceed.

There is no evidence in the record to support Waconda's assertion that PGE has placed any conditions on Waconda's ability to conduct an iSIS if Waconda identifies the information it needs and executes an NDA.[70] PGE has agreed to review Waconda's iSIS in accordance with the Commission's rules.[71] Waconda's attempt to place the blame on PGE by arguing that PGE, not Waconda, has impeded the interconnection process by placing conditions on Waconda's performance of an iSIS is false and should be rejected.

D. PGE IS ENTITLED TO SUMMARY JUDGMENT ON WACONDA'S THIRD CLAIM FOR RELIEF BECAUSE PGE DID NOT MISS INTERCONNECTION DEADLINES.

Waconda has offered no evidence to create a question of fact that precludes summary judgment on Waconda's Third Claim for Relief. The evidence, when viewed in the light most

[70] Waconda's Response at 27 (Waconda argues that "PGE has conditioned [its] agreement to Waconda Solar conducting the independent System Impact Study upon Waconda Solar dropping its request that PGE review the independent System Impact Study in a reasonable, non-discriminatory manner consistent with Commission rules and its contractual duties."); Dodd Decl. Exs. 1, 3, 5, 7 (letters from PGE to Waconda).
[71] Dodd Decl. Ex. 7 at 2 (September 14, 2021, letter from PGE to Waconda at 2).

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

favorable to Waconda, demonstrates that PGE met all interconnection deadlines, answered Waconda's questions in a reasonable time frame, and that Waconda did not proceed with the interconnection. PGE is entitled to summary judgment on Waconda's Third Claim.

1. PGE met all interconnection deadlines, and it responded to Waconda's request for corrections to PGE's studies in a timely manner.

Waconda has offered no evidence that demonstrates any question of fact exists which precludes summary judgment on Waconda's claim that PGE missed interconnection deadlines and failed to respond to Waconda's questions in a timely manner.

In its Motion, PGE carefully explained how it has met each of the deadlines established by the Commission's interconnection rules.[72] PGE also explained how it responded to Waconda's questions regarding the feasibility study results in a reasonable period of time.[73] In its response, Waconda does not dispute that PGE met the deadlines established by the rules. Instead, Waconda argues that PGE should have responded to Waconda's questions in less than 15 days. But as explained by PGE's Motion, there is no deadline established by the rules requiring PGE to respond to questions within 15 days (or within any other period), and PGE responded to Waconda's questions within a reasonable period of time.[74]

On July 12, 2018, Waconda sent PGE an email asking eight questions about the facility study results and making two additional information requests.[75] The rules establish no deadline for a response to such questions and a response for additional information, but PGE responded within 11 business days.[76] Considering that PGE was processing many pending interconnection requests and considering that the rules typically allow the utility 60 business days to conduct

[72] PGE's Motion at 43-48 (detailing every deadline in the process and how PGE timely met each deadline).
[73] *Id*. at 48-49.
[74] *Id.*
[75] Answer ¶ 36 and Ex. D (Jul. 12, 2018 email from Waconda to PGE).
[76] Am. Compl. ¶ 44; Answer ¶ 44 and Ex. F (July 27, 2018 email from PGE to Waconda).

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

studies and provide results, there is no basis to conclude that it was unreasonable for PGE to respond to Waconda's July 12 email within 11 business days. Waconda cites no authority to support its contention that 11 business days (or 15 calendar days) is an unreasonable time within which to respond to an interconnection applicant's questions and requests for additional information.

As demonstrated in Section II.B.2, the inaccuracies in the feasibility study and revised feasibility study were immaterial. It is important to note Waconda does not claim that PGE's conclusions concerning the interconnection facilities and system upgrades necessary for Waconda to safely interconnect to PGE's system were unreasonable. Thus, any immaterial inaccuracies in the feasibility studies, which have since been superseded by a system impact study, are not a reasonable basis for the Commission to conclude that PGE failed to timely meet interconnection deadlines.

Although Waconda alleges that PGE failed to meet interconnection deadlines, Waconda does not allege in its amended complaint that the dates PGE provided the feasibility study and system impact study exceeded the deadlines established in the Commission's rules. The Commission can and should grant PGE summary judgment on Waconda's Third Claim on that basis alone.

2. Waconda created its own timing dilemma and is itself responsible for delay in the interconnection process.

The Commission should not grant the Third Claim because Waconda created its own timing dilemma by selecting a COD without the information it needed to make an informed decision about the COD. Waconda argues that questions of fact preclude resolution of this

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

argument on summary judgment,[77] but even viewing the facts in the light most favorable to Waconda, its claim fails.

To begin with, resolution of this issue is not necessary to dismiss the third claim for relief. As discussed above, PGE has not missed any interconnection deadlines and PGE therefore is not responsible for delays. There is no basis to extend the COD, even if Waconda had not created its own timing dilemma by selecting an overly aggressive COD. In any event, Waconda admits: (1) Waconda chose its own COD without input from PGE;[78] (2) Waconda selected the February 1, 2020, COD in its May 21, 2018, power purchase agreement[79] before PGE completed Waconda's feasibility study on July 10, 2018;[80] (3) PGE estimated in the July 10, 2018, feasibility study that construction of the facilities would take eighteen months from the date of execution of an interconnection agreement;[81] (4) PGE made no representations to Waconda about how long it would take PGE to construct the facilities and system upgrades necessary complete Waconda's interconnection before July 10, 2018;[82] and (5) Waconda guessed how long its interconnection would take based on an average Waconda calculated from construction estimates contained in publicly-available system impact studies for other projects.[83]

Waconda applied to interconnect its facility on March 20, 2018.[84] Waconda executed its power purchase agreement on May 21, 2018.[85] In that PPA, Waconda selected a COD of February 1, 2020.[86] Waconda could have selected a COD up to three years after execution, but

[77] Waconda's Response at 55-56.
[78] Declaration of Troy Snyder in Support of Waconda's Response ("Snyder Decl.") ¶¶ 3-5 (Nov. 22, 2021).
[79] Am. Compl. ¶¶ 19-20; Answer ¶¶ 19-20.
[80] *Id.* ¶ 22.
[81] *Id.* Attachment B at 6 (July 10, 2018, Feasibility Study at 6).
[82] Snyder Decl. ¶¶ 3-5; Am. Compl. Attachment B at 6 (Feasibility Study at 6).
[83] Snyder Decl. ¶ 3 ("I relied on the following [system impact] studies and estimated the average construction timeline was 12 months. . . . I estimated it would take around 9 months to complete the interconnection studies with PGE.").
[84] Am. Compl. ¶ 10; Answer ¶ 10.
[85] Am. Compl. ¶ 19; Answer ¶ 19.
[86] Am. Compl. ¶ 20; Answer ¶ 20.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

instead selected an aggressive COD of 20 months after execution.[87] In selecting this aggressive COD, Waconda "estimated" that it would take nine months to complete the interconnection study process and 12 months to construct the requisite interconnection facilities.[88] PGE is not responsible for Waconda's poor guesswork and aggressive business decisions.

When Waconda selected its aggressive COD based on these estimates, Waconda had not yet received the feasibility study or had any indication of what facilities and system upgrades were necessary to interconnect. On July 10, 2018, PGE provided Waconda the feasibility study.[89] That study estimated an 18-month timeline to construct the anticipated facilities.[90] That 18-month construction timeline meant that Waconda would have missed its COD by at least six months regardless of any delays in the interconnection study process. Recall that Waconda has never contested the conclusions of the interconnection study process or the estimated timeline to construct the requisite interconnection facilities and system upgrades.

Waconda's imprudent selection of an aggressive COD caused its inability to meet the COD, not any error or delay in the interconnection study process. Consequently, PGE is entitled to summary judgment.

3. The Commission lacks authority to grant the relief Waconda seeks.

Even if PGE had contributed to causing Waconda's failure to meet its COD (and it did not), there is no legal basis for the Commission to grant Waconda an extension of the COD. As PGE detailed in its Motion, the Commission lacks the authority to order a change in the terms of an executed PURPA PPA.[91] In its response, Waconda argues that the Commission can modify

[87] PGE's Motion at 51.
[88] Snyder Decl. ¶ 3.
[89] Am. Compl. ¶ 22 and Attachment B (July 10, 2018, Feasibility Study); Answer ¶ 22 and Ex. B (July 10, 2018 email from PGE to Waconda providing Feasibility Study).
[90] Am. Compl., Attachment B at 6 (Feasibility Study at 6).
[91] PGE's Motion at 53.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

an executed PPA. Waconda asserts that the Federal Energy Regulation Commission's ("FERC") decision in *West Penn Power Company* allows the Commission to alter the terms of the PPA.[92] This is incorrect. In *West Penn*, FERC did not, as Waconda argues, recognize a state commission's authority to alter a PPA. FERC decided only that a claim concerning the PPA had already been litigated and refused to reconsider it:

> West Penn's complaints about the specific actions taken by the Pennsylvania Commission regarding the Purchase Agreement already have been fully litigated in another forum. We will not entertain an attempt to relitigate before this Commission matters that have been settled by the Pennsylvania courts, whose determinations the United States Supreme Court also declined to disturb.[93]

FERC's resolution of West Penn's claim on procedural grounds provides no authority to resolve Waconda's claim for amendment of the PPA on the merits.

Waconda also argues that, based on the Commission's decision in *Blue Marmot*, the Commission could decide that PGE has a legally enforceable obligation to purchase Waconda's power and order PGE to do so "under terms that the Commission believes are necessary and appropriate under PURPA and its own enabling statutes to protect qualifying facilities' rights."[94] Waconda is wrong. *Blue Marmot* established that a QF is bound by the COD it selects when establishing a legally enforceable obligation ("LEO").[95] Further, in this case the parties entered into a fully executed PPA, so Waconda's obligations are established by written contract, not by the separate concept of a LEO. There is no authority for the proposition that the Commission

---

[92] Waconda's Response at 61 ("FERC has recognized state commissions' ability to do so under circumstances such as this, where delay from litigation makes specific milestones in the Power Purchase Agreement impractical." (citing *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995)).
[93] *West Penn*, 71 FERC ¶ 61,494.
[94] Waconda's Response at 60-61.
[95] *See Blue Marmot V LLC, et al., v. Portland Gen. Elec. Co.*, Docket No. UM 1829, Order No. 19-322 at 9 (Sept. 30, 2019) (noting that a legally enforceable obligations exists when a qualifying facility signs a final draft of an executable contract that includes a scheduled COD thereby obligating itself to provide power or be subject to penalty for failing to deliver energy on the scheduled COD).

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

can modify a fully executed PPA by declaring that the parties' rights are controlled by an implied LEO with terms different from those in the parties' written PPA. The Commission should reject this baseless claim.

(a) General contract law principles do not permit the Commission to alter the terms of the PPA.

The Commission should also reject Waconda's arguments that the Commission has authority to order reformation of the PPA under general principles of unconscionability, impracticality, and the invalidity of illegal contract terms.[96]

As to unconscionability, Waconda argues only that courts have invalidated unconscionable terms in contracts other than PPAs.[97] Waconda does not argue that any of the terms of its Commission-approved standard form PPA are unconscionable or impractical.

Waconda suggests that "PGE's terms could constitute an illegal agreement" because the terms on which PGE will agree to allow Waconda to conduct an iSIS—requiring Waconda to drop its request that PGE evaluate the iSIS results reasonably and under principles of good utility practice—violates the Commission's rules.[98] But PGE has placed no such "term" on Waconda's right to conduct an iSIS. PGE has expressly informed Waconda that PGE is not taking the position it can or will evaluate an iSIS in bad faith, unreasonably, or inconsistent with generally applicable principles of good utility practice and PGE has stated that it intends to evaluate any iSIS consistent with the requirements of rules and law.[99] PGE has not required terms that constitute an "illegal agreement." Rather, Waconda has refused to proceed unless PGE agrees to standards not enunciated in OAR 860-082-0060(7)(h).

[96] Waconda's Response at 28, 63.
[97] *Id.* at 63.
[98] *Id.* at 28.
[99] Dodd Decl. Ex. 7 at 3 (September 14, 2021, letter from PGE to Waconda at 3).

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

Waconda also argues that the Commission should grant the requested relief because "it would put form over substance" to find that the Commission cannot extend the COD when it does have authority to order PGE to enter into a new PPA that begins on the day after the current termination date and "achieve[] exactly the same result."[100] Extending the COD would not achieve the same result as ordering PGE to enter into a new PPA because the avoided cost rates are significantly lower now than they were in May 2018 when Waconda executed the PPA. Requiring PGE to pay to Waconda the now-stale rates established in a soon-to-be-terminated PPA would not amount to putting form over substance. If the PPA is terminated, Waconda is free to execute a new PPA with current avoided cost rates, but it may not execute a new PPA at May 2018 prices.

Waconda's argument that the Commission's general authority to enforce contract provisions and Oregon contract law principles providing courts authority to invalidate unconscionable contracts provides the Commission jurisdiction to extend the COD and termination date[101] also finds no support in the law. This argument fails for two reasons. First, the PPA is not unconscionable as to Waconda.[102] To the extent that Waconda argues the COD in the PPA is unconscionable, that is a term that Waconda, not PGE, selected.[103] The PPA permitted Waconda to select a COD of its choosing within three years of execution, and then Waconda had the burden of meeting that COD. As the Commission is aware, PGE relies on anticipated power deliveries from QFs when engaging in resource planning and the PPAs permit

[100] Waconda's Response at 61.
[101] *Id.* at 63-64.
[102] *Hatkoff v. Portland Adventist Med. Ctr.*, 252 Or App 210, 222 (2012) (holding that 90-day deadline to file claim was not unconscionable because it did not "deprive[] a party of the reasonable opportunity to vindicate his or her rights.").
[103] *See Sprague v. Quality Rests. Nw., Inc.*, 213 Or App 521, 525 (2007) (noting that the primary focus in the unconscionability inquiry is whether there is substantial disparity in bargaining power combined with terms that are unreasonably favorable to the party with greater power).

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

a QF to lock in fixed prices based on the promise of timely power deliveries.[104] There is nothing unconscionable about having strict timelines in a contract.[105] Second, the doctrine of unconscionability applies solely to contract terms, not to contract performance.[106] Here, Waconda has not identified anything unconscionable about the PPA's terms, it merely argues that in performing under the PPA, PGE acted unreasonably.

In addition to the Commission's lack of authority, each of Waconda's arguments that the Commission can and should modify the PPA are based on the false premise that Waconda is entitled to relief because PGE caused Waconda's failure to meet its COD. Thus, the cases Waconda cites to demonstrate that utilities have agreed to extend the COD in a PPA when the utility causes a delay in the interconnection process do not (1) support Waconda's contention that the Commission has authority to order an extension of the COD or (2) require or even suggest that PGE should, on its own volition, agree to do so.

The Commission should reject Waconda's request for an order that modifies the PPA because the Commission lacks the authority to do so and, even if it had that authority, Waconda failed to establish PGE's conduct provides a reasonable basis to extend the COD and termination date.

---

[104] *See, Fossil Lake Solar, LLC v. Portland Gen. Electr. Co*, Docket No. UM 2051, Order No. 20-340 at 14 (Oct. 12, 2020) (discussing that the utility should be able to rely on capacity when promised and that this is an element of the bargain under a PPA).

[105] *See Best v. U.S. Nat'l Bank of Or.*, 303 Or 557, 560 (1987) (unconscionability determined at time of contract formation); *Sprague*, 213 Or App at 527 (holding that arbitration limitations period that was shorter than applicable statute of limitations was not unconscionable); *Smith by Coe v. Piluso*, 79 Or App 238, 241 (1986) (discussing enforceability of time-essence clause in real estate purchase contract); *Crane v. Mabry*, 104 Or App 634, 639 (1990) (in absence of time-essence clause, a failure to timely perform can invalidate a contract after proper notice of default).

[106] *Best*, 303 Or at 560.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

(b) The terms of the PPA do not require PGE to extend the COD.

The terms of the PPA do not require PGE to amend the COD or the fixed price term because an extension of the COD is not reasonable or necessary. Waconda argues that Section 2.2.3 of the PPA establishes that PGE should agree to extend the COD because that section provides that PGE should not unreasonably withhold agreement to a COD that is more than three years after the effective date if the seller demonstrates that a later COD is reasonable and necessary.[107] First, the amended complaint contains no claim that PGE is required to extend the COD pursuant to Section 2.2.3. Accordingly, the Commission should reject Waconda's argument. Second, Waconda has made no showing that a later COD is reasonable or necessary, as explained above. Waconda's PPA contains stale avoided cost prices that are substantially higher than today's avoided cost rates. Waconda is entitled to those stale rates only if it achieves the COD it selected as scheduled. Waconda has not done so and, given Waconda's decision not to move forward with the facility study process, there is no prospect that Waconda will be in a position to begin commercial delivery anytime soon.

The Commission should not require PGE's customers to pay stale avoided cost prices for Waconda's output when Waconda has failed to meet the COD that it selected. It would not be reasonable to require PGE to extend the COD at this stage. Further, Section 2.2.3 is inapplicable because it only reiterates the seller's right under the Commission's orders to select a COD *at the time of contract execution* that is up to three years after the effective date or later, if the seller demonstrates that a later COD is reasonable or necessary. Waconda did not seek a later COD at the time of contract execution and has made no showing that Section 2.2.3 applies now.

[107] Waconda's Response at 64-65.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

For all of the reasons discussed above and in PGE's Motion, the Commission should dismiss Waconda's Third Claim for Relief as a matter of law.

E. PGE IS ENTITLED TO SUMMARY JUDGMENT ON WACONDA'S FOURTH CLAIM FOR RELIEF BECAUSE PGE DID NOT GIVE ITSELF UNDUE PREFERENCE OR SUBJECT WACONDA TO UNREASONABLE PREJUDICE OR DISADVANTAGE.

Waconda argues that PGE discriminated against Waconda by "categorically" refusing to allow applicants to hire consultants to perform PGE's interconnection studies.[108] Waconda has not established that PGE has such a policy. However, even if it had established that such a policy exits, the policy would not discriminate against Waconda because the rule allows PGE to refuse to agree to allow applicants to hire third-party consultants to conduct PGE's studies and because PGE would be treating Waconda like it treats all other applicants under such a policy.

Waconda argues that PGE has discriminated against Waconda by PGE hiring its own consultant to aid PGE in completing its studies when PGE would not agree to Waconda hiring a consultant to perform PGE's studies (instead of PGE conducting those studies).[109] The rule allows PGE to hire a consultant to aid it in conducting its studies, and the rule does not require that PGE agree to allow Waconda to hire a consultant to conduct PGE's studies in lieu of PGE conducting those studies. PGE does not discriminate against Waconda by simply doing that which is permitted by the Commission's rules.

(a) PGE's exercise of its discretion under OAR 860-082-0060(9) not to agree to allow Waconda to hire third-party contractors to complete PGE's interconnection studies does not establish that PGE discriminated against Waconda.

PGE's exercise of its authority under the Commission's rules to decline to allow applicants to hire consultants to perform PGE's studies does not demonstrate that PGE

[108] *Id.* at 66.
[109] *Id.* at 3, 66.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

discriminated against Waconda.[110] Waconda cites no authority to support its argument that unless PGE sometimes agrees to allow interconnection applicants to hire third-party consultants to complete PGE's interconnection studies, even though the rules do not require it to do so, then PGE discriminates against interconnection applicants such as Waconda by giving itself undue preference.

(b) Waconda's other discrimination arguments are not properly before the Commission, and the Commission should reject them.

As described above, Waconda asks the Commission to infer from "[t]he facts in this case" that "PGE has some sort of corporate policy or practice of categorically denying interconnection customers the opportunity to engage a third party to complete interconnection studies, or to conduct an independent System Impact Study."[111] Waconda then asks the Commission to find that such a policy discriminates against Waconda. The Commission should reject this argument for three reasons. First, it was not pleaded in the amended complaint. Second, the inference of a corporate policy is pure speculation. Third, such a policy would not violate the rules or discriminate against Waconda. The rule allows PGE to refuse to agree that the applicant can conduct PGE's interconnection studies. And any PGE policy against agreeing to allow an applicant to conduct PGE's studies would treat all applicants the same, not discriminate against Waconda. Discovery is not necessary to determine whether PGE subjected Waconda to undue prejudice by cooperating with some interconnection applicants to perform an iSIS and failing to cooperate with Waconda.

[110] Waconda also asserts that PGE refuses to allow interconnection applicants to construct interconnection facilities and perform necessary system upgrades. Waconda's Response at 22, n.26. However, construction of interconnection facilities is not at issue in this case, and the Commission should not consider Waconda's unpleaded arguments concerning the construction of interconnection facilities.
[111] *Id.* at 66-67.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

Waconda argues that it needs discovery to determine whether PGE has discriminated against Waconda by cooperating with some interconnection applicants, but not others, to facilitate the applicants' completion of an iSIS.[112] This argument suffers from at least three fatal flaws. First, it is not properly before the Commission because it was not pleaded in Waconda's amended complaint.[113] Second, the claim is based on the false premise that PGE has failed to cooperate with Waconda so that Waconda can complete an iSIS. As demonstrated above, PGE has not failed to cooperate with Waconda. Third, Waconda has made no showing, as required by ORCP 47 F, that discovery is needed to establish the facts underlying Waconda's unpleaded claim.

F. PGE IS ENTITLED TO SUMMARY JUDGMENT ON WACONDA'S CLAIMS THAT PGE VIOLATED THE DUTY OF GOOD FAITH AND FAIR DEALING.

In each of its four claims for relief, Waconda alleges that PGE violated the implied duty of good faith and fair dealing in the performance of PGE's contracts with Waconda. The Commission should reject Waconda's conclusory statements unsupported by law or fact that PGE's acts violated the implied duty of good faith and fair dealing.[114]

Waconda first argues that PGE violated the duty of good faith and fair dealing by failing to respond to its first request to conduct an iSIS on August 24, 2018.[115] Waconda argues that PGE's failure to respond to the request violated the duty of good faith and fair dealing implied in Waconda's contracts with PGE by refusing to engage in good faith when Waconda requested an iSIS.[116] Waconda's argument is incorrect: during the three years Waconda claims PGE refused

[112] *Id.* at 67.
[113] Am. Compl. ¶¶ 187-90.
[114] *See, e.g.*, Waconda's Response at 11 (arguing that PGE violated its contractual duty of good faith and fair dealing by failing to "help facilitate the independent System Impact Study" by agreeing to review the iSIS in a reasonable, non-discriminatory manner consistent with principles of Good Utility Practice).
[115] *Id.* at 18 (citing PGE's Answer Ex. I at 1).
[116] *Id.* at 18-20.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

to engage with Waconda concerning the iSIS,[117] PGE was negotiating in good faith with Waconda specifically about Waconda's request to conduct an iSIS. As explained in section II.C.3(b) above, after Waconda requested an iSIS in August 2018, Waconda filed its original complaint three weeks later in September 2018.[118] The parties immediately began settlement discussions for the next two years which included negotiating in good faith Waconda's request to conduct an iSIS.[119] During this period, PGE periodically inquired whether Waconda wished to conduct an iSIS and Waconda was noncommittal.[120] PGE did not violate the duty of good faith and fair dealing implied in any of its contracts with Waconda by negotiating with Waconda.[121]

Waconda also contends that PGE breached the duty of good faith and fair dealing by refusing to agree to review Waconda's never-submitted iSIS under a standard not enunciated in OAR 860-082-0060(7)(h). The implied duty of good faith and fair dealing cannot contradict an express term of the contract "nor otherwise provide a remedy for an . . . act that is expressly permitted by the contract."[122] Only the parties' "objectively reasonable expectations" are relevant to whether a party acted in good faith.[123] The express terms of a contract help to define the objectively reasonable expectations of the parties.[124] Here, the parties' study agreements

---

[117] *Id.* at 21.
[118] *See* Complaint.
[119] *See, e.g.*, Dodd Decl. Ex. 1 at 1-2 (PGE's June 23, 2021, letter to Waconda summarizing settlement discussions); Dodd Decl. Ex. 3 at 1 (Waconda's July 8, 2021, letter to PGE) ("Waconda Solar continues to wish to have an iSIS conducted, but only if [PGE]" agrees to "Waconda Solar's conditions for the performance of the iSIS.").
[120] *See*, Dodd Decl. Ex. 3 at 5-7 (PGE's July 30, 2021, letter to Waconda) (summarizing discussions and noting that "[d]uring these settlement negotiation, PGE's counsel periodically inquired as to whether Waconda had reached a decision about whether it would conduct an iSIS and was repeatedly told by counsel for Waconda that Waconda had not decided whether it would conduct an iSIS.").
[121] Waconda also alleges that PGE violated the duty of good faith and fair dealing when PGE "unreasonably withheld its consent to allow Waconda Solar to hire a third-party consultant to complete . . . an independent System Impact Study." Am. Compl. ¶ 147. Under the rules, PGE has no role in approving or disapproving an applicant's iSIS consultant, and PGE has never disapproved a Waconda iSIS consultant. Thus, that cannot be a basis for violating any implied terms in PGE's contracts with Waconda.
[122] *Klamath Off-Project Water Users, Inc. v. PacifiCorp.*, 237 Or App 434, 445 (2010) (quotation marks and citation omitted).
[123] *Uptown Heights Assocs. v. Seafirst Corp.*, 320 Or 638, 645 (1995) (quotation marks and citation omitted).
[124] *See id.*

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

required PGE to conduct interconnection studies consistent with the Commission's applicable small generator interconnection rules. There were no agreements that required PGE to review Waconda's iSIS according to standards not found in the rules. For example, the feasibility study agreement provides: "Applicant elects and PGE shall cause to be performed a Feasibility Study consistent with OAR 860-082-0060(6)."[125] The system impact study agreement includes parallel language: "Applicant elects and PGE shall cause to be performed a System Impact Study consistent with OAR 860-082-0060(7)."[126] Thus, the express terms of the contracts mandate that PGE perform its obligations in accordance with the Commission's rules and do not require PGE to review alternative findings under the standards demanded by Waconda.

Accordingly, PGE did not breach the duty of good faith and fair dealing. The applicable study agreements merely obligated PGE to perform the studies in accordance with the Commission's rules. No express or implied term of the study agreements obligated PGE to do more than the interconnection rules require. As a result, PGE is entitled to summary judgment on each of Waconda's four claims because PGE fulfilled its obligations under the Commission's interconnection rules and did not interfere with Waconda's performance under the parties' contracts.

G. WACONDA'S CLAIMS CONCERNING PGE'S INTERCONNECTION STUDIES AND ALLEGED FAILURE TO COOPERATE WITH WACONDA TO PERFORM AN ISIS ARE MOOT.

Waconda's ill-defined claim concerning PGE's original SIS is moot because that SIS was superseded by a later SIS necessitated by a higher-queued project withdrawing from the queue.[127] Waconda does not dispute that the claim is moot. Instead, Waconda argues that the

[125] Am. Compl., Attachment A at 1 (April 17, 2018, Feasibility Study Agreement § 2).
[126] Am. Compl., Attachment C at 1 (July 27, 2018, System Impact Study Agreement § 2).
[127] PGE's Motion at 61.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

Commission should address Waconda's claim anyway because PGE unilaterally decided to issue a new SIS, thereby mooting the claim.[128] PGE did not unilaterally decide to issue a new SIS, as Waconda argues.[129] PGE issued a new SIS because the withdrawal of the higher-queued project from the queue necessitated restudying Waconda's interconnection.[130] PGE's restudy to evaluate the impact of the withdrawal of the higher-queued project on Waconda's SIS was consistent with the Commission's interconnection rules.[131]

Waconda's interconnection agreement is withdrawn by operation of law under OAR 860-082-0060(8)(c). Instead of addressing that legal question presented by PGE's Motion, Waconda argues that the Commission should not grant PGE summary judgment because (1) PGE's conclusion that the application is withdrawn by operation of law does not make it so; (2) its interconnection application is not withdrawn by operation of law because "PGE violated Commission rules and its contractual duties[;]"[132] and (3) PGE allegedly made a contrary argument in another case.[133]

First, PGE's argument that the application is withdrawn as a matter of law is based on OAR 860-082-0060(8)(c), not based on PGE's opinion that the application is withdrawn. PGE has simply pointed out that under the facts of this case, Waconda's application is withdrawn under OAR 860-082-0060(8)(c). Second, PGE has already established that it did not violate the Commission's rules or breach the contractual duties it owed to Waconda. Third, PGE made a

[128] Waconda's Response at 68-69.
[129] Even if PGE had unilaterally issued a revised SIS for the purpose of correcting a material error, there would have been nothing wrong with that. The rules do not prevent utilities from issuing revised studies to correct errors and the Commission should not discourage correction of error. However, in this case, PGE issued a new SIS because a higher queued project had withdrawn and a revised SIS study was therefore required.
[130] Declaration of Jason Zappe in Support of PGE's Motion ¶ 8 and Ex. 3 (July 9, 2019, email from PGE to Waconda).
[131] OAR 860-082-0060(7)(f) (requiring a utility to consider all other generating facilities that have a pending completed interconnection application).
[132] Waconda's Response at 71.
[133] *Id.* (citing *Zena Solar, LLC v. Portland Gen. Elec. Co.*, Docket No. UM 2164, PGE's Response to Zena Solar's Motion for Interim Relief and Preliminary Injunction ("PGE's Response to Zena") at 21-22 (July 2, 2021)).

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

completely different argument in the *Zena Solar v. PGE* case, Docket No. UM 2164, because there was a signed interconnection agreement between the parties. PGE's argument in that case was that Zena Solar was not entitled to interim relief or a preliminary injunction under ORCP 47 A when Zena sought to enjoin PGE from issuing a notice terminating an interconnection agreement because a termination notice would not preclude Zena from arguing that the termination notice was ineffective.[134] Of course, in *Zena Solar*, PGE argued that its termination notice was effective and thus the interconnection agreement was terminated. Similarly, here, PGE takes the position that the interconnection application is withdrawn by operation of law. There is nothing inconsistent about PGE's position. In this case, Waconda is similarly free to argue that the application is not withdrawn.

Waconda also argues that its claims are not moot for failing to seek a waiver of the Commission's rules because the Commission can grant a waiver of its rules on its own motion.[135] The amended complaint does not request a waiver of the rule. And Waconda offers no argument or evidence to demonstrate why, in this case, the Commission should exercise that power now, years later, to excuse Waconda from application of OAR 860-082-0060(7)(c) despite Waconda never asking the Commission to do so at any time to date.[136]

III. CONCLUSION

PGE's motion presents questions of law and questions of fact that, when viewed in the light most favorable to Waconda, fail to establish a genuine issue of material fact that precludes summary judgment. Each of Waconda's claims are appropriate to resolve on summary

[134] Docket No. UM 2164, PGE's Response to Zena at 21-22, available at https://edocs.puc.state.or.us/efdocs/HAC/um2164hac162843.pdf.
[135] Waconda's Response at 72.
[136] *Id.* at 72-73.

MARKOWITZ HERBOLD PC
1455 SW BROADWAY, SUITE 1900
PORTLAND, OREGON 97201
(503) 295-3085
Fax: (503) 323-9105

judgment, and PGE respectfully requests that the Commission grant its motion for summary judgment and dismiss Waconda's complaint.

DATED this 15th day of December 2021.

Respectfully submitted,

MARKOWITZ HERBOLD PC

s/ Jeffrey S. Lovinger
Jeffrey S. Lovinger, OSB #960147
Anit K. Jindal, OSB #171086
April M. Stone, OSB #200937
Markowitz Herbold PC
1455 SW Broadway, Suite 1900
Portland, OR 97201
(503) 295-3085 (office)
(503) 323-9105 (fax)
JeffreyLovinger@MarkowitzHerbold.com
AnitJindal@MarkowitzHerbold.com
AprilStone@MarkowitzHerbold.com

PORTLAND GENERAL ELECTRIC COMPANY

Donald J. Light, OSB #025415
Assistant General Counsel
121 SW Salmon Street, 1WTC1301
Portland, OR 97204
(503) 464-8315
Donald.Light@pgn.com

Attorneys for Portland General Electric Company

1218219