BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1971

In the Matter of WACONDA SOLAR, LLC, Complainant, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	WACONDA SOLAR'S RESPONSE TO PORTLAND GENERAL ELECTRIC COMPANY'S MODIFIED SECOND MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Pursuant to OAR 860-001-0420(4), Waconda Solar, LLC ("Waconda Solar") respectfully files this Response to Portland General Electric Company's ("PGE's") Modified Second Motion for Summary Judgment, filed on September 15, 2021. In 2019, PGE filed its Second Motion for Summary Judgment concurrently with its Answer to Waconda Solar's First Amended Complaint. Waconda Solar understands that the Second Motion for Summary Judgment that PGE filed on August 20, 2019 is replaced by PGE's Modified Second Motion for Summary Judgment, and thus all arguments herein respond to PGE's modified second motion, and this response refers to that latter motion simply as PGE's "motion for summary judgment," or "motion."

II. SUMMARY

PGE's motion for summary judgment should be denied because summary judgment is not appropriate when there are genuine issues as to material facts and because, when those disputed facts are viewed most favorably to Waconda Solar, the facts do not support PGE's motion. To the extent that the Commission decides to rule on summary judgment and address any matters of law, then the Commission should deny PGE's motion for summary judgment and rule in Waconda Solar's favor on any disputed legal issues.

PGE asserts Waconda Solar's claim that PGE's feasibility studies contained errors should be dismissed because the studies contained all the required information and the errors it corrected were immaterial. However, those errors and remaining errors are material, and PGE did not provide complete studies.

PGE asserts Waconda Solar's claim regarding a third party completing the remaining studies should be denied. PGE claims it has no duty to consent to allow Waconda Solar to hire a third party to complete the studies and it can withhold its consent unreasonably. PGE unreasonably withheld its content to allow Waconda Solar to hire a third party to conduct the remaining studies, especially considering the errors in the feasibility studies and PGE's history of errors in studies. Thus, PGE's motion for summary judgment should be denied.

PGE asserts Waconda Solar's claim regarding PGE preventing Waconda Solar from conducting an independent System Impact Study should be denied. However, PGE is required to allow Waconda Solar to hire a third party to conduct the independent System Impact Study and to gain access to the information necessary to conduct a study. PGE claims it has not prevented Waconda Solar from completing an independent System Impact Study. This is incorrect because PGE is unwilling to state it will review the independent System Impact Study in a reasonable, non-discriminatory manner consistent with Commission rules and its contractual duties. Thus, PGE has prevented Waconda Solar from conducting the independent System Impact Study. This demonstrates there are disputed facts that the Commission must view in the light most favorable to Waconda Solar and thus the Commission should rule in Waconda Solar's favor on this claim.

PGE also asserts that Waconda Solar's claim for an extension of the scheduled commercial operation date and termination date should be denied because Waconda created its own timing dilemma and the Commission lacks authority to modify an executed Power Purchase Agreement. This is incorrect because Waconda Solar relied on PGE's information when selecting its commercial operation date, so it is disputed fact

regarding whether Waconda Solar or PGE created the dilemma. Further, the Commission has authority to extend the commercial operation date under the terms of the Power Purchase Agreement, contractual law principles and the Commission's general regulatory authority over utilities and to implement the Public Utility Regulatory Policies Act ("PURPA"). Thus, PGE's motion should be denied.

PGE asks the Commission to deny Waconda Solar's claim that PGE discriminated against Waconda Solar regarding third-party consultants completing studies. PGE asserts that it did not discriminate against Waconda Solar because PGE can hire its own third-party consultants and has no obligation to allow Waconda Solar to hire a third-party consultant. However, PGE is discriminating against Waconda Solar when PGE can hire third parties but unreasonably refuses Waconda Solar the same opportunity. Thus, there are disputed facts or the Commission should rule in Waconda Solar's favor.

PGE also asserts that Waconda Solar's claim about the System Impact Study should be dismissed. PGE claims the System Impact Study is complete, does not contain any deficiencies, and the issue is moot anyway because PGE has to restudy since a higher queued project dropped out. However, Waconda Solar's complaint references the deficiencies in the System Impact Study, thus the existence of these deficiencies is a disputed fact. Further, the claim is not moot because the utility has an obligation to provide a complete, accurate study the first time around, which PGE has failed to do.

Finally, PGE claims the entire complaint can be dismissed as moot because PGE asserts Waconda Solar's interconnection application is deemed withdrawn. This is incorrect because PGE has not complied with Commission rules and its contractual duties. Further, if a complaint were to be dismissed any time a utility deems the

interconnection customer's application withdrawn, it would be impossible to raise a complaint without obtaining interim relief or a stay from the Commission. The complaint process is an opportunity to litigate any alleged wrongdoings. Thus, the issues are not moot just because PGE claims Waconda Solar's interconnection application is withdrawn.

Overall, there are disputed facts in this case that when construed most favorably to Waconda Solar, support a denial of PGE's motion for summary judgment. In addition, to the extent that there are pure issues of law that can be resolved now, the Commission should rule in Waconda Solar's favor.

III. RESPONSE

A. Legal Standard for Summary Judgment

In contested cases, the Commission follows Oregon Rules of Civil Procedure ("ORCP") except when inconsistent with its own rules, a Commission order, or an Administrative Law Judge ruling.[1] Summary judgment may be granted where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law.[2] No genuine issue as to a material fact exists if, based on the record and viewed in a manner most favorable to the nonmoving party, no objectively reasonable person could return a verdict for the nonmoving party on the matter that is the subject matter of the motion for summary judgment.[3] In other words, "[i]n determining whether to grant a motion for summary disposition, [the Commission]

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1 OAR 860-001-0000(1).
2 ORCP 47C.
3 *Id.*

must view the evidence and the record, in the light most favorable to the nonmoving party,"[4] which in this instance is Waconda Solar.

B. The Commission Should Be Aware of the Far-Reaching Consequences that Granting PGE's Motion for Summary Judgment Would Have on Interconnection Customers, and How It Would Undermine the Implementation of Federal and State Law on Qualifying Facility Sales

1. The Interconnection Process Is a Vital Component of a Proper Implementation of PURPA and the Corollary State Law

As the Commission is aware, Congress passed PURPA to accomplish several purposes related to the nation's energy supply. Among these was giving small power producers of alternative energy access to stable pricing and a market for selling their power.[5] Congress recognized that "traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities," and this reluctance was a barrier to the development of cogeneration and small power production facilities.[6] Thus, under PURPA, small power producers were given rights to put their power onto a utility's system under an established avoided costs rate construct.

PURPA was a significant initiative and represented a major shift in the utility industry by modifying what had up to that time been a monopoly for utilities over electric generation. Because PURPA chipped away at the utilities' monopoly, and because utilities have a financial incentive to invest their own capital in electric generation, it was

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4 *In re Revised Tariffs Applicable to Electric Service*, UE 111, Order No. 00-090 at 3 (Feb. 14, 2000).

5 *In Re Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 6 (May 13, 2005).

6 *FERC v. Mississippi*, 456 U.S. 742, 750 (1982).

expected that PURPA implementation would be a point of significant contention with most utilities. Thus, the law surrounding PURPA, as implemented by FERC and state commissions including Oregon's, has recognized that qualifying facilities must be protected from efforts by the public utilities to avoid purchases from qualifying facilities.

This context is important and relevant in this case because the interconnection process represents an important and critical piece of the Commission's implementation of PURPA. Without a fair, transparent, and functional process for interconnecting to a utility, qualifying facilities are unable to effect the sales of power that they are entitled to make under this federal law, and its Oregon state law counterpart. Indeed, the interconnection process can be a common point of failure for projects that may otherwise come to fruition. Because this case involves an interconnection customer's complaint about problems in the interconnection process, it is important that the Commission carefully review the issues presented here. This case will have a significant impact on whether qualifying facilities have access to the type of interconnection process that is necessary to avoid utilities thwarting, intentionally or not, the successful completion of projects that make economic sense under a utility's avoided cost rate structure.

2. Deciding Waconda Solar's Complaint through Summary Judgment Would Amount to a Finding that Interconnection Customers Are Not Entitled to Conduct Meaningful Studies

The Commission's ruling on PGE's motion for summary judgment in this case marks an even more important decision because PGE invites the Commission to determine that, *as a matter of law*, qualifying facilities do not have any meaningful foothold to gain an independent or meaningful review of a utility's determinations in the

interconnection process absent the filing of a complaint. PGE argues that as a matter of law, it has:

- No duty to allow a third-party to conduct any of the interconnection studies;
- No duty to offer a reasoned explanation for its rejection of an interconnection customer's request to have a third-party conduct the studies (even though the Commission's rules provide that the parties may agree to have a third-party conduct the studies);
- No duty to facilitate, and instead the ability to effectively prevent, an interconnection customer's efforts to conduct an independent System Impact Study (even though the Commission's rules expressly require PGE to consider the findings of any independent System Impact Study);
- No duty to review an independent System Impact Study in a reasonable, non-discriminatory manner consistent with Commission rules and contractual duties of good faith and fair dealing;
- No duty to provide correct or accurate determinations in its interconnection studies so long as it asserts that subsequent studies have been corrected or asserts that its mistakes are immaterial (and that its assertions in this regard should be taken as an established fact for purposes of summary judgment);
- No duty to reasonably follow the interconnection process because it can remove an interconnection customer from the queue and make an interconnection complaint moot.

Granting PGE's motion would mean that qualifying facilities in Oregon have no effective insight into, or remedy for harms in the interconnection process, and are required to take the utility's point of view on costs, required infrastructure, and process requirements related to one of the most critical components of their ability to successfully bring projects into operation. Such a construct would invite utilities' abuse of the interconnection process and PURPA generally and leave a utility customer group with no meaningful remedy for the actions of the monopoly that controls the power grid to which they are entitled to interconnect. The only way in which an interconnection customer

would be able to gain insight or test a utility's conclusions would be to file a complaint, and utilize the formal discovery process to gain information and a Commission order directing the utility to provide access to its facilities. But even this limited path for relief would hinge upon the Commission agreeing to grant interim relief or a stay, because PGE argues (and would likely argue) that any such complaint is moot.

Rather than determine Waconda Solar's complaint through PGE's motion for summary judgment, the Commission should review the facts in the case, as developed through the normal testimonial process, to determine whether PGE's actions have been contrary to principles of good faith and fair dealing, contrary to the Commission's standards of reasonable utility operations, and contrary to its own established rules. Many of these questions cannot be determined on summary judgment unless the Commission were to side with the view that qualifying facility developers have no ability to gain meaningful review of the utility's actions in the interconnection process under any fact scenario. To the extent any legal questions can be resolved on motions practice, the Commission should rule in Waconda Solar's favor.

3. The Commission Should Protect Interconnection Customers by Safeguarding their Right to Review, Test, and Dispute Utility Determinations in the Interconnection Study Process

In the interconnection process, the studies that are conducted (the Feasibility Study, the System Impact Study, and the Facilities Study) are the place where the "rubber meets the road" for qualifying facilities in the interconnection process. It is through these studies that interconnection customers' obligations to fund upgrades and infrastructure are laid out and where the economics of their projects can be drastically affected. To the extent the studies contain errors or overestimations of required costs and actions, the

process can become an unjustified breaking point for developers, and essentially produce a "wrongful termination" of the project. In light of PURPA's intended purpose of facilitating projects that otherwise do not have an available market (and its recognition that utilities are inherently opposed to diversifying generation resources), the Commission should ensure that interconnection customers have an adequate and meaningful opportunity to review utility determinations, and in appropriate instances, utilize third-parties' assistance in those efforts.

Interconnection customers have only a limited number of opportunities for gaining insight into, or challenging utilities' determinations in the interconnection study process. Their options are limited to:

1) Asking the utilities questions regarding the utility's study outcomes and decisions;

2) Having a third-party or independent party conduct the studies, rather than the utility;

3) Having a third-party produce an independent study, which could then be brought to the utility to test and challenge the utility's assumptions and conclusions; or

4) Seeking Commission review of the utility's studies, through the complaint process.

Strikingly, through its motion for summary judgment, PGE seeks to close the door on the first three of these processes, and significantly limit the Commission's review of studies in the complaint process.

First, PGE seeks to close the door on a meaningful process for questioning the utility on its study findings by taking the position that the utility's assertions to interconnection customers regarding the studies must be taken at face value, and thus that

the utility has the "final say" on all matters regarding the studies. This is apparent in this case where PGE asks the Commission to find that any errors are immaterial or have been corrected. This is despite the fact that the errors were material and Waconda Solar does not have confidence or assurances that the errors were corrected because PGE has refused to answer additional questions and Waconda Solar has not been able to conduct discovery or cross-examination of PGE on these topics.

Second, PGE seeks to close the door on having an independent, third-party conduct the studies by asserting that it has no duty to ever allow a third-party to conduct the studies under the Commission's rules. PGE appears emboldened by the Commission's Order No. 19-218 in *Sandy River Solar, LLC v. PGE*, where the Commission found that under its rules, there is no duty for a utility to act in accordance with a reasonableness standard when it considers an interconnection customer's request to utilize the option of having a third-party perform interconnection studies—an option laid out by the Commission's rules. In that order, the Commission expressly did not consider whether its general statutory or regulatory authorities to impose reasonableness requirements on utilities or a utility's duty to approach its contractual counter-parts with good faith and fair dealing prevent certain utility actions in refusing the involvement of third-parties. PGE now seeks, though its motion for summary judgment, to close the door on those requirements as well.

Specifically, PGE argues that neither the Commission's general enabling statutes, which give it authority to require that utility actions be reasonable with respect to customers, nor the implied duty of good faith and fair dealing that attends every contract, has any impact on an interconnection customer's rights nor have any application to the

interconnection process. Instead, PGE argues, those rights and duties are all codified in the Commission's rules—to the extent the rule does not specifically address something, the utility does not need to consider it. Stated differently, unless the rule explicitly prohibits utilities from violating a law, a utility does not need to consider that law when acting under a rule. This is nonsensical. Regardless, the rules must require PGE to cooperate and be reasonable because it would be impossible for an interconnection customer to verify the costs it is paying for interconnection were reasonable.

Third, on the topic of a third-party producing an *independent, additional* study, PGE also seeks to shut the door on this through its motion for summary judgment. It states its position that, because Waconda Solar can only point to a right that it has to *present* an independent System Impact Study to PGE (which PGE must "evaluate" and "address"), PGE does not need to evaluate the independent System Impact Study under any reasonableness, non-discriminatory, or good faith and fair dealing standards. PGE claims it is willing to provide system information to Waconda Solar if Waconda Solar executes a nondisclosure agreement ("NDA"), but PGE refuses to state the standard of review it will use to evaluate the independent System Impact Study. Thus, PGE is not fulfilling its duty to help facilitate the independent System Impact Study because PGE will not agree to evaluate the study in a reasonable, non-discriminatory manner consistent with its contractual duty of good faith and fair dealing. Such an interpretation would undermine the Commission's rules, as well as represent a dismal customer service approach that the Commission should not endorse.

Finally, on the topic of an interconnection customer's ability to at least review and challenge the utility's interconnection studies by filing a complaint at the Commission

(item four in the list above), PGE's motion for summary judgment seeks to shut the door on this approach by asserting that the utility's version of the facts surrounding the study should be taken as truth—not subject to discovery, cross-examination, or further investigation. PGE makes direct assertions in its motion, asking the Commission to find, for example, through summary judgment, that Waconda Solar's complaint regarding the Feasibility Study should be denied because PGE already corrected errors in it, and they were immaterial in any event.[7] PGE asserts that the errors had no effect on the outcome of the Feasibility Study, and were addressed in subsequent studies.[8] Notably, these assertions have not been subject to discovery, and Waconda Solar has not been allowed to test them in the Commission's complaint process either, given the ALJ's limitations on the scope of discovery in the case pending PGE's motion for summary judgment.[9]

An interconnection customer could still file a complaint against a utility despite PGE's assertions above to gain information, but the interconnection customer would not be able to file the complaint until the interconnection customer was no longer willing to continue to the next stage in the interconnection process.[10] The Commission will codify the utility's right to, and encourage utilities to refuse to cooperate, or provide accurate, correct studies or review independent studies. The Commission will have, as a matter of law, precluded the interconnection customer's right to obtain information from the utility,

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7 PGE Motion at 4.
8 PGE Motion at 25.
9 ALJ Ruling at 1 (Sept. 3, 2019).
10 At the point of an irreconcilable dispute, then PGE would remove the interconnection customer from the queue and claim any disputes were moot (as it has here), or the interconnection customer could seek to remain in the queue, in which PGE would argue that such a request be denied.

the practical ability to conduct independent studies, or to obtain accurate or detailed studies outside of the complaint process. The Commission should encourage the non-litigious ability to gather information and resolve disputes, and not force interconnection customers to file complaints to gain basic information or vet utility studies. And finally, the complaint option will be neutered in many cases because the utility can simply decide to correct its prior errors or voluntarily cease their illegal behavior after the complaint is filed, ensuring that any challenges are moot. This is exactly the situation here: PGE made significant and material errors in the Feasibility Study and refused to allow Waconda Solar to conduct its own studies, which harmed Waconda Solar, and PGE now claims that everything is moot and there was no harm because PGE corrected the errors and asserts that it will allow Waconda Solar to conduct an independent System Impact Study (which PGE is free to ignore in a unreasonable and discriminatorily manner).

To avoid all these harmful and unreasonable outcomes and ensure interconnection customers are able to gain insight into, or challenge utilities' determinations in the interconnection study process, the Commission should safeguard the interconnection customer's right to review, test, and dispute utility determinations in the interconnection study process.

4. The Commission Should Take Care to Not Discard Interconnection Customers' Rights Through PGE's Motion for Summary Judgment

As a matter of regulatory policy, the Commission should hold PGE to the normal standards of customer care and diligence with respect to its interconnection customers that it does with respect to its other customers. The Commission should require PGE to follow the Commission's rules carefully, should not excuse utility mistakes or omissions

simply because PGE asserts that projects have not been fatally harmed by those actions, and should certainly not endorse a view that the utilities are entitled to battle with interconnection customers more so than approach them with a customer service ethic.

Specifically, the Commission should require that PGE approach the implementation of its small generator interconnection rules in good faith, facilitating interconnection with qualifying facilities that have followed the rules and are entitled to interconnect with the utility to sell their power under PURPA. If utilities are not required to cooperate, and in fact are authorized to skip requirements, miss deadlines, and refuse to provide rational explanations for their refusals to facilitate interconnections, then the Commission would be establishing an unfortunate standard for the regulated utilities in the state, and would also be violating PURPA.

Yet, PGE's motion for summary judgment invites such action by the Commission. Specifically, PGE argues that even though it has failed to provide correct and complete studies by the Commission's required deadlines, that should be of no consequence, because it asserts that Waconda Solar has been unaffected.[11] PGE has refused to allow the use of third-party contractors by interconnection customers to either complete studies or construct facilities without any justification, even though the rules allow that a customer and PGE may agree to do so. PGE argues that it has no duty to consider these requests and can always refuse them. PGE refused to respond to clear requests of an interconnection customer for cooperation in developing an independent System Impact Study, which the utility is required to review, but argues that this is

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[11] PGE Motion at 27.

allowed, because it has no duty to facilitate such a study. PGE also argues that it does not matter because it is *now* willing to entertain such requests (now that a complaint has been filed). PGE refuses to allow an extension of Waconda Solar's commercial operation date despite the challenges in the interconnection process, because it argues that Waconda Solar created its own problem by choosing an "overly aggressive [commercial operation date],"[12] even though Waconda Solar chose the date by relying on PGE's own information.[13] Finally, PGE uses third-party contractors to complete its interconnection work, but refuses to allow its interconnection customers to use third-party contractors under any circumstance, even though the Commission's rules allow for it. None of these positions are consistent with a good faith, customer service approach that the Commission should expect from PGE.

Yet, PGE asks the Commission to determine, through summary judgment, that all of these actions are allowed. The Commission should reject PGE's request, and the underlying premise that PGE's monopoly status applies in the interconnection process to such a great extent that interconnection customers have *no options* for meaningful involvement in the interconnection process, which they pay for, and which is key to their ability to sell power as provided for in federal and state law.

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12 PGE Motion at 50.

13 Declaration of Troy Snyder at 1-2.

C. The Commission Should Deny PGE's Motion for Summary Judgment Because PGE's Views on the Law Are Incorrect and the Facts, When Construed Most Favorably to Waconda Solar, Show that PGE Has Acted Contrary to Its Obligations

In reviewing each of PGE's requested determinations through summary judgment, the Commission must consider whether the facts show that PGE prevails as a matter of law, even when the facts are construed most favorably toward Waconda Solar. In each instance, under this standard, PGE's motion should be denied.

1. The Facts, When Construed Most Favorably to Waconda Solar, Indicate that PGE Has Acted in a Way that Undermines Waconda Solar's Rights, Under the Commission's Rules and Contractual Duties, to Present PGE an Independent System Impact Study

i. PGE Denied Waconda Solar's Requests to Utilize the Process Provided for by the Commission's Rules

As described above, PGE's interconnection customers have very limited opportunity to review and engage in the interconnection process especially as it relates to the studies that PGE produces (and refuses to let others produce). But the Commission's rules spell out the process through which each of these studies is to be conducted and provide various obligations that the utility and interconnection customer must observe, including deadlines, study contents, and the process for contracting for the studies and ultimate construction of the facilities.[14]

One concrete opportunity for review, transparency, and investigation by the interconnection customer is embodied in the Commission's rules regarding the System Impact Study, as an obligation of a regulated utility to consider any independent System

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[14] *See generally* OAR 860-082.

Impact Study that the interconnection customer performs and presents to the utility. On this topic, the Commission's rules in OAR 860-082-0060(7)(h) state:

> If an applicant provides an independent system impact study to the public utility, then the public utility must evaluate and address any alternative findings from that study.[15]

This provides one of the more meaningful opportunities under the Commission's rules for a customer like Waconda Solar to judge the reasonableness of a utility's conclusions regarding what costs an interconnection customer must bear and to force the utility to engage with the interconnection customer to either defend its conclusions or modify them in light of issues identified by the customer or its consultant. Such engagement or pressure on a utility's conclusions on costs has proven to have significant impacts.[16]

In this case, the facts show that Waconda Solar was deeply concerned about the interconnection studies produced by PGE, including the Feasibility Study, which is the first study in the process. Waconda Solar identified multiple errors in that study, asked questions repeatedly, and repeatedly told PGE that it saw issues with PGE's conclusions.[17] Waconda Solar also requested repeatedly that PGE agree to allow

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15 OAR 860-082-0060(7)(h).

16 *See, e.g.* Ecoplexus case, where SIS Re-Study reduced estimated costs from over $300 million to less than $25 million (Docket No. UM 2009, Madras Solar's Answer to PGE's Counter-Claims at 6 (Aug. 12, 2019); Docket No. UM 2009, Madras Solar's Reply Testimony at Madras Solar/300, Rogers/34 (Nov. 5, 2019)).

17 *See* PGE's Answer to Amended Complaint, Exhibit E at 1 (Waconda Solar explaining that "my questions from the Feasibility Study have not been answered and I am unable to make business decisions based on the inconsistencies within that study," and that "I once again ask that you respond to and answer the questions from my previous email . . . Further because of the inconsistencies within the Feasibility Study and that fact that portions of it are simply not correct, I am asking that Waconda Solar have a third party engineer complete the remaining studies as allowed in OAR 860-082-0060.")

Waconda Solar to "have a third-party engineer complete the remaining studies as allowed in OAR 860-082-0060," specifically because of "inconsistencies within the Feasibility Study and the fact that portions of it are simply not correct."[18] The goal of these requests was for Waconda Solar to gain insights into PGE's studies, to make it clear to PGE that Waconda Solar was requesting use of every possible avenue to gain insights into PGE's studies, and to apply all available tools to gain confidence in PGE's studies, or to be able to substitute a third-party's analysis for PGE's if possible.[19]

In fact, Waconda Solar hired counsel during this process to assist it in gaining review of PGE's work, and specifically had counsel draft a letter, stating in the clearest possible terms that it wanted to use third-party assistance, including having a third-party prepare an independent System Impact Study. That letter stated:

> Additionally, Waconda Solar intends to seek an independent System Impact Study under OAR 860-082-0060(7)(h). Waconda Solar needs to make informed business decisions about its project and fears that there will be more errors in any studies done by PGE. An independent study will provide Waconda Solar with a better picture of its project. As such, please provide Waconda Solar with the system configuration so that its independent consultant can complete the study.[20]

In its response to that letter PGE acknowledged receipt and refused to grant consent for Waconda Solar to hire a third-party consultant with regard to OAR 860-082-0060(9), but PGE did not respond to Waconda Solar's request to conduct an independent System Impact Study.[21]

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18 PGE's Answer to Amended Complaint, Exhibit E at 1.
19 *See* PGE's Answer to Amended Complaint, Exhibit I at 1.
20 PGE's Answer to Amended Complaint, Exhibit I at 1.
21 PGE's Answer to Amended Complaint, Exhibit J at 1.

The facts also show that, by PGE's admission, there is information required to do an independent System Impact Study that is not publicly available, and there is information required to do the study that must be obtained from PGE.[22] Thus, there is no question that Waconda Solar is prevented from doing an independent System Impact Study without PGE's cooperation. Thus, there should also be no question that PGE's initial actions prevented Waconda Solar from being able to benefit from the Commission's rules that protect it and give it at least a limited ability to review and challenge PGE's interconnection studies.

Under these facts, it is Waconda Solar, not PGE, that is entitled to summary judgment, and PGE's motion should be denied. Construed most favorably toward Waconda Solar, these facts show that PGE either purposefully, or negligently impeded Waconda Solar's opportunity to take advantage of the Commission's rules that allow it at least a limited chance for engagement and verification of PGE's studies.[23]

PGE offers another defense to its past refusals, arguing that if Waconda Solar would only ask now, that it would cooperate—asserting that the Commission cannot find

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22 PGE's Answer to Amended Complaint at 23 ¶¶ 102, 103.

23 As explained above, Waconda Solar requested the opportunity to complete an independent System Impact Study, requested information from PGE to complete the independent System Impact Study, and requested permission to hire a third-party consultant to complete the remaining studies, and requested permission to hire a third-party consultant to complete the remaining studies, but PGE ignored the requests regarding the independent System Impact Study. *See generally*, PGE's Answer to Amended Complaint, Exhibit E at 1; PGE's Answer to Amended Complaint, Exhibit I at 1; PGE's Answer to Amended Complaint, Exhibit J at 1.

it to have acted contrary to the Commission's rules because it is now willing to correct any improper behavior. PGE caveats even this defense, saying that:

> If Waconda requests specific information from PGE for the identified purpose of conducting an independent system impact study, then PGE is willing to work in good faith to provide Waconda with appropriate information subject to reasonable limits regarding relevance, breadth, burden of production, and provided that any sensitive or confidential commercial or system information can be and is protected through appropriate confidentiality agreement or projective order.[24]

PGE claims it will work with Waconda Solar to provide Waconda Solar with the appropriate information to conduct the independent System Impact Study, but it is subject to "reasonable limits regarding relevance, breadth, burden of production, and provided that any sensitive or confidential commercial or system information can be and is protected[.]" Waconda Solar appreciates that PGE has stated that its limits will be "reasonable", PGE does not believe that it is obligated to be reasonable, and PGE reserves the right to change its mind and be unreasonable.

The facts, construed most favorably to Waconda Solar, show that PGE refused to engage in good faith with Waconda Solar on the Commission's rules that contemplate Waconda Solar's right to have an independent System Impact Study performed. Further, the facts show that even now, PGE's approach toward the whole topic is dismissive, making clear even before it is presented with a study that it would be unlikely to view that as more than a "check the box" exercise.

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[24] PGE Motion at 38-39, footnote 166. Regardless, PGE reserves the right to decide to act in bad faith because PGE will take the position that a statement in a legal pleading is not binding.

Finally, it is worth noting that PGE's refusal to engage with Waconda Solar on this topic over two years ago cannot be remedied (or escape review) by PGE's offer to take up the topic now. Two years have passed, and Waconda Solar has suffered from a lack of insight and review of PGE's studies as it has sought to move its project forward. Under PGE's view, Waconda Solar has lost the opportunity to proceed under the Power Purchase Agreement because of delays arising from PGE's refusal to engage; Waconda Solar disagrees about the Power Purchase Agreement, but the harm from PGE's refusal is evident in either case. The Commission should not allow PGE to avoid a determination of wrongdoing simply by offering to correct behavior on a going forward basis, especially when PGE has not actually offered to correct its behavior and Waconda Solar has suffered material harm from PGE's actions.

ii. PGE's Motion for Summary Judgment Should Be Denied Because PGE's Legal View That It Has No Duty to Facilitate an Independent System Impact Study Is Erroneous

Aside from the facts described above showing that PGE undermined Waconda Solar's right under the Commission's rules allowing it to present an independent System Impact Study to the utility, PGE's motion for summary judgment should be denied because its view of the law on this topic is incorrect. PGE's position is that it has no duty to facilitate an independent System Impact Study, despite the Commission's rules. Again, the Commission's rules give a clear right for an interconnection customer to present an independent System Impact Study to PGE.

PGE now sort of acknowledges that it must cooperate for one to be completed, and the facts show that Waconda Solar clearly asked for PGE's cooperation, and it was denied. Yet, PGE argues that it has not violated any rule, and "denies that there is a

requirement under the applicable rules for a utility to provide information and access to facilitate an independent system impact study."[25] Along similar lines, PGE has made it clear that it generally discourages interconnection customers from involving third parties at all.[26]

PGE's view of its duty cannot be reconciled with the Commission's rules. If PGE has no duty to cooperate at all with an interconnection customer doing an independent System Impact Study, and if an interconnection customer is unable to do an independent System Impact Study without PGE's cooperation, then OAR 860-082-0060(7)(h) essentially presents a null result by giving a right to interconnection customers for enforcement against a utility that can be taken away by a utility's decision to not grant that right. The Commission should deny PGE's motion for summary judgment on this point because such a reading of the Commission's rules does not make any sense and essentially repeals the Commission's rule.

PGE's view of the law also cannot be reconciled with its duty of good faith and fair dealing that it owes to contractual counter-parties, such as Waconda Solar. Under

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25 PGE's Answer to Amended Complaint at 29, ¶ 144.

26 *See* PGE's Answer to Amended Complaint at 38-39, ¶ 226 (admitting that PGE is "generally unwilling to agree to allow Complainant or other interconnection applicants to hire their own third-party consultants to conduct the interconnection studies or to conduct the engineering and construction of required interconnection facilities and system upgrades because it reduces PGE's legitimate control over changes to its system, increases the cost and complexity associated with coordinating the engineering and construction of interconnection facilities and system upgrades, and creates the possibility of a conflict of interest by the third-party contractor who is working for the interconnection applicant but must insure that all adverse system impacts are identified and all improvements meet PGE's needs and standards").

basic contract principles, parties to a contract owe each other a duty of good faith and fair dealing in the performance of their contract and are prohibited from taking actions that would frustrate the ability of the other party to gain the benefit of the contract.

With regard to this duty of good faith and fair dealing, the Court of Appeals has explained:

> In general, every contract has an obligation of good faith in its performance and enforcement under the common law. . . . The purpose of that duty is to prohibit improper behavior in the performance and enforcement of contracts, and to ensure that the parties will refrain from any act that would have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. . . . The common-law implied duty of good faith and fair dealing serves to effectuate the objectively reasonable expectations of the parties.[27]

The duty of good faith is traditionally applied by courts in situations where one party has the discretion to execute a substantial term of the agreement and requires that the discretion is exercised for the purposes of the contract and "to effectuate the reasonable contractual expectations of the parties."[28]

With respect to Waconda Solar, PGE has executed a Power Purchase Agreement with Waconda Solar that requires Waconda Solar to deliver power to PGE, which necessitates an interconnection. A critical part of that interconnection process is the interconnection studies, including the System Impact Study. PGE also executed a Feasibility Study Agreement and System Impact Study Agreement. Thus, because of its

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27 *Klamath Off-Project Water Users, Inc. v. PacifiCorp*, 237 Or App 434, 445 (2010) (internal citations and quotations omitted).

28 *Pacific First Bank by Washington Mutual v. New Morgan Park Corp.*, 319 Or 342, 351 (1994) (internal citations omitted).

contracts with Waconda Solar (in addition to the requirements of OAR 860-082-0060(7)(h)), PGE has a duty to facilitate an independent System Impact Study if that is desired by Waconda Solar because that would further its "objectively reasonable expectations" under the Power Purchase Agreement and refraining from doing so would harm Waconda Solar's ability to further the implementation of the contract. Waconda Solar's objectively reasonable expectations are that it would only pay the reasonable costs of interconnection, but Waconda Solar cannot verify it is only paying for the reasonable costs if it cannot review PGE's studies or conduct its own independent System Impact Study. Thus, PGE is thwarting Waconda Solar's expectations.

In responding to Waconda Solar's assertions that it violated its duty of good faith and fair dealing, PGE argues *no* facts. Instead, it argues that the Commission's rules are the embodiment of what it takes to act in good faith, and that Waconda Solar has "no objectively reasonable expectation for anything other than what is provided in the regulation[s] of the Commission]."[29]

But, this does not address why PGE should be excused for precluding Waconda Solar's rights to develop an independent System Impact Study to give it insights and protections provided by the Commission's rules and its contracts. PGE's view of the law on this topic also ignores that the duty of good faith and fair dealing expressly applies where specific contractual provisions do not as it is an implied duty in every contract that creates separate and incremental obligations, and that it is one which can be breached

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[29] PGE Motion at 58; *See also id*. at 60 ("Thus, OAR 860-082-0060 *is* the Commission's statement of reasonable practice in the interconnection study process.").

even where the specific terms of a contract may not be.[30] Taken literally, PGE's argument would be that even if it has a duty to process an interconnection request, the duty of good faith and fair dealing does not require it to answer its phones, return emails, or engage at all with customers because the Commission's rules do not expressly provide so. The Commission should not endorse such an interpretation of its rules.

iii. PGE's Motion for Summary Judgment Should Be Denied Because PGE's Refusal to State It Will Review the Independent System Impact Study in a Reasonable, Non-Discriminatory Manner Consistent with its Contractual Duties Violates Commission Rules and Its Contractual Duties of Good Faith and Fair Dealing and Has Prevented Waconda Solar from Conducting an Independent System Impact Study

By refusing to state that PGE will review the independent System Impact Study in a reasonable, non-discriminatory manner consistent with Commission rules and its contractual duty of good faith and fair dealing, PGE has prevented Waconda Solar from conducting its independent System Impact Study. PGE claims Waconda Solar has "equivocated as to whether it wants to conduct the study" and "conditioned its desire to conduct a study on terms not found in the Commission's rules[.]"[31] This is not the case. Waconda Solar expressed its desire to conduct an independent System Impact Study many times[32] and merely requested assurances PGE would evaluate and address the

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30 *McKenzie v. Pacific Health & Life Ins. Co.*, 118 Ore. App. 377, 380-81 (1993) (internal citations omitted).

31 PGE Motion at 41.

32 *See* PGE's Answer to Amended Complaint, Exhibit E at 1; PGE's Answer to Amended Complaint, Exhibit F at 2; PGE's Answer to Amended Complaint, Exhibit G at 1; PGE's Answer to Amended Complaint, Exhibit I at 1; PGE's Declaration of Rebecca Dodd in Support of PGE's Motion, Exhibit 2 at 1 (Sept. 15, 2021); PGE's Declaration of Rebecca Dodd in Support of PGE's Motion, Exhibit 4 at 1 (Sept. 15, 2021).

independent System Impact Study in a reasonable, non-discriminatory manner consistent with Commission rules and its contractual duties. Waconda Solar has not been equivocal regarding its desire to conduct an independent System Impact Study: Waconda Solar has requested that it be allowed to conduct the study if PGE is willing to follow the law when it reviews the study.

PGE has repeatedly stated it does not believe it needs to review the independent System Impact Study in a reasonable, non-discriminatory manner consistent with its contractual duties. In a letter to Waconda Solar's counsel PGE stated:

> In its prior letters, Waconda has stated that it is not willing to conduct an [independent System Impact Study] if PGE will not agree that its evaluation of alternative findings in the [independent System Impact Study] will be conducted consistent with certain standards of review, including "reasonableness", "good faith", and "Good Utility Practice." But none of these standards of review are stated, or defined, by the Commission's rules as standards applicable to evaluation of an independent system impact study.[33]

Further, PGE has stated "Waconda has conditioned its desire to conduct a study on terms not found in the Commission's rules" and PGE "does not agree to be bound by standards not stated or defined by the Commission's rules."[34] Thus, PGE is essentially stating it retains the right to not review the independent System Impact Study in a reasonable, non-discriminatory manner consistent with Commission rules or its contractual duties. Waconda Solar believes these standards apply to a utility's review of an independent System Impact Study. Therefore, PGE refusal to review the independent System Impact

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33 PGE's Declaration of Rebecca Dodd in Support of PGE's Motion, Exhibit 7 at 2-3 (Sept. 15, 2021).

34 PGE Motion at 40-41.

Study under these standards is preventing Waconda Solar from conducting the independent System Impact Study.

PGE claims it has agreed to allow Waconda Solar to conduct the independent System Impact Study.[35] However, PGE has not really agreed to allow Waconda Solar to conduct the independent System Impact Study because PGE has conditioned is 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.[36] Thus, PGE's offer to have Waconda Solar conduct the independent System Impact Study is not a real offer if PGE will not review the study consistent with the law and its contractual duties.

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

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35 PGE Motion at 42.

36 PGE's Declaration of Rebecca Dodd in Support of PGE's Motion, Exhibit 7 at 2-3 (Sept. 15, 2021).

Further, PGE's terms could constitute an illegal agreement, and courts have refused to enforce agreements that are illegal.[37] Courts have stated "[a]n agreement is illegal if it is contrary to law, morality or public policy. Plain examples of illegality are found in agreements made in violation of some statute; and, stating the rule broadly, an agreement is illegal if it violates a statute or cannot be performed without violating a statute."[38] It follows that offers to form an agreement also cannot contain provisions that would make the agreement illegal. If PGE does agree to abide by the standards of review in Commission rules and its contractual duties, then an interconnection customer's right to conduct the independent System Impact Study becomes useless. Thus, PGE is preventing Waconda Solar from conducting the independent System Impact Study even though PGE claims it has agreed to allow Waconda Solar to conduct the study.

PGE claims there is no genuine issue of material fact regarding whether PGE is refusing to provide Waconda Solar with information necessary to conduct the independent System Impact Study.[39] That is not the case because PGE is refusing to state how it will evaluate and address the independent System Impact Study, which is essential to Waconda Solar's right to conduct an independent System Impact Study. Waconda Solar sought reassurances PGE would review the independent System Impact Study in a reasonable, non-discriminatory manner consistent with Commission rules and its contractual duties, but PGE had refused to provide those. Thus, when the facts are

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

38 *Bagley*, 356 Or at 552 (citing *Uhlmann*, 97 Or at 689) (internal quotes omitted).

39 PGE Motion at 40.

viewed most favorable to Waconda Solar, PGE's motion for summary judgment should be denied.

Finally, it is notable that PGE is making every effort to prevent the Commission from even addressing the merits of what an interconnection customer's rights are regarding independent System Impact Studies. PGE claims that Waconda Solar's complaint is moot,[40] and PGE is opposing a similar, although much broader, Petition for Declaratory Ruling filed by the Community Renewable Energy Association, the Oregon Solar + Storage Industries Association, and Renewable Energy Coalition, that would address this and other questions.[41] By attempting to avoid these legal questions, PGE wishes to retain the status quo in which many interconnection customers do not avail themselves of the independent System Impact Study option because they anticipate that PGE's position is that they have no legal rights to conduct the study, obtain information from PGE, or have the study reviewed in a reasonable and non-discriminatory manner consistent with general contract principles.

iv. PGE's Motion for Summary Judgment Should Be Denied Because PGE Has a Role to Play with Regards to Whether Waconda Solar Hires a Third Party to Conduct the Independent System Impact Study

PGE claims it has "no role to play with regard[s] to whether Waconda hire a third party to conduct an independent system impact study."[42] This is incorrect as explained above. PGE has many roles to play with regard to whether Waconda Solar can hire a

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40 PGE Motion at 64.

41 *In re REC, OSSIA, and CREA Petition for Declaratory Ruling*, Docket No. DR 57, Joint Utilities' Comments at 1 (Nov. 19, 2021).

42 PGE Motion at 42.

third party to conduct the independent System Impact Study. For example, PGE must provide its system information, access to its system for the third party to be able to conduct the independent System Impact Study, and answer questions regarding its system. Additionally, PGE must be willing to review the independent System Impact Study consistent with Commission rules and its contractual duties, which Waconda Solar understands PGE is not willing to do. Thus, PGE's assertion it plays "no role" in Waconda Solar's ability to hire a third party to conduct the independent System Impact Study is inaccurate and demonstrates how PGE will take unreasonable positions in the interconnection process. PGE's motion for summary judgment should be denied because the facts construed most favorably to Waconda Solar indicate PGE has several major roles in Waconda Solar's ability to conduct an independent System Impact Study and PGE is preventing Waconda Solar from conducting the independent System Impact Study.

2. The Facts, When Construed Most Favorably to Waconda Solar, Indicate that PGE Has Unreasonably Refused to Allow the Use of Third-Parties, and Not Acted in Good Faith or Reasonably on the Subject

i. The Use of Third Parties to Conduct Interconnection Studies Represents an Important Tool in Interconnection Customers' Limited Opportunities to Verify, Review, and Test a Utility's Determinations in the Process

As described above, the opportunities for an interconnection customer to understand, verify, or challenge a PGE interconnection study are very limited. One meaningful opportunity to change this structure is for the utility to allow the interconnection customer to hire a third-party to conduct the studies, and perhaps even construct the required interconnection facilities.

This option is expressly provided for by the Commission's interconnection rules. With respect to the studies, OAR 860-082-0060(9) provides that "[a] public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete a Feasibility Study, System Impact Study, or Facilities Study, subject to public utility oversight and approval."[43] With respect to the actual construction of the interconnection facilities, OAR 860-082-0060(8)(f) provides that "[a] public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight and approval."[44] These rules, as confirmed by the Commission's order adopting them and the rulemaking record, were developed to give interconnection customers an opportunity to use the assistance of a third-party as a remedy to challenges that they may face from the utility's administration of the interconnection process.[45] The rules provide that the use of a third-party is to be subject to the utility's oversight and is to be governed by an agreement between the utility and the interconnection customer.

The right to have a third-party conduct a study or construct required facilities is a critical fallback for interconnection customers who are unsatisfied with utility efforts, and especially where a utility's actions in the interconnection process have been shown to be improper, incomplete, careless, or mistaken.

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43 OAR 860-082-0060(9).
44 OAR 860-082-0060(8)(f).
45 *See generally* Declaration of John Lowe.

ii. Waconda Solar Sought to Make Use of the Commission's Rules on Third-Party Studies Because of Its Concerns with PGE's Studies

In this case, Waconda Solar identified numerous issues and inaccuracies in PGE's Feasibility Study and raised those with PGE.[46] In light of this, Waconda Solar requested that PGE provide it authorization to have a third-party conduct the remainder of the PGE interconnection studies and allow Waconda Solar to conduct an independent System Impact Study.[47] Waconda Solar was unsatisfied with PGE's responses and continued to have many unanswered questions and unresolved concerns with respect to the Feasibility Study even after PGE provided a new version of it.[48]

Eventually, Waconda Solar signed the System Impact Study Agreement for the project, explaining:

> While my questions from the Feasibility Study have not been answered and I am unable to make business decisions based on the inconsistencies within that study, I am returning the System Impact Study Agreement solely to preserve Waconda Solar's position in the interconnection queue. Also, I once again ask that you respond to and answer the questions from my previous email.
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> Further, because of the inconsistencies within the Feasibility Study and that fact that portions of it are simply not correct, I am asking that Waconda Solar have a third-party engineer complete the remaining studies as allowed in OAR 860-082-

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46 PGE's Answer to Amended Complaint, Exhibit D at 1; PGE's Answer to Amended Complaint, Exhibit E at 1.

47 PGE's Answer to Amended Complaint, Exhibit E at 1 (Waconda Solar requesting that a third-party engineer conducts the remaining studies pursuant to OAR 860-082-0060. Note no subsection was referenced indicating Waconda Solar requested to conduct an independent System Impact Study and hire third-party engineer to complete the remaining studies.).

48 PGE's Answer to Amended Complaint, Exhibit G at 1; PGE's Answer to Amended Complaint, Exhibit H at 1.

> 0060. Please respond to both this email and my previous emails without delay.[49]

In response to Waconda Solar's requests to conduct an independent System Impact Study and have a third party conduct the remaining studies, PGE refused.[50] The reasons for Waconda Solar's request were made clear—it found that the Feasibility Study produced by PGE was erroneous in many respects, that PGE was not responsive to its questions and concerns, and that it had limited ability to understand the conclusions PGE asserted in the studies.[51] PGE's reason for refusal were not clear. After Waconda Solar reiterated its request multiple times, PGE finally provided no explanation and simply informed Waconda Solar:

> You have requested that PGE grant Waconda Solar the right to hire a third-party consultant to complete the System Impact Study and Facilities Study per OAR 860-082-0060(9). PGE respectfully denies your request.[52]

iii. PGE's View That It Has No Duty to Act Reasonably and Non-Discriminatorily on the Topic of Third-Party Interconnection Studies Should Not Be Sustained by the Commission

In this case, through its motion for summary judgment, PGE takes what Waconda Solar believes is an extreme position—that because the Commission's rules do not *require* it to consent to having third parties conduct the interconnection studies, it has no duty to agree to such requests, and *no requirement to justify the reasonableness of its decision*. PGE cites OAR 860-082-0060(9), and argues:

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49 PGE's Answer to Amended Complaint, Exhibit E at 1.
50 PGE's Answer to Amended Complaint, Exhibit J at 1.
51 *See generally*, PGE's Answer to Amended Complaint, Exhibit G at 1-5.
52 PGE's Answer to Amended Complaint, Exhibit J at 1.

> The rule permits the utility to refuse to agree to allow the applicant to hire a third party to conduct the required studies. Further, there is no requirement that the utility justify the "reasonableness" of its decision.[53]

Thus, under PGE's interpretation of the rule, a utility is empowered to completely expunge any application of OAR 860-082-0060(9) from interconnection customers' limited toolbox through a unilateral determination to do so. In other words, PGE's position is that, because the rule is not mandatory, the utility can choose to make nothing of the rule at all, and simply inform customers that it has chosen to not extend the rule's offering to that customer.

Even if OAR 860-082-0060(9)'s language is interpreted as being cast in discretionary terms, Waconda Solar believes that the correct interpretation of the rule is that a utility is at least required to exercise its discretion under that rule in a manner that is reasonable. Such an interpretation is consistent with and required by the Commission's broad mandate to ensure the monopoly utilities it regulates behave in a manner that is reasonable toward their customers. This authority and duty is reflected in several different statutes, including ORS 756.040, which addresses the Commission's general powers and states that in addition to any duties otherwise vested in the Commission, the Commission shall "protect [] customers, and the public generally, from unjust and unreasonable exactions and practices [by the utilities]."[54] This makes it clear that the Commission *shall* ensure that no customers are treated unreasonably by regulated utilities. ORS 756.040 also makes it clear that the Commission is to "represent the

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53 PGE Motion at 29.

54 ORS 756.040(1).

customers of any public utility . . . in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction."[55] If the Commission is to represent customers' interests, it certainly has a duty and the authority to disallow unreasonable practices by the utilities it regulates. Thus, if the Commission agrees with PGE's interpretation of the current rules as authorizing unreasonable behavior, then the Commission is statutorily obligated to commence a rulemaking to promulgate new rules that do *not* allow utilities to treat their customers unreasonably. Failure to do so would be a dereliction of the Commission's legal obligations.

Additionally, ORS 757.325 requires that utilities not act unreasonably in giving preference or advantage to any person.[56] This provision would include PGE itself, to whom PGE is reserving *all* of its discretion with respect to interconnections, despite that the rules make it clear there is an opportunity for interconnection customers to utilize third parties' assistance, subject to PGE's oversight and approval.

In light of these authorities, PGE is not entitled to categorically walk away from the entire subject matter of third-party assistance to interconnection customers that are struggling to get answers and valid studies in the interconnection process. PGE must at least establish that its actions on this topic, including its refusals to allow customers any relief through this option, are reasonable—just as it is required to do on any other topic on which it is regulated.

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55 ORS 756.040(1).
56 ORS 757.325.

PGE's duty to act reasonably is also reflected in the Commission's rules on interconnection that make it clear that customers are only required to pay the reasonable costs of interconnection to the utility. OAR 860-082-035(2) states that the interconnection customers "must pay the *reasonable* costs of the interconnection facilities." Thus, under the Commission's rules, an interconnection must be entitled to some process to ensure that the costs that it is required to pay are reasonable, and a utility is clearly subject to an obligation to charge no more than that. If an interconnection customer therefore has reason to believe that a utility is proposing to charge unreasonable costs of interconnection because of the findings of studies that contain errors, a utility should be obligated to consider in good faith whether to allow a third party to conduct the studies, and the Commission should find a flat refusal to do so unreasonable and in violation of the utility's obligation to charge only the "reaaonable" costs to interconnection customers.

PGE argues that the Commission has already found that it has no duty to act reasonably on the topic of third-party interconnection studies, through interpreting a similar provision of its rules. PGE cites the Commission's Order No. 19-218, from *Sandy River Solar, LLC v. PGE*, Docket No. UM 1967 for this proposition, where the Commission found:

> 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 upgrades.[57]

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[57] PGE Motion at 31 (citing Order No. 19-218 at 25).

Although Waconda Solar believes that the Commission's order in that case was wrongly decided and should be reversed,[58] it is at least clear that the Commission's order relied only on a review of the specific language in the rules to determine if a duty to act reasonably was embedded within them. The Commission made this clear in its order, where it noted that it was not ruling on other arguments made by the Complainant that PGE was violating its general duties to act reasonably toward its customers because it found that the Complainant had not raised the issue in its complaint.[59]

The Commission went on to explain:

> Although we acknowledge that we have the authority to correct unreasonable actions by a utility in certain circumstances under either our general enabling statutes or contractual law, we note that the bar is high to apply these general obligations to circumstances in which we have addressed a utility's obligations more directly in specific rules. We may, however, change our rules. We have the authority to amend our rules or adopt new rules that expand our oversight over interconnection issues, including imposing new limitations on utility discretion to refuse third party involvement, in a specific rule through future rulemakings.[60]

Waconda Solar thus views the Commission's findings in Order No. 19-218 as indicating that it would have to take a hard look at a utility's actions before finding that they have violated a duty to act reasonably in refusing to allow a third party to conduct an interconnection study in lieu of the utility. However, the Commission did not find that a

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58 Waconda Solar raises all the same arguments that Sandy River Solar, LLC raised in Docket No. UM 1967. Waconda Solar asserts all the same arguments, incorporates the arguments by reference, and attaches those arguments to this Response to preserve arguments for a potential appeal. (Attachment A).

59 Order No. 19-218 at 25.

60 Order No. 19-218 at 25-26.

utility has no duty to act reasonably on the topic, as PGE has asserted. And, as such, the Commission presumably expects that under some factual scenarios a utility's actions in refusing to allow a third party to conduct studies could be unreasonable.

In it motion for summary judgment, PGE has not argued that the undisputed facts show that it has acted *reasonably*. Importantly, there are really no undisputed facts on that topic, because there is neither a stipulation of the facts nor any testimony on this topic. Instead, Waconda Solar has alleged in its complaint that:

> PGE has a history of preparing interconnection studies that contain errors and inaccuracies, do not adequately contain all of the information required by the Commission's rules, and are delayed past the study timelines. . . . PGE made a number of errors in the initial Feasibility Study for the Waconda Solar project. These numerous errors included but were not limited to basic information such as the total existing and proposed generation on the distribution line and the rating of the substation transformer (among others). Waconda Solar immediately inquired into these errors, and after a couple weeks of prodding, PGE finally admitted that it made some errors in the study. Then, only after Waconda Solar requested it, PGE finally provided a revised Feasibility Study more than a month after the initial study was provided. The revised Feasibility Study corrected some errors but still states two differing values for the total amount of generation on the substation transformer among other errors and inconsistencies. Waconda Solar immediately inquired into the errors in the Revised Feasibility Study, but as of the date of this filing, has not received a response.[61]

Further, Waconda Solar alleged many instances, in its complaint, of PGE's history of failures in conducting interconnection studies.[62] Thus, Waconda Solar asserts ample

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61 First Amended Complaint at 2-3, 8-14 ¶¶ 23-67, 76-81.

62 *See* First Amended Complaint at 13-14, ¶¶ 67-75 (describing PGE errors in studies for a variety of projects about which TLS Capital is aware).

facts to show that PGE acted unreasonably by denying Waconda Solar an opportunity to have a third-party conduct the interconnection studies, because PGE had failed to produce reasonable studies for Waconda Solar, and Waconda Solar had reason to believe that it would continue to fail to do so. Importantly, on summary judgment, these facts must be construed in the manner most favorable to Waconda Solar.

In its motion for summary judgment, PGE appears to primarily rely on its view that as a matter of law, it has no duty of reasonableness as established in Order No. 19-218. However, as explained above, that order is not applicable to all of the issues in dispute. Further, Waconda Solar believes the Commission should overrule that decision and rule that its general duties require the utilities to act reasonably when an interconnection customer requests a third party complete the studies. It appears PGE will argue it never has a duty to act reasonably unless the rules specifically require it. This will make the option to do independent studies null and creates a wasted rule if the utility will never agree to substantively review the independent study.

In its motion for summary judgment, PGE also argues this issue should be resolved in UM 2111.[63] These issues regarding an interconnection customer's ability to have third parties complete the studies was first raised in UM 2000 in 2019.[64] It has been three years since these issues were first raised and there still has not been any resolution. Additionally, a conclusion in UM 2111 is not expected to be reached on these issues until 2022, 2023, or even later. Interconnection customers need options to ensure

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63 Motion at 32-34.

64 *In re Commission Investigation into PURPA Implementation*, Docket No. UM 2000, Order No. 19-254 at 1.

interconnection costs are reasonable now, and the ability to hire third parties to conduct the studies is one tool. PGE's motion for summary judgment should not be granted because the issue could be addressed in another docket in a few years, and that rights should be reaffirmed or clarified now.

In its motion for summary judgment, PGE also fails to offer facts to counter Waconda Solar's allegations. To the extent it addresses those facts, it argues that the Commission cannot give any "credence to Waconda's allegation of missed deadlines or inadequate study results" without "effectively adjudicat[ing] the facts in the absence of any pending complaints."[65] Waconda Solar understands PGE's argument to be that the Commission cannot assume that PGE has a history of failures in interconnection studies, because it would have to adjudicate other disputes before finding that this is true. PGE's position, however, overlooks the fact that in a motion for summary judgment, the facts are to be construed most favorably to the non-moving party (here, Waconda Solar).

More practically, PGE's position also overlooks that PGE has gone to great lengths to keep the Commission from reviewing the evidence on whether it has in fact failed in other interconnection studies, as is alleged by Waconda Solar in this case.[66] PGE effectively claims that mistakes in other cases are not indicative of PGE's duty to act reasonably when deciding whether an interconnection customer can hire a third party to conduct studies. This is not true. PGE's history of making mistakes in its

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65 PGE Motion at 35.

66 *See generally, e.g.,* Docket No. UM 1967, PGE's Response to Complainant's Second Motion to Compel (March 22, 2019) (asserting that complainant that alleged PGE history of failures in interconnection studies was not entitled to discovery regarding PGE's interconnection studies for other projects).

interconnection studies demonstrates that interconnection customers should be able to hire third parties to conduct the studies.[67]

Some of PGE's mistakes have come before the Commission already. For example, in requesting a rule waiver in Docket No. UM 1631, Marquam Creek Solar had a fully executed interconnection agreement with PGE with an interconnection cost estimate of $268,350.[68] When a higher queued project withdrew from the queue, PGE proposed a restudy of Marquam Creek Solar's interconnection and the restudies indicated the generation facility would cause backfeeding into PGE's system requiring extensive and costly 3V0 upgrades costing $1,100,053.[69] This is a drastic increase in interconnection costs especially when Marquam Creek Solar already had a fully execute interconnection agreement with PGE.

Similarly, in Docket No. UM 2009, PGE initially estimated interconnection costs for a specific point of interconnection, which at first it refused to consider[70], would cost roughly $343.7 million for a Network Resource Interconnection Service ("NRIS")[71] and $51 million for an Energy Resource Interconnection Service ("ERIS").[72] After a restudy

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67 See Attachment B showing PGE's history of delays and errors in the interconnection process and interconnection studies.

68 *See In re General Waiver Requests*, Docket No. UM 1631, Marquam Creek Solar, LLC's Petition for Waiver of OAR 860-082-0025(1)(c) at 1 (Jan. 25, 2021).

69 Docket No. UM 1631, Marquam Creek Solar, LLC's Petition for Waiver of OAR 860-082-0025(1)(c) at 1-2 (Jan. 25, 2021).

70 *Madras PV1, LLC v. PGE*, Docket No. UM 2009, Complaint at 6, ¶ 12 (Apr. 22, 2019).

71 Docket No. UM 2009, PGE's Response Testimony at PGE/101, Morton/86 (June 11, 2019).

72 Docket No. UM 2009, Madras Solar's Reply Testimony at Madras Solar/300, Rogers/32 (Nov. 5, 2019).

and admittance of PGE's mistake in the initial study, the interconnection costs were reduced to $27 million for NRIS interconnection[73] and $3 million for ERIS interconnection.[74] PGE's mistake resulted in drastic differences in estimated interconnection costs, and it could have resulted in the interconnection customer abandoning its project, if the customer had not (successfully) challenged those conclusions.

There are numerous other problems with PGE's interconnection studies, some of which are noted in the Amended Complaint, and alleges (and the Commission must accept as true for the purposes of a motion for summary judgment) the following allegations:

- PGE has a history of making errors in its interconnection studies";
- The owner of Waconda Solar "experienced PGE's errors and inconsistencies in a number of other studies for other projects.
- PGE has a history of missing interconnection application timelines and study timelines.
- PGE has a history of providing inadequate studies that do not contain the information required by the Commission's rules.
- PGE's errors result in dramatically different cost estimates.
- PGE's delays in the interconnection process cause financial harm to QFs.
- PGE's interconnection department is understaffed.[75]

Some examples of specific problems identified in the complaint include:

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73 Docket No. UM 2009, Madras Solar's Answer to PGE's Counter-Claims at 6 (Aug. 12, 2019).

74 Docket No. UM 2009, Madras Solar's Reply Testimony at Madras Solar/300, Rogers/34 (Nov. 5, 2019).

75 First Amended Compliant at ¶¶ 67-68, 77-81.

- For Mt. Hope Solar, PGE gave Mt. Hope Solar an interconnection study that double counted some upgrades or requirements.

- For Eola Solar, PGE gave Eola Solar a facility study where the estimated costs nearly doubled from the system impact study despite no changes in the requirements; PGE claims that this was the result of PGE's clerical error.

- For Brush College Solar, PGE gave Brush College Solar a facility study with 61% higher costs than what was in the system impact study again, despite there being no changes to any of the requirements.

- For Brush College Solar, PGE provided Brush College Solar with a facility study but when Brush College Solar questioned PGE on certain aspects of the study, PGE determined that voltage regulator was not actually needed.

- For Sandy River Solar, PGE provided Sandy River Solar with a system impact study that required a recloser that was not actually needed, and PGE removed that requirement in the facility study.

- For Mountain Meadow Solar, PGE provided Mountain Meadow Solar with a feasibility study that did not identify all adverse system impacts and the study was not accurate; it said the project would cause backfeed into the substation despite a load on the line that far exceeded the total generation.[76]

PGE also has a history of delays in completing interconnection studies. For example, in UM 1902, PGE was delayed in returning interconnection studies for Pacific Northwest Solar (Amity Project) by 205 calendar days at the time the complaint was originally filed.[77] Also, in UM 1903, PGE was also delayed in returning interconnection

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[76] First Amended Compliant at ¶¶ 69-74.

[77] *Pacific Northwest Solar, LLC (Amity Project) v. PGE*, Docket No. UM 1902, Complaint at 7, ¶ 37 (Oct. 9, 2017).

studies to Butler Solar by 230 calendar days.[78] Further, in UM 1904, PGE was also delayed in returning interconnection studies for Pacific Northwest Solar (Duus Project) that resulted in a delay of 330 calendar days.[79]

On this topic of whether PGE unreasonably refused Waconda Solar's request to have a third-party consultant conduct the interconnection studies, Waconda Solar has alleged that PGE acted unreasonably and has alleged facts that support that view. In response, PGE argues that it has no duty to act reasonably on this topic, and that even if the Commission were inclined to review its actual actions on this topic, it could not do so because the information would be undiscoverable or unknowable. The Commission cannot grant summary judgment on these grounds because it would require the Commission, contrary to the legal standard, to assume the facts in a manner most favorable to PGE's view. It also would strain the Commission's authorities for the Commission to pre-emptively determine a discovery or fact matter (whether PGE has a history of failures in interconnection studies) prior to allowing its own fact-finding process to have even operated on the question and decide a motion for summary judgment on those grounds. Thus, PGE's motion should be denied. Waconda Solar has alleged facts that, if true, support Waconda Solar's position and do not support PGE's motion.

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78 *Butler Solar, LLC v. PGE*, Docket No. UM 1903, Complaint at 8, ¶ 42 (Oct. 9, 2017).

79 *Pacific Northwest Solar, LLC (Duus Project) v. PGE*, Docket No. UM 1904, Complaint at 7, ¶ 37 (Oct. 9, 2017).

3. The Facts, Construed Most Favorably Toward Waconda Solar, Show That PGE Has Provided Erroneous Studies That Have Not Met the Standards of the Commission's Rules

As part of the interconnection study process, Waconda Solar paid for and PGE provided a Feasibility Study to Waconda Solar on July 10, 2018.[80] Under OAR 860-082-060(6)(e), in its Feasibility Study, PGE was required to "identify any potential adverse system impacts on the public utility's transmission or distribution system or an affected system that may result from the interconnection of the small generator facility." In reviewing the Feasibility Study, Waconda Solar highlighted numerous issues. These included:

- Erroneous dates and references;[81]
- The exclusion of information that the study itself states that it included;[82]
- Misstatements about the proposed and existing generation on the distribution line and transformer ratings;[83]
- The exclusion of any information on any studies that were performed, or the results or analysis of those studies;[84] and
- Statements of required costs, without a description or explanation of those costs.[85]

After asking questions, and repeated follow up, PGE agreed to issue a Revised Feasibility Study,[86] but Waconda Solar found that the Revised Feasibility Study

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80 First Amended Complaint, Attachment B at 1.
81 First Amended Complaint at 8, ¶¶ 24-25.
82 First Amended Complaint at 8-9. ¶ 27.
83 First Amended Complaint at 9, ¶¶ 28, 29.
84 First Amended Complaint at 9, ¶ 30.
85 First Amended Complaint at 9, ¶¶ 31-33.
86 First Amended Complaint at 9-11, ¶¶ 34-52.

continued to include numerous errors and omissions.[87] Waconda Solar has continued to demand a correct study, which it believes has not been provided.[88] In light of these experiences, Waconda Solar has alleged in its complaint that PGE failed in its duties to provide a Feasibility Study that meets the Commission's requirements.

PGE now seeks summary judgment, arguing that the studies met the Commission's requirements, the errors identified were immaterial, and PGE corrected them in subsequent study reports.[89] PGE's motion for summary judgment on this topic should be denied because the resolution of that issue clearly requires a factual inquiry that has not been conducted in this case.

i. PGE's Motion for Summary Judgment Should Be Denied Because its Feasibility Study Does Not Conform to Commission Rules or Requirements Outlined in the Feasibility Study Agreement

To support its motion, PGE argues that the Feasibility Study contains a very low bar—that PGE need only "identify" potential adverse system impacts, not go into them in any detail.[90] It is both a legal and a factual question as to what a Feasibility Study must contain and whether the Feasibility Study provided sufficient information to meet the requirements.

Under Commission rules a Feasibility Study must:

> identify any potential adverse system impacts on the public utility's transmission or distribution system or an affected system that may result from the interconnection of the small generator facility. In determining possible adverse system

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87 First Amended Complaint at 11-13, ¶¶ 53-65.
88 First Amended Complaint at 13, ¶ 65.
89 PGE Motion at 19-27.
90 PGE Motion at 19-25.

> impacts, the public utility must consider the aggregated nameplate capacity of all generating facilities that, on the date the feasibility study begins, are directly interconnected to the public utility's transmission or distribution system, have a pending completed application to interconnect with a higher queue position, or have an executed interconnection agreement with the public utility.[91]

Further, the Feasibility Study Agreement states:

> The Feasibility Study report shall provide the following information:
> 6.1 An identification of the potential Adverse System Impacts on PGE's transmission and/or distribution system or any Affected System.
> 6.2 Preliminary identification of any circuit breaker short circuit capability limits exceeded as a result of the interconnection,
> 6.3 Preliminary identification of any thermal overload or voltage limit violations resulting from the interconnection, and
> 6.4 Preliminary description and non-bonding estimated cost of facilities required to interconnect the Small Generator Facility to PGE's T&D System and to address the identified short circuit and power flow issues.[92]

PGE claims it does not need to provide a detailed analysis in the Feasibility Study because the Commission rules only require it to "identify" any potential adverse system impacts while the System Impact Study requires it to "identify and detail."[93] This is incorrect.

Consider that, for the Facilities Study, the third study in the process as the studies get more detailed, the rules similarly only require a utility to "identify" interconnection

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91 OAR 860-082-0060(6)(e).
92 First Amended Complaint, Attachment A at 2.
93 PGE Motion at 19-20, 23.

facilities and system upgrades needed.[94] Thus, PGE's assertion that it does not need to provide any detailed analysis because the Commission rules only require the utility to "identify" potential adverse system impacts in the Feasibility Study fails because the Commission would not have intended the third study, the Facilities Study, that is supposed to be the most detailed to also only "identify" necessary interconnection facilities and system upgrades without providing any detailed analysis. In addition, even to correctly identify any facilities and upgrades, the utility should be required to conduct a reasonable and thorough analysis to ensure that the identification is accurate.

PGE's claim that its Feasibility Study did not contain errors because it "identified" without detailing potential adverse system impacts is not appropriate for summary judgment. PGE essentially asserts Commission rules do not require it to show its work or justify why it believes the upgrades are necessary. Waconda Solar believes the Commission rules and the Feasibility Study Agreement require PGE to provide more information than just identifying the upgrades. The studies are a tool for the interconnection customer to ensure it will be paying reasonable costs for interconnection facilities and system upgrades.[95] Further, the studies need to include enough information so that an interconnection customer can reasonably determine if it the project will be economically viable, but to do that the studies need to contain enough details. Thus, the

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94 OAR 860-082-0060(8)(e).

95 *See* OAR 860-082-0035(2), (4) (stating "[t]he applicant must pay the reasonable costs of the interconnection facilities" and "[t]he applicant must pay the reasonable costs of any system upgrades").

Feasibility Study needs to contain enough detail so that an interconnection customer can determine whether to proceed. This is a factual question.

Here, PGE claims its motion for summary judgment should be granted because its Feasibility Study and Revised Feasibility Study identified any potential adverse system impacts.[96] PGE's Revised Feasibility Study included more detail as indicated in bold:

> (1) Overloaded Conductor: The revised study states that the "proposed generation will exceed the thermal limits of the existing conductor" leading to the conclusion that **"two sections" of the overhead line** totaling approximately 2.5 miles need to be reconductored.
> (2) Overloaded Protective Devices: The revised study "identified two protective devices that become overloaded with the installation of Waconda Solar … **an existing hydraulic recloser located on Wapato St. NE [that is] … not capable of handling the two-way flow of power … [and] a 65T Fuse located on pole 1351 … [that will] become overloaded due to an increase in amps … [that will] exceed the fuse rating with the installation of the new generator"** and the study notes that both protective devices "will need to be replaced with electronic reclosers."
> (3) Potential to Backflow the Transmission System: Finally, the revised study notes the same risk of backflow and the same facilities needed to address that risk as identified in the original study.[97]

These bolded additions are important to meet the requirements in the Commission's rules and the Feasibility Study Agreement. This type of information is important for an interconnection customer to understand its potential adverse system impacts and whether to proceed in the interconnection process.

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96 PGE Motion at 23.
97 PGE Motion at 21-22.

Further, this is the type of information that should have been included in the original Feasibility Study. Waconda Solar had to ask clarifying questions and ask PGE to fix errors in the study before PGE provided the Revised Feasibility Study. Additionally, even after PGE provided the Revised Feasibility Study, Waconda Solar requested an accurate and correct study because it still identified errors in the Revised Feasibility Study.[98] PGE's motion for summary judgment should be denied because PGE should have provided more detail regarding the potential adverse system impacts in its original Feasibility Study and PGE still has not provided a complete Feasibility Study consistent with Commission rules and the Feasibility Study Agreement as Waconda Solar has noted errors in the Revised Feasibility Study. Thus, these corrections demonstrate that the initial Feasibility Study Agreement was not complete and accurate.

ii. PGE's Motion for Summary Judgment Should Be Denied Because the Interconnection Studies Contained Material Errors that Affect an Interconnection Customer's Decision Regarding Viability of a Project

PGE also asserts that the errors were immaterial in any event and were corrected by PGE in the subsequent study.[99] But, PGE's claims in this regard are highly factual and supported by nothing more than PGE's counsel's reasonings. For example, PGE argues in its motion:

> While [certain of] these errors arguably had the *potential* to impact PGE's feasibility study conclusions, it turns out that none of the errors actually altered PGE's conclusions."[100]

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98 PGE's Answer to Amended Complaint, Exhibit H at 1.
99 PGE Motion at 25.
100 PGE Motion at 26 (emphasis in original).

In other words, PGE argues that because its conclusions remained the same even after it corrected the errors, the errors were immaterial, and thus it should be granted summary judgment on the question of whether the studies were erroneous.

Waconda Solar disagrees that the errors are immaterial and has stated in an email to PGE that there were "significant errors and inconsistencies within the Feasibility Study."[101] Just because PGE asserts that they are not material does not make it true.

The errors in both studies are material. Some of the errors relate to the size of the project, which can affect whether the project is economically feasible or not. Further, some of the errors identified by Waconda Solar relate to the proposed and existing generation on the distribution line and transformer ratings.[102] These errors affect the economic feasibility of the project and determine whether Waconda Solar proceeds in the interconnection process or abandons the project. Thus, this information is material, and it is important the studies contain correct information on these essential facts.

Here at least some of the errors were material enough that they could have resulted in an interconnection customer making different business decisions. For example, after Waconda Solar received the Feasibility Study, it asked questions regarding the stated generation on the transformer and feeder. Waconda Solar specifically asked:

- Why the generation on the transformer was 12.45 megawatts ("MW") but generation on the feeder was 15.47 MW;
- Why the study stated the line was rated at 10 MW and it claimed Waconda Solar, a 2.25 MW project, put the total generation on the line to 15.47 MW; and

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101 PGE's Answer to Amended Complaint, Exhibit F at 2.

102 First Amended Complaint at 9, ¶¶ 28, 29.

- Why the study stated the transformer was rated at 14 MW but had 15.47 MW of generation on the feeder.[103]

After PGE provided a Revised Feasibility Study, Waconda Solar had more questions regarding generation on the transformer and feeder. Waconda Solar asked why the study stated the load on the transformer was 15.95 MW but elsewhere stated it was 12.45 MW.[104] To date, PGE has never responded to the questions about errors in the Revised Feasibility Study.[105]

PGE's motion for summary judgment should also be denied because an interconnection customer needs assurances the utility will complete accurate studies the first time around. PGE claims its motion for summary judgment should be granted because it corrected errors in the Revised Feasibility Study.[106] However, PGE is ignoring that Waconda Solar has a right to a properly performed Feasibility Study, for which it paid, *without* needing to first review and verify the study and bring errors to the utility's attention for correction.

An interconnection customer needs to be able to make informed business decisions regarding whether to proceed in the interconnection process. Once an interconnection customer receives a study it has two options: proceed to the next study or abandon the project. Errors in a study showing high costs or a long interconnection

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103 PGE's Answer to Amended Complaint, Exhibit D at 1.

104 PGE's Answer to Amended Complaint, Exhibit H at 1.

105 *See* Amended Complaint at 13, ¶¶ 65, 66 (Waconda Solar claiming PGE never responded to its email about errors in the Revised Feasibility Study); *See* PGE's Answer to Amended Complaint at 19, ¶¶ 65, 66 (PGE admitting it never responded to Waconda Solar's questions regarding the errors in the Revised Feasibility Study).

106 PGE Motion at 27.

process could cause an interconnection customer to abandon if it believes the project is uneconomic, but in reality, it was economic if not for a utility's mistakes in the study. In the alternative, errors showing low costs or a quick process could cause an interconnection customer to proceed with the project under the false impression that the project would be economic. However, but for the errors in a study, the study should have indicated the project would be uneconomic. This would result in an interconnection customer unnecessarily paying for unnecessary studies. Both results can clog the interconnection queue and harm other interconnection customers because PGE is providing inaccurate Feasibility Studies.

Further, errors in interconnection studies can affect the project's risk profile and influence how a developer makes informed business decisions. Each individual error in a study could change how a developer views the project and determine whether to proceed or not. One of the errors mentioned above was that PGE stated the transformer was rated at 14 MW but had 15.47 MW of generation on the feeder. While this error did not have a cost to it in the study, this error can affect the viability of the project. For example, if there had been a project ahead in the queue that would have to replace the transformer that was likely to proceed, this is lower risk than if that project were unlikely to proceed. Thus, errors that do not directly relate to the economics of a project can still be material as they can affect a project's risk profile and viability when developers are making business decisions.

Thus, it is important a utility provide an accurate, complete study the first time around regardless whether the errors here were material or not. PGE's motion for

summary judgment should be denied because utilities need to provide complete, accurate studies so that interconnection customers can make informed business decisions.

Further, the bolded items above in the Revised Feasibility Study are material as those facts are important for an interconnection customer to understand the potential adverse system impacts and determine whether to proceed to the next interconnection study. Thus, the errors are material and either summary judgment is inappropriate, or summary judgment is warranted for Waconda Solar.

Additionally, nothing in PGE's argument establishes that PGE's Feasibility Study was actually modified to contain the correct conclusions. Instead, PGE only argues that PGE did not change its conclusions. In so arguing, PGE urges the Commission to pre-suppose that PGE's statements that it corrected the study are true, and then to further conclude that because PGE's conclusions in the study did not change, its corrections must not have been material.

This argument misses the point because the *question* is whether the studies are complete and correct, and PGE's statements in its motion do not resolve that question. Instead, they only offer PGE's point of view, and do not even do that through an evidentiary method. Put simply, PGE's argument does not establish as an "undisputed fact" that the Feasibility Study has been corrected—they only establish that PGE believes that it has been, despite Waconda Solar's outstanding questions to PGE that PGE has neglected to address.

4. The Facts, Construed Most Favorably Toward Waconda Solar, Show That Its Commercial Operation Date Should be Extended

In its complaint, Waconda Solar asks for relief from the Commission that includes an extension to its required commercial operation date ("COD") to reflect the necessary litigation in this case for Waconda Solar to preserve its rights.[107] In its motion for summary judgment, PGE now asks the Commission, to determine as a matter of law, that Waconda Solar is not entitled to this relief because:

1) PGE met all of its obligations and timelines in the interconnection study process,

2) "Waconda is responsible for creating its own timing dilemma by selecting an overly aggressive COD…and by refusing to execute a facilities study agreement or move forward with an independent system impact study," and

3) The Commission lacks the authority to modify the COD.[108]

PGE's arguments for summary judgment on these issues fail. PGE's first two arguments rely on disputed facts. As described above in section C.3.i., the facts, when construed most favorably toward Waconda Solar, demonstrate that PGE's interconnection studies do not meet the requirements of the Commission's rules. Although PGE contends differently, the fact that the issues remain disputed makes them inappropriate for disposition through summary judgment. For example, it is unreasonable for Waconda Solar to email PGE four times asking for PGE to respond and for PGE to take 15 days to respond to questions regarding errors in a study especially if

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107 First Amended Complaint at 30-31.

108 PGE Motion at 42.

PGE claims the errors were immaterial.[109] Unless the rules specifically require PGE to act reasonably, it appears PGE takes the position it can act unreasonably.

i. PGE's Motion for Summary Judgment Should Be Denied Because Waconda Solar Did Not Create its Own Timing Dilemma When Selecting its COD Because Waconda Solar Relied on Reasonable Information Available at the Time

Additionally, whether Waconda Solar created its own timing dilemma by selecting an "overly aggressive COD" or refusing to execute a Facilities Study Agreement are certainly not candidates for resolution through summary judgment because they, too, depend on the resolution of factual issues, not yet addressed in this proceeding. Rather than offer evidence on this topic, PGE's motion for summary judgment essentially just posits that these things are true.

The evidence demonstrates that Waconda Solar's chosen COD was reasonable. The Declaration of Troy Snyder offers evidence that Waconda Solar's chosen COD was entirely reasonable when chosen, given the information available to Waconda Solar regarding the average timeline when interconnection upgrades were expected to be complete from other system impact studies.[110] Troy Snyder estimated the study process would take 9 months based on Commission rules and timelines in PGE's interconnection study agreements.[111] The average amount of time PGE estimated to take to interconnect facilities from various studies at the time was 12 months.[112] Thus, a reasonable estimate

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109 PGE's Answer to Amended Complaint, Exhibit D at 1; PGE's Answer to Amended Complaint, Exhibit E at 1.

110 *See* Declaration of Troy Snyder at 1-2.

111 Declaration of Troy Snyder at 2.

112 Declaration of Troy Snyder at 2.

is that it would take 21 months to reach COD. Waconda Solar began the interconnection process in April 2018[113] and selected a COD in February 2020, 22 months later.

The following table illustrates the facts at the time Waconda Solar began the interconnection process.

Table 1: PGE System Impact Studies Waconda Solar Relied on When Selecting its COD

Project	Queue #	Date of SIS	Months to Complete Work
Drift Creek	SPQ0007	7/5/2017	12
Brush Creek	SPQ0008	7/5/2017	18
Balston	SPQ0011	5/22/2017	6
Palmer Creek	SPQ0010	5/22/2017	12
Case Creek	SPQ0022A	5/22/2017	12
O'Neil Creek	SPQ0017	5/15/2017	9
Day Hill	SPQ0027	12/18/2017	8
Willamina Mill	SPQ0022	7/17/2017	18
Kale Patch	SPQ0028	5/23/2017	12
Boring	SPQ0010	5/22/2017	12
Labish	SPQ0021	4/14/2017	6
Rafael	SPQ0020	5/15/2017	12
Tickle Creek	SPQ0030	9/22/2017	6
St Louis	SPQ0018	4/24/2017	12
Thomas Creek	SPQ0038	4/14/2017	12
Yamhill Creek	SPQ0044	4/14/2017	6
Volcano	SPQ0045	4/14/2017	68
		Average	10.53

That information shows that Waconda Solar relied on other PGE interconnection studies, and its best estimates of when the project could be completed. That PGE now asserts that Waconda Solar was somehow ill-advised to choose the COD it did (almost

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[113] April 2018 was the date of the Scoping Meeting and when the Feasibility Study Agreement was executed. *See* Amended Complaint at 7, ¶¶ 13, 16.

double the average time of PGE's own estimates) only suggests that PGE believes a developer should not rely on the information provided by PGE. If that is the case, then Waconda Solar should be entitled to relief from its chosen COD because it is PGE that should be responsible for not adhering to reasonable timelines, or for not providing reasonable information about its processes.

In its motion for summary judgment, PGE also seeks to inject a "motive" for Waconda Solar's selected COD, arguing that it was chosen "in an effort to 'lock in' preferable rates before a rate change on May 23, 2018."[114] PGE claims that Waconda Solar made a "gamble" which was revealed as unrealistic and that Waconda Solar should have been aware of the "risks associated with its decision."[115] There is no basis for this cynical assertion, and it does not even make sense because the chosen COD does not determine what avoided costs a qualifying facility is entitled to. Rather, that depends on the time when a "legally enforceable obligation" is incurred,[116] which indisputably had occurred by the time Waconda Solar signed the Power Purchase Agreement, regardless of what COD was specified within it.

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114 PGE Motion at 50.

115 PGE Motion at 50.

116 *In the Matter of Pub. Util. Comm'n of Or. Staff Investigation into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 16-174 at 27 (May 13, 2016) (reflecting that the creation of a legally enforceable obligation locks in utility's then-current avoided cost prices); 18 CFR § 292.304(d)(1)(ii)).

ii. PGE's Motion for Summary Judgment Should Be Denied Because the Commission Does Have Authority to Remedy Harms Caused by a Utility and an Extension of Waconda Solar's COD is Appropriate

PGE's last argument for why the Commission should dispose of Waconda Solar's request for a COD extension by summary judgment is that the Commission does not have authority to modify an executed Power Purchase Agreement, and thus presumably is powerless to remedy a situation where a utility causes delay in the interconnection process and causes a project to miss its COD. Waconda Solar agrees that the Commission does not have the power to modify the terms of an executed Power Purchase Agreement without the consent of the qualifying facility. However, this does not mean that the Commission lacks the authority to order the utility take any specific action, including ordering the utility to offer the qualifying facility a specific contractual amendment or, as an alternative approach, ordering the utility to offer to terminate the current Power Purchase Agreement and execute a new one with the new COD and all other terms the same. Either approach is well within the Commission's authority. .

The Commission has broad authority to implement PURPA.[117] Further, the Commission has a duty to ensure the utilities it regulates do not engage in unjust or unreasonable practices, and to represent the customers of the utilities.[118] Thus, if a utility unjustly or unreasonably causes harm to an interconnection customer, the Commission has a duty to remedy that harm. The Commission has exercised its duty to order the

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117 *FERCv. Miss.*, 456 U.S. at 751; *North Am. Natural Resources v. Michigan PSC*, 73 F Supp 2d 804, 807 (1999).

118 ORS 756.040(1).

utilities to rectify harms in several instances. For example, in *Dalreed Solar, LLC v. PacifiCorp*, the Commission ordered PacifiCorp to negotiate in good faith to provide Dalreed Solar with a draft Power Purchase Agreement.[119] Further, in *Blue Marmot V LLC, et al., v. PGE* the Commission ordered PGE to provide executable contracts or sign contracts for the various Blue Marmot projects.[120] The Commission also has approved standard contracts that utilities must enter into if a qualifying facility wishes to sell power to the utility under the standard contract. The utilities have no discretion to disagree or disobey a Commission order directing the utility to enter into specific contract terms with a qualifying facility or interconnection customer. Thus, the Commission does have broad authority to generally order a utility to do something and the Commission has authority to order a utility to do something to conform with the law, its policies or rules, or remedy a harm caused by the utility.

Additionally, the Commission has authority to determine when a utility and a qualifying facility have entered into a legally enforceable obligation ("LEO") and has the authority to find that a power purchase and sale obligation has arisen even where a contract has not been signed.[121] Thus, the Commission could, by that same authority, find that PGE is not relieved of its obligation to purchase Waconda Solar's power solely by virtue of the fact that the current power sales agreement contains a COD that was missed because of the utility's actions or the delay caused by litigation. In other words,

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119 *Dalreed Solar, LLC v. PacifiCorp*, UM 2125, Order No. 21-097 at 1 (Mar. 30, 2021).

120 *Blue Marmot V LLC, et al., v. PGE*, Docket No. UM 1829, Order No. 19-322 at 20-21 (Sept. 30, 2019).

121 Docket No. UM 1829, Order No. 19-322 at 9-10 (Sept. 30, 2019).

the Commission has the authority to find that Waconda Solar established a LEO and to separately order that PGE purchase power from Waconda Solar under terms that the Commission believes are necessary and appropriate under PUPRA and its own enabling statutes to protect qualifying facilities' rights. 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.[122]

For example, there is no question that the Commission could direct PGE to enter into a contract to purchase Waconda Solar's net output based on a specific date. Waconda Solar's current Power Purchase Agreement expires April 1, 2038.[123] The Commission could simply order PGE to enter into a subsequent Power Purchase Agreement that starts the day after the current termination date. This has no practical difference from Waconda Solar's request that the Commission require PGE "to grant an extension of Waconda Solar's power purchase agreement … termination date …."[124] It would put form over substance for the Commission to conclude that it cannot order PGE to agree to modify the current Power Purchase Agreement, when it can order PGE to enter into a subsequent Power Purchase Agreement that achieves exactly the same result.

Waconda Solar notes that in other instances, utilities have actively recognized that delays that they cause should be remedied through agreeing to extend the COD. For

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122 *See, e.g. West Penn Power Co.*, 71 FERC ¶ 61,153 (1995) (declining to disturb state Commission findings that certain milestones of a qualifying facility's contract could be modified for litigation delay).

123 *In re PGE – Qualifying Facility Contracts*, Docket No. RE 143, Waconda Solar, LLC – Power Purchase Agreement at 6 (July 2, 2018).

124 First Amended Complaint at 30.

example, in *Kootenai Electric Cooperative v. Idaho Power Company*, after the Commission found that Kootenai had established a LEO, the parties executed a Power Purchase Agreement with an updated COD.[125] In that case, the Commission did not specifically rule on this point because it was not in dispute, likely because Idaho Power understood that it makes sense to update a COD based on the time an interconnection customer litigates the case. Waconda Solar believes that it would be reasonable for PGE to do the same, even by agreement, and that a Commission order finding that PGE's actions caused delays should be reason enough for PGE to modify the COD in the contract.

In *Blue Marmot*, the Commission ruled there was insufficient evidence on the record to demonstrate achievement of Blue Marmots' stated COD was not possible due to litigation and declined to issue an extension.[126] However, the Commission did find that Blue Marmot had established a LEO with PGE and ordered PGE to sign standard contracts with the Blue Marmot projects that included different provisions than the contracts the Blue Marmot projects had executed and obligated themselves to.[127] The Commission then opened a second phase of the proceeding to allow the Blue Marmots' to demonstrate that the factual evidence supported new CODs. Thus, as a matter of law,

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125 *Compare Kootenai Elec. Coop., Inc. v. PGE*, Docket No. UM 1572, Complaint Exhibit 103 at 55 ("Seller has selected *May 1, 2012* as the estimated Schedule Operation Date") (Jan. 3, 2012) (emphasis added) *with* Idaho Power Co. – Qualifying Facility Contracts, Docket No. RE 141, OAR Compliance Filing Kootenai Elec. Coop., Inc. Oregon Standard Energy Sales Agreement, Appendix B at 36 ("Seller has selected *April 1, 2014* as the estimated Schedule Operation date") (Mar. 11, 2014) (emphasis added).

126 Docket No. UM 1829, Order No. 19-322 at 20.

127 Docket No. UM 1829, Order No. 19-322 at 20.

the Commission effectively concluded that it could extend the COD, but it that case the relief would be limited to whether there had been enough evidence Blue Marmot would not reach its COD because of litigation. The case was subsequently settled.

While Waconda Solar has an executed Power Purchase Agreement with PGE instead of just a LEO, Waconda Solar has still committed itself to selling power to PGE just like it would in a LEO. Further, in this case there is ample evidence litigation has caused Waconda Solar to miss its COD unlike in Blue Marmot. This case has been stayed by mutual agreement of the parties for 22 months[128], and it is possible that Waconda Solar could have reached its COD but for these delays. Thus, the Commission has the legal authority to consider an extension of Waconda Solar's COD, and resolve, based on the evidence, whether Waconda Solar is entitled to an extension.

The Commission would also have jurisdiction to extend the COD because this is a regular contract dispute where the Commission can offer a remedy. The Power Purchase Agreement is a contract between Waconda Solar and PGE. Oregon law allows modifications of unconscionable or impractical contract provisions.[129] Further, the Commission has stated it has the "expertise and the authority to review the terms and conditions of these standard contracts that were developed through Commission

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128 Time between Waconda Solar and PGE's first Joint Motion to Extend Time (Sept. 11, 2019) and Waconda Solar and PGE's Joint Motion to Modify Procedural Schedule (Aug. 4, 2021).

129 *See Livingston v. Metropolitan Pediatrics, LLC*, 234 Or App 137, 151-55, 227 P.3d 796, 806-08 (2010); *Carey v. Lincoln Loan Co.*, 203 Or App 399, 420-25, 125 P.3d 814, 826-30 (2005).

proceedings."[130] Thus, the Commission should be allowed to review the facts in the case and determine if Waconda Solar is entitled to an extension of the COD.

PGE asserts that Waconda Solar's claim should be dismissed and that Waconda Solar is not entitled to an extension of its COD. However, PGE should allow for an extension of the COD because of the specific provisions of Waconda Solar's Power Purchase Agreement and its contractual duty of good faith and fair dealing. Waconda Solar reasonably selected a 20-month COD as previously explained, but it was entitled to a COD up to 36 months and 12-month cure period.[131] Waconda Solar's Power Purchase Agreement with PGE provides:

> 2.2.2 By February 1, 2020 Seller shall have completed all requirements under Section 1.5 and shall have established the Commercial Operation Date.
>
> 2.2.3. Unless the Parties agree in writing that a later Commercial Operation Date is reasonable and necessary, the Commercial Operation Date shall be no more than three (3) years from the Effective Date. *PGE will not unreasonably withhold agreement to a Commercial Operation Date that is more than three (3) years from the Effective date if the Seller has demonstrated that a later Commercial Operation Date is reasonable and necessary.*[132]

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130 *PGE v. Alfalfa Solar I, LLC, et al.*, Docket No. UM 1931, Order No. 18-174 at 5.

131 *In re Investigation into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 15-130 at 2 (Apr. 16, 2015).

132 Docket No. RE 143, Waconda Solar, LLC – Power Purchase Agreement at 6 (emphasis added).

First, the plain language of the contract allows a COD of 36 months plus an additional 12 months for a cure period. This means that even without the Commission's direction, Waconda Solar has a unilateral right to select a new COD to at least June 4, 2021.[133]

PGE has a duty to not unreasonably withhold agreement to an extension of the COD greater than the 36 months. The COD must be "reasonable and necessary" and PGE's consent shall not be "unreasonably" withheld. Thus, under the terms of the Power Purchase Agreement alone, PGE has a contractual duty to extend the COD and Waconda Solar is entitled to at least a COD of 48 months (i.e., one additional year beyond the 36 months) because Waconda Solar has shown through litigation that a later COD is reasonable and necessary. Thus, Waconda Solar should be entitled to a COD under the Power Purchase Agreement of at least June 4, 2022.

Further, an extension of the fixed price term is reasonable. As explained previously, the Commission has authority under PURPA to remedy harms caused by a utility or ensure that contracts are consistent with the law and its policies and rules. Because PGE has been unwilling to agree to an extension of the COD and caused harm to Waconda Solar as shown in this response, Waconda Solar is entitled to extension of the fixed price term to remedy that wrong. Waconda Solar should not lose its fixed price period because of delays related to litigating issues related to its interconnection. Thus, PGE's motion for summary judgment should be denied.

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[133] Waconda Solar's Effective Date was June 4, 2018. Docket No. RE 143, Waconda Solar, LLC – Power Purchase Agreement at 17.

5. The Facts, Construed Most Favorably to Waconda Solar, Show that PGE Has Given Itself Undue Preference Compared to Waconda Solar, In Violation of ORS 757.325

ORS 757.325 provides that "[n]o public utility shall make or give undue or unreasonable preference or advantage to any particular person or locality, or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect."[134] Waconda Solar alleges that PGE violates this statute by allowing for itself to utilize third-party assistance in completing interconnection studies, through availing itself of the market for such services, but categorically refusing non-utility qualifying facility generators from doing so.

Waconda Solar does not contend that PGE violates this statute merely because it may refuse to allow an interconnection customer to utilize a third-party consultant's assistance, based on some circumstance that makes doing so reasonable. However, Waconda Solar contends that PGE does violate this statute when it, without justification, determines that it will categorically not allow interconnection customers, as a corporate policy, to avail themselves of the use of third parties, even though the Commission's rules allow for such an action. Such an approach amounts to a clear preference for its own business to utilize the market of consultants, and a bias (or decision) against allowing its customers to do so, for no sound reason.

The facts in this case, especially if construed most favorably toward Waconda Solar, demonstrate that PGE has some sort of corporate policy or practice of categorically denying interconnection customers the opportunity to engage a third party to complete

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134 ORS 757.325.

interconnection studies, or to conduct an independent System Impact Study.[135] In fact, the core issues in the case are attempting to challenge those very policies. Thus, it would be inappropriate to grant PGE's motion for summary judgment on this topic.

Waconda Solar also alleges that PGE violates the statute regarding undue preference if it cooperates with some interconnection customers to perform an independent System Impact Study but refuses to cooperate with Waconda Solar for no sound reason. On this topic, Waconda Solar has not been permitted to obtain discovery to determine whether that has happened here but notes that such facts should be explored before the Commission grants PGE's motion for summary judgment on what is clearly a fact-specific determination. Alternatively, the Commission could simply review PGE's legal pleadings, which demonstrate that PGE has such policies.

D. PGE's Claim that the SIS Issues Are Moot or Without Merit Should be Rejected

In its motion for summary judgment, PGE argues that Waconda Solar's claims for relief from deficiencies in the System Impact Study should be dismissed because they are moot, and in any event without merit.[136] PGE claims that they are moot because PGE has

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135 *See* Docket No. UM 1967, PGE's Motion for Partial Summary Judgment at 10-18 (Feb. 27, 2019) (arguing Commission rules allow a utility to withhold its consent to allow an interconnection customer to hire a third-party consultant to construct the interconnection facilities and system upgrades); *see, e.g.*, PGE's Answer to Amended Complaint, Exhibit J at 1 (PGE denying Waconda Solar's request to hire a third-party consultant to complete the System Impact Study and Facilities Study); *see* Declaration of John Lowe at 13, ¶ 31 (explaining he is unaware of PGE allowing any interconnection customer to hire a third-party to complete interconnection upgrades).

136 PGE Motion at 61-63.

determined that it needs to redo the study, in light of higher queued projects withdrawing from the interconnection queue,[137] in essence arguing that any deficiencies do not matter, because a new fact scenario will present itself in any event.

On the topic of mootness, Waconda Solar responds that the Commission should not allow PGE to modify its behavior in the future to avoid a conclusion that it violated a law or regulation. In this instance, allowing PGE to do so would open the door to a perpetual and boundless opportunity for a utility to escape the complaint process, because it could simply respond to a complaint by stating that it will redo the study that is challenged, or reconsider the challenged actions that it took. As long as the utility agreed to change its illegal behavior, then the interconnection customer would be unable to obtain relief, even if the original illegal behavior led to project failing to be constructed.

PGE is required by Commission rules to provide a complete System Impact Study to interconnection applicants, and thus fails to meet the Commission's standards when it does not do so. If PGE were allowed to moot out such claims by asserting that it will create a new study, for any reason, then a customer's rights could be violated with no remedy at all.

Here, Waconda Solar was harmed by PGE's actions, and is entitled to a finding that PGE's actions resulted in that harm so that it can obtain effective remedies in the future. Even if PGE changes and corrects the studies, Waconda Solar has been harmed. These harms include an inability to have made reasonable business decisions based on

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[137] PGE's Answer to Amended Complaint, Exhibit K at 1.

PGE's inaccurate studies, and the delays caused by this litigation, which PGE is using to terminate its Power Purchase Agreement.

The effects of PGE's proposed finding of mootness are perhaps most serious on the topic of whether PGE violated the Commission's rules by refusing to cooperate with Waconda Solar as it sought to develop an independent System Impact Study. PGE's refusal to cooperate had a major impact on Waconda Solar by leaving it in a position, during the development process, of lacking insights into PGE's study, and an inability to test the accuracy and reasonableness of PGE's study. Even if PGE would ultimately have had to redo the study because of a higher-queued project, that does not change the fact that Waconda Solar's rights were frustrated.

Moreover, the Commission should deny PGE's argument and recognize that the Commission serves an important role in the complaint process of giving guidance to the utilities and interconnection customers about their rights, and that it creates precedent and stimulates action through adjudicating those rights on the basis of actual utility and developer experience. In other words, an important part of this case is establishing that utilities have an obligation to cooperate with their interconnection customers on the topic of developing independent system impact studies, so that this right is clear and utilities do not thwart projects by imposing barriers out of either intentional efforts or ignorance of the requirements in the future.

In addition to arguing mootness, PGE argues that Waconda Solar's claims about deficiencies in the System Impact Study should be dismissed because they lack merit. Waconda Solar alleged in its complaint that the study contained inaccurate

information,[138] and that the study failed to identify and detail the impacts on PGE's transmission or distribution system associated with the project as required by the Commission's rules.[139] Waconda Solar also alleges that the System Impact Study does not include a "short circuit analysis; a stability analysis; a power flow analysis; a voltage drop flicker study; a protection and set point coordination study; [or] grounding reviews" as required by the Commission's rules.[140]

In response, PGE simply points to the length of the System Impact Study, noting that the study "is an eight-page document that attaches as an exhibit, a separate 27-page document detailing the results and procedures around various technical analyses required for the study."[141] PGE argues that "[o]n its face, the study complied with any obligation PGE had to detail 'the impacts on PGE's transmission or distribution system.'"[142]

Whether the System Impact Study meets the requirements of the Commission's rules should not be disposed of through summary judgment, because determining whether the study comports with the Commission's requirements requires a factual inquiry. Despite PGE's insistence that the study's length demonstrates its robustness, Waconda Solar has raised that the study lacks elements called for in the Commission's rules, that it contains inaccurate information, and that it is not complete. The resolution of these issues requires testimony and potentially discovery, and the Commission should not endorse the use of summary judgment as a means to cut off the evidentiary process on a

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138 Waconda Amended Complaint at 20, ¶¶ 127-128.
139 Waconda Amended Complaint at 20, ¶ 129.
140 Waconda Amended Complaint at 21, ¶ 130.
141 PGE Motion at 63.
142 PGE Motion at 63.

topic simply because PGE states a contrary view to the complainant. Alternatively, the Commission can accept Waconda Solar's unrebutted assertions and find as a matter of law that PGE's studies fail to conform with the law.

E. PGE's Claim that Waconda Solar's Claims for Relief Are All Moot Because Waconda Solar's Interconnection Application is Deemed Withdrawn Should Be Rejected

PGE's claim that all of Waconda Solar's claims for relief should be moot because Waconda Solar's interconnection application is deemed withdrawn pursuant to OAR 860-082-0060(8)(c) should fail because PGE inappropriately decided Waconda Solar's application was withdrawn as PGE violated Commission rules and its contractual duties. In essence, PGE argues the claims are moot because PGE deemed the application withdrawn, Waconda Solar did not seek a waiver of Commission rules, and a complaint before the Commission has no effect on a withdrawal.[143] That is contrary to what PGE has argued in other cases.

In UM 2164, in response to a motion for interim relief and preliminary injunction PGE asserted "a notice of termination will not prevent Zena from arguing to the Commission that PGE's notice of termination is ineffective."[144] In its response PGE also cited *Fossil Lake Solar, LLC v. PGE* where a termination notice was sent to Fossil Lake Solar, but the parties were able to litigate the effectiveness of the dispute before the Commission.[145] Specifically, PGE stated "[n]othing about the fact that PGE had issued a

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143 PGE Motion at 64.

144 *Zena Solar, LLC v. PGE*, Docket No. UM 2164, PGE's Response to Zena Solar's Motion for Interim Relief and Preliminary Injunction at 21 (July 2, 2021).

145 *Zena Solar, LLC v. PGE*, Docket No. UM 2164, PGE's Response to Zena Solar's Motion for Interim Relief and Preliminary Injunction at 21-22 (citing *Fossil Lake*

notice of termination prevented Fossil Lake from pursuing its alleged rights in a complaint proceeding before the Commission. The case was litigated to decision through cross motions for summary judgment."[146]

The same principle applies here. The parties should be able to litigate the claims raised by Waconda Solar. PGE's claim that the issues are moot because Waconda Solar's application is deemed withdrawn should be rejected because in other cases claims have not been deemed moot just because PGE claims an application is deemed withdrawn or PGE provides a notice of termination. If PGE can argue claims are moot and a case should be dismissed because PGE asserts an application is withdrawn or an agreement is terminated, then PGE is essentially preventing an interconnection customer from bringing a complaint. That would be contrary to Commission rules and precedent.

PGE also claims Waconda Solar's claims are moot and the complaint should be dismissed because Waconda Solar did not seek a waiver of the Commission rules.[147] However, the Commission is able to grant a waiver of its rules on its own motion.[148] PGE is essentially asking the Commission to rule that it cannot grant a waiver on its own motion if good cause exists. That is contrary to the Commission rules. If the Commission finds good cause exists, it can grant a waiver of its rules on behalf of

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Solar, LLC v. PGE., Docket No. UM 2051, Fossil Lake Complaint (Dec. 19, 2019)).

146 Docket No. UM 2164, PGE's Response to Zena Solar's Motion for Interim Relief and Preliminary Injunction at 22 (citing Docket No. UM 2051).

147 PGE Motion at 64.

148 OAR 860-082-0010(1).

Waconda Solar. Thus, PGE's claim that the entire complaint should be dismissed because the claims are moot should be denied.

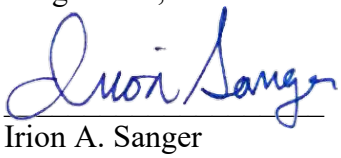
IV. CONCLUSION

For all of the reasons described above, the Commission should deny PGE's motion for summary judgment.

Dated this 22nd day of November 2021.

Respectfully submitted,

Sanger Law, PC



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Of Attorneys for Waconda Solar, LLC

Attachment A

Briefs in Sandy River Solar, LLC v. PGE, Docket No. UM 1967 Regarding PGE's Motion for Partial Summary Judgment

Waconda Solar Incorporates Sandy River, LLC's Arguments by Reference

Jeffrey S. Lovinger | Lawyer
JeffreyLovinger@MarkowitzHerbold.com

February 27, 2019

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
PO Box 1088
Salem, OR 97308-1088

Re: UM 1967 - Sandy River Solar, LLC v. Portland General Electric Company

Attention Filing Center:

Enclosed for filing today in the above-named docket is Portland General Electric Company's Motion for Partial Summary Judgment.

Thank you for your assistance.

Very truly yours,

Jeffrey S. Lovinger

SANDPO\840288

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1967

SANDY RIVER SOLAR, LLC, Complainant, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	**PORTLAND GENERAL ELECTRIC COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT** ***Oral Argument Requested***

TABLE OF CONTENTS

I. MOTION

Pursuant to OAR 860-001-0420 and ORCP 47, Portland General Electric Company ("PGE") moves for summary judgment against complainant Sandy River Solar, LLC's ("Sandy River") second claim for relief in the above-captioned complaint proceeding. PGE requests that the Commission deny Sandy River's second claim for relief and paragraphs 3 and 7 of Sandy River's prayer for relief. PGE requests oral argument on this motion.

II. INTRODUCTION

This dispute centers on the Small Generator Interconnection Procedures in OAR 860-082-0060. Interconnection customer Sandy River's second claim for relief asks the Commission to require PGE to allow Sandy River to use a third-party consultant to construct interconnection facilities and system upgrades on PGE's distribution system. The rules do not permit the relief that Sandy River seeks, and therefore Sandy River's second claim should be denied as a matter of law. Resolving this issue now, before proceeding any further with discovery or the current procedural schedule for testimony and a hearing, will simplify and expedite the resolution of this proceeding. The legal issue presented for resolution in this motion is the core legal issue in the case and the threshold question regarding the relevance of many of Sandy River's data requests. By resolving this motion for summary judgment, the Commission will resolve the key dispute between the parties and this may allow the parties to settle the remaining subsidiary issues or will greatly simplify their resolution if the case must proceed to hearing.

III. BACKGROUND

A. FACTS

Sandy River is a limited liability company proposing to construct a 1.85 megawatt solar qualifying facility ("QF") and to interconnect to PGE's 13 kV Dunns Corner distribution feeder near Sandy, Oregon.[1] PGE and Sandy River have completed all studies required by OAR Chapter 860, Division 082.[2] PGE has informed Sandy River that there are improvements to the Dunns Rd substation that must occur before the Sandy River project can safely and reliably interconnect to PGE's system.[3] PGE has explained that these substation improvements are currently scheduled to be completed in February 2020 as part of higher queued interconnection request SPQ0070.[4] In July 2018, PGE informed Sandy River that it would take approximately 18 months (until about February 2020) to complete the Sandy River interconnection and place it in service.[5] PGE and Sandy River have not yet executed an interconnection agreement.[6]

[1] First Am. Compl. ¶¶ 2, 8 (Sep. 27, 2018); Compl., Att. C at 3 (Revised Facility Study and Redline Revised Facility Study) (Aug. 24, 2018).
[2] Am. Compl. ¶¶ 12, 15, 23, 26, 70; Answer to First Am. Compl. ("Answer") at 1, 4-5, ¶¶ 12, 15, 23, 26, 70 (Oct. 9, 2018).
[3] Compl., Att. C at 6 (Revised Facility Study and Redline Revised Facility Study: "The construction completion date of this Sandy River Solar project is contingent on the construction and completion of a higher queued project."); Answer at 2, ¶ 66 and Ex. J; *see also* Declaration of Molly Honoré in Support of PGE's Mot. for Partial Summ. J. ("Honoré Decl."), Ex. 1 at 6 (PGE Resp. to Data Request 11: "As PGE has previously explained to Sandy River Solar, most of the time provided for in the estimated construction schedule is to allow time for higher queued interconnection project SPQ0070 to be completed. That project includes the installation of new relays at the substation that are a necessary requirement for the Sandy River interconnection.") at 8 (PGE Resp. to Data Request 14: "… [T]he SEL-487E transformer relay requirements being installed under SPQ0070 must be complete for Sandy River Solar to interconnect. The estimated construction schedule proposed as part of the Revised Facilities Study includes time to allow the completion of such work as part of the interconnection of SPQ0070, which is a necessary requirement for the Sandy River Solar interconnection.").
[4] *Id.* at 4 and 10 (PGE Resp. to Data Request 1 and Attachment 001-G) (indicating that SPQ0070 has a scheduled in-service date of Feb. 17, 2020).
[5] First Am. Compl. ¶¶ 69-70, 78; Answer at 2, ¶¶ 69-70, and Ex. J at 1; Compl., Att. C at 5-6 (Revised Facility Study); *see also* Honoré Decl., Ex. 1 at 4, 6, 8, and 10 (PGE Resp. to DR 1, PGE Resp. to DR 11, PGE Resp. to DR 14, and Attachment 01-G).
[6] First Am. Compl. at 1.

On August 2, 2018, Sandy River demanded by letter that PGE allow Sandy River to hire a third-party consultant to construct the required interconnection facilities and system upgrades.[7] On August 10, 2018, PGE responded and explained that OAR 860-082-0060(8)(f) does not require PGE to agree to allow Sandy River to hire a third-party consultant, and that PGE was not willing to agree under the circumstances.[8] In response, Sandy River filed the complaint in this proceeding. Sandy River's second claim for relief and paragraphs 3 and 7 of Sandy River's prayer for relief asks the Commission to require PGE to grant Sandy River's request to hire a third-party consultant, on the basis that it was "unreasonable" for PGE to refuse Sandy River's request.[9] The hearing date is currently set for May 9, 2019.[10]

Renewable Energy Coalition ("REC") recently petitioned to intervene in this complaint proceeding.[11] REC states that it intends to align itself with Sandy River, including with respect to Sandy River's second claim for relief.[12]

Contrary to the positions of both Sandy River and REC, the rules do not require PGE to agree to the use of third-party contractors to perform work on PGE's electrical system, and the rules simply do not provide for application of any "reasonableness" standard on PGE's consideration of requests by interconnection customers to hire third-party contractors.

[7] First Am. Compl. ¶ 81; Answer ¶ 81 and Ex. N at 1-2 (Aug. 2, 2018 Letter from Sandy River to PGE).
[8] First Am. Compl. ¶ 84; Answer ¶ 84 and Ex. O at 1-2 (Aug. 10, 2018 Letter from PGE to Sandy River).
[9] First Am. Compl. ¶¶ 117-32 and Prayer for Relief ¶¶ 3, 7.
[10] Docket No. UM 1967, ALJ Memorandum at 1 (Nov. 14, 2018) (prehearing conference memorandum setting procedural schedule).
[11] Docket No. UM 1967, REC's Petition to Intervene (Jan. 29, 2019).
[12] *Id.* ¶ 7.

B. STATUTORY FRAMEWORK/HISTORY OF RULES

1. Initial Rulemaking for OAR 860-082-0060 (AR 521).

The Commission adopted OAR 860-082-0060 pursuant to its authority under the federal Public Utility Regulatory Policies Act of 1978 ("PURPA"), which vests authority in state regulatory agencies to implement rules that require utilities like PGE to offer to purchase energy from QFs.[13] In July 2007, the Public Utility Commission of Oregon's Staff ("Staff") initiated Docket No. AR 521 to adopt rules respecting small generator interconnection with a public utility's electrical system.[14] In order to qualify as "small generators" under the rules, the customer must have a nameplate capacity of 10 megawatts or less.[15]

Staff held workshops for participants to discuss the proposed rules and file comments. Staff initially contemplated the involvement of third-party consultants in the design of interconnection facilities. Staff's initial proposed rule stated that the parties "may agree to permit the Interconnection Customer to separately arrange for a third party to design and estimate the construction costs for the required Interconnection Facilities."[16]

[13] 16 USC § 824a-3(a), (f)(1).
[14] *In the Matter of a Rulemaking to Adopt Rules Related to Small Generator Interconnection*, Docket No. AR 521, Compl. (July 24, 2007).
[15] OAR 860-082-0005(1).
[16] Honoré Decl., Ex. 2 at 5 (Docket No. AR 521, Staff Second Set of Comments and Workshop Edits re Oregon Small Generator Interconnection PUC Staff's Proposed Rules at 23, Draft OAR 860-082-055(6)(b) at 23 (Oct. 2, 2007)). Attached to the Honoré Decl. are courtesy copies of excerpts of certain administrative filings from the Commission and other governmental agencies, and documents and records in the files of the Commission that have been made a part of the files in the regular course of performing the Commission's duties. For the sake of space, PGE has provided excerpts of the relevant portions of these documents. However, the Commission can take official notice of these documents in their entirety as part of issuing a decision on this motion. OAR 860-001-0460(1)(d).

During the commenting process, John Lowe,[17] on behalf of Sorenson Engineering, Inc., advocated to change Staff's proposed language to instead give the interconnection customer "the option" to use third-party consultants in the interconnection process.[18] Sorenson wanted the language to state that the Interconnection Customer "shall have the option of having an agreed-upon third party consultant design and estimate the construction costs for the required Interconnection Facilities."[19]

Because Sorenson's proposed "option" language would give the interconnection customer the right to demand the use of third-party contractors, Sorenson included some additional language in its proposed changes that would protect the public utility. The additional language would require the interconnection customer to "waive the required timeframes associated with the Interconnection Facilities Study, and hold the Utility harmless with regard to its results" if a third-party consultant were used.[20] Energy Trust of Oregon, Inc. ("ETO") also commented on the proposed rules, and similarly advocated to give the interconnection customer "the option" to have system upgrades be performed by an independent contractor.[21]

PGE responded to the comments by emphasizing that significant safeguards would be required for PGE to allow third-party contractors to work on its system.[22]

[17] Mr. Lowe has offered testimony in this proceeding on behalf of REC. *See* Docket No. UM 1967, REC/100, Lowe (Feb. 7, 2019).
[18] Honoré Decl., Ex. 3 at 5-6 (Docket No. AR 521, Comments of Sorenson Engineering, Inc. at 5-6 (Nov. 27, 2007)).
[19] *Id*. at 6.
[20] *Id*.
[21] Honoré Decl., Ex. 4 at 3 (Docket No. AR 521, ETO's Comments at 3 (Nov. 9, 2007)).
[22] Honoré Decl., Ex. 5 at 6-7 (Docket No. AR 521, PGE's Comments at 3-4 (Nov. 27, 2007)).

Further, PGE commented that "significant additional protections" would be needed beyond the proposed rules, if Sorenson and ETO's changes were adopted.[23]

Sorenson's and ETO's proposed changes were not adopted. Following the initial comment period, the Commission "substantially revised the proposed rules in response to the comments received from the rulemaking participants, as well as to further refine and clarify the rules."[24] The Commission then re-filed the revised proposed rules and established a new schedule for public comment.[25] The revised rules did not include the language proposed by Sorenson or ETO that would have given the interconnection customer "the option" to use a third-party contractor. Instead, the Commission modified the rules slightly, but retained the permissive language from the original draft.[26] The final rule states:

> The public utility may contract with a third-party consultant to complete the interconnection facilities and system upgrades identified in the facilities study. A public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight and approval. [27]

2. UM 1610 history

The use of third-party contractors in the interconnection process was revisited in 2012, in general policy Docket No. UM 1610. Although the parties to that docket discussed revising the current rules to give QFs the right to use third-party contractors

[23] *Id*. at 3.
[24] Honoré Decl., Ex. 6 at 1 (Docket No. AR 521, Memorandum and Notice of Workshop at 1 (June 4, 2008)).
[25] *Id.*
[26] *Id*. at 6 (Draft Small Generator Interconnection Rules at 22, Section 860-082-0060(8)(f)).
[27] OAR 860-082-0060(8)(f).

under certain conditions, no changes were ultimately adopted. The parties—including REC—understood that the issue would be revisited in a later general policy docket.

The Commission opened Docket No. UM 1610 to investigate issues related to QF contracting and pricing.[28] PGE and REC both intervened in that proceeding,[29] along with other public utilities and QF-aligned parties.[30] Staff proposed an initial list of issues relating to PURPA implementation and QF contracting.[31] The initial issues list included "Issue VII.B," which addressed the use of third-party contractors:

> Should the interconnection process allow, at QFs request or upon certain conditions, third-party contractors to perform certain functions in the interconnection review process that are currently performed by the utility?[32]

The parties responded to the proposed issues list to address disputed issues, including VII.B. REC argued to include Issue VII.B in the issues list because it wanted the Commission to "consider specific and limited revisions to its interconnection rules, practices, and policies" to improve the interconnection processes for QFs.[33] In other words, REC understood that the current rules did not allow the QF to demand to use third-party contractors, and wanted the Commission to consider revisions to its current rules that would give QFs that option.

[28] *In the Matters of Idaho Power Company, Application to Revise the Methodology Used to Determine Standard Avoided Cost Prices and Motion for Temporary Stay of Obligation to Enter into New Power Purchase Agreements with Qualifying Facilities, and Request to Revise Standard Contract Avoided Cost Prices paid to Qualifying Facilities under Schedule 85*, Docket Nos. UM 1590 & UM 1593, Order No. 12-146 at 1, 2 (Apr. 25, 2012).
[29] *In the Matter of Public Utility Commission of Oregon, Staff Investigation Into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, PGE's Petition to Intervene (July 10, 2012); Docket No. UM 1610, REC's Petition to Intervene (Aug. 1, 2012).
[30] *See, e.g.,* Docket No. UM 1610, Idaho Power Company's Petition to Intervene (July 11, 2012); Docket No. UM 1610, Community Renewable Energy Association's Petition to Intervene (Aug. 2, 2012).
[31] Honoré Decl., Ex. 7 (Docket No. UM 1610, Staff's Proposed Issues List (Oct. 3, 2012)).
[32] *Id.* at 6.
[33] Honoré Decl., Ex. 8 at 9 (Docket No. UM 1610, REC Resp. to Disputed Issues at 6 (Oct. 10, 2012)).

The ALJ finalized the issues list on October 25, 2012, including a revised Issue "7.B"[34] as recommended by Staff: "Should QFs have the ability to elect a larger role for third party contractors in the interconnection process? If so, how could that be accomplished?"[35] The parties addressed the issues in multiple phases. Phase I did not include Issue 7.B.[36] Phase II, which commenced in February 2014, initially included Issue 7.B.[37] However, in 2015 the parties agreed to remove Issue 7.B from Phase II and address it either in a third phase of Docket No. UM 1610, or in a separate general policy docket following completion of Phase II.[38]

Issue 7.B has so far not been addressed in UM 1610, and a separate docket has not been opened to permit further discussion of the issue. The rules therefore remain unchanged, and—as previously recognized by REC—do not give the QFs the right to use third-party contractors in the interconnection process.

3. Applicable Standards for Summary Judgment.

A defendant may move for summary judgment in defendant's favor against all or any part of the claims asserted against it.[39] The Commission should grant the motion for summary judgment "if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving

[34] The Commission stopped using roman numerals when it issued its revised Issues List.
[35] Docket No. UM 1610, ALJ Ruling, Appendix A at 3 (Oct. 25, 2012); *see also* Docket No. UM 1610, Staff's Response to Disputed Issues at 2 (Oct. 10, 2012).
[36] Docket No. UM 1610, ALJ Ruling, Appendix A at 1-3 (Dec. 21, 2012).
[37] Docket No. UM 1610, Order No. 14-058 at 32, Appendix A at 3 (Feb. 24, 2014).
[38] Honoré Decl., Ex. 9 at 10 (Docket No. UM 1610, Parties' Brief in Support of Stipulation Re: Issues List at 10 (Feb. 26, 2015)).
[39] ORCP 47 B ("A party against whom any claim . . . is asserted . . . may, at any time move, with or without supporting affidavits or declarations, for summary judgment in that party's favor as to all or any part thereof.").

party is entitled to prevail as a matter of law."[40] The Commission should conclude that "[n]o genuine issue as to a material fact exists if, based upon the record before the court viewed in the manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment."[41]

For purposes of summary judgment, "[a] material fact is one that, under applicable law, might affect the outcome of a case."[42] The interpretation of a statute, rule, or Commission order is a question of law, and a dispute between the parties regarding the meaning of a rule or law does not prevent the Commission from deciding the proper interpretation in response to a motion for summary judgment.[43]

The party moving for summary judgment has the initial burden of showing that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law.[44] The nonmoving party has the burden of producing evidence on any issue raised in the motion as to which the nonmoving party would have the burden of persuasion at trial.[45]

Because OAR 860-082-0060(8)(f) does not give a QF the right to unilaterally opt to use a third-party consultant to complete interconnection facilities and system upgrades

[40] ORCP 47 C.
[41] *Id*.
[42] *Zygar v. Johnson*, 169 Or App 638, 646 (2000) (citation omitted).
[43] *See, e.g.*, *City of Portland v. PGE*, Docket No. UM 1262, Order No. 06-636 at 1-2 (Nov. 17, 2006) (Commission granted defendant PGE's motion for summary judgment and dismissed complaint after interpreting statute as a matter of law).
[44] *Thompson v. Estate of Adrian L. Pannell*, 176 Or App 90, 100 (2001), *rev. denied*, 333 Or 655 (2002) ("As the party moving for summary judgment … defendant had the initial burden to establish that there was no genuine issue as to … material fact.").
[45] ORCP 47 C.

on the public utility's system, Sandy River's second claim for relief must fail as a matter of law.

IV. ARGUMENT

This motion turns on the plain language in OAR 860-082-0060(8)(f):

> The public utility may contract with a third-party consultant to complete the interconnection facilities and system upgrades identified in the facilities study. A public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight and approval.[46]

Sandy River alleges that this language imposes on PGE the following obligations:

> 1. "[T]o not unreasonably refuse to grant its consent" to allow Sandy River "to hire a third-party consultant to complete the interconnection facilities and system upgrades[;]"[47]
>
> 2. "[T]o provide a list of approved third-party consultants[;]"[48] and
>
> 3. "[T]o inform [Sandy River] of the process upon which PGE will review any third-party consultant selected by [Sandy River] to determine if they are qualified and have the experience and knowledge to properly and safely do the work."[49]

None of those obligations exist anywhere in the rules. To the contrary, the plain language of OAR 860-082-0060(8)(f) allows PGE to withhold its consent to allow the small generator interconnection customer to use a third-party contractor or consultant to construct interconnection facilities or system upgrades. The regulation as written makes sense because PGE owns the interconnection facilities and system upgrades, and has affirmative obligations to other QFs and customers to maintain its systems and ensure

[46] OAR 860-082-0060(8)(f); *see also* Am. Compl. ¶¶ 118-19.
[47] *Id.* ¶ 120.
[48] *Id.* ¶ 122.
[49] *Id.* ¶ 124.

they operate safely and reliably. Imposing an amorphous reasonableness standard onto the regulations would be inefficient and unworkable for small interconnection projects.

Furthermore, the Commission, PGE, and REC have already acknowledged that the rules currently do not allow an interconnection customer to force utilities to permit the customer to use third-party contractors. The Commission may decide to open a general policy docket allowing interested parties to weigh in on revisions to OAR 860-082-0060(8)(f), and to address concerns Sandy River and REC have about the current rules. However, it is not proper in this case-specific proceeding for Sandy River and REC to impose an obligation on PGE that does not yet exist.

A. THE TEXT AND CONTEXT OF OAR 860-080-0060(8)(F) DO NOT REQUIRE PGE TO PERMIT SANDY RIVER TO HIRE A THIRD-PARTY CONSULTANT.

The Commission should first examine the text and context of OAR 860-080-0060(8)(f) to determine its meaning.[50] "[T]here is no more persuasive evidence of the intent" of the rulemaking authority than "the words by which [that authority] undertook to give expression to its wishes."[51] The text and context of this rule make perfectly clear that the public utility is not required to agree, under any circumstances, to permit small generator interconnection customers to use third-party contractors to perform work on the public utility's system.

[50] *State v. Gaines*, 346 Or 160, 171-72 (2009).
[51] *Id*. at 171 (quotation marks and citations omitted); *see also PGE Co. v. Bureau of Labor & Indus.* 317 Or 606, 610 (1993) ("[T]he text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent." (citation omitted).

1. The plain language of the regulation gives PGE the discretion to decide whether to allow the interconnection customer to use a third-party consultant.

Under OAR 860-082-0035, the default rule is that the public utility constructs, owns, operates, and maintains interconnection facilities and system upgrades.[52] OAR 860-082-0060(8)(f) is an optional modification of this default rule. It permits the public utility to use its own third-party contractor, or gives the utility the discretion to permit the interconnection customer to use a third-party contractor to construct the facilities and upgrades. The text of OAR 860-080-0060(8)(f) is clear: "a public utility and an applicant *may* agree in writing to allow the applicant to hire a third-party consultant . . . ."[53] The regulation provides only that the public utility "may" agree—it is not required to permit the applicant to hire a third-party consultant, and the public utility is not subject to any reasonableness standard with respect to its decision.[54] "May" is

[52] *See* OAR 860-082-0035(2) ("The public utility *constructs*, owns, operates, and maintains the interconnection facilities.") (emphasis added); OAR 860-082-0035(4) ("A public utility must design, procure, *construct*, install, and own any system upgrades to the public utility's transmission or distribution system necessitated by the interconnection of a small generator facility.") (emphasis added).

[53] OAR 860-080-0060(8)(f) (emphasis added).

[54] As stated above, contrary to the allegations in Sandy River's First Amended Complaint, OAR 860-080-0060(8)(f) does not include any language requiring the public utility to provide a list of approved third-party consultants, or to inform the applicant about the public utility's process of reviewing proposed third-party consultants. Interconnection customers recently proposed in comments during FERC's formal rulemaking for revisions to the *large* generator interconnection rules that FERC require utilities to maintain a list of contractors available to interconnection customers. Honoré Decl., Ex. 10, ¶ 110 (*Reform of Generator Interconnection Procedures & Agreements*, 163 FERC ¶ 61,043, 18 CFR Part 37, Order No. 845 (Apr. 19, 2018)). (Available at https://www.ferc.gov/whats-new/comm-meet/2018/041918/E-2.pdf.) As discussed below, the procedures and agreements applicable to large qualifying facilities—under FERC and as adopted by the Oregon Public Utility Commission—are significantly different than those applicable to small generators, and expressly include an option to build. *See* A.2, *infra*. Even under the rules applicable to large QFs, however, FERC rejected the customers' requests. FERC determined that the existing rules did not impose an obligation on utilities to provide a list of approved contractors to interconnection customers, and declined to adopt that change in revisions to the rules. Honoré Decl., Ex. 10, ¶ 110 (163 FERC ¶ 61,043, Order No. 845.

permissive, not mandatory. It gives PGE the authority to agree to allow the applicant to hire a third-party consultant, but does not require PGE to agree.[55]

The Commission cannot ignore the use of "may" in the regulation, and cannot interpret the regulation to mean that a public utility *must* agree to permit an applicant to hire a third-party consultant.[56] If the Commission had intended to say that a public utility *must* agree to use third-party consultants to construct interconnection facilities and system upgrades—as Sorenson and ETO advocated during the rulemaking process—the Commission would have said so.

2. The Commission knew how to mandate use of third-party consultants when it wanted to.

The Commission knew exactly how to express its intent to require the use of third-party consultants under certain circumstances in the interconnection process, because it did just that for large generators in the Standard Oregon Qualifying Facility Large Generator Interconnection Procedures ("QF-LGIP"). The Commission adopted the QF-LGIP in Docket No. UM 1401, Order No. 10-132, on April 7, 2010. Section 13.4 governs the use of third-party consultants for interconnection studies, and states:

> 13.4 **Third Parties Conducting Studies**
>
> If (i) at the time of the signing of an Interconnection Study Agreement there is disagreement as to the estimated time to complete an Interconnection Study, (ii) Interconnection Customer receives notice pursuant to Articles 6.3, 7.4 or 8.3 that Transmission Provider will not complete an Interconnection Study within the applicable timeframe for such Interconnection Study, or (iii) Interconnection

[55] *PGE*, 317 Or at 610 ("[W]ords of common usage typically should be given their plain, natural, and ordinary meaning." (citation omitted)); *Nibler v. Oregon Dept. of Transp.*, 338 Or 19, 26 (2006) ("[T]he word 'may' ordinarily denotes permission or the authority to do something." (citation omitted)).
[56] ORS 174.010 (a judge cannot "insert what has been omitted, or [] omit what has been inserted" when interpreting a statute or regulation).

> Customer receives neither the Interconnection Study nor a notice under Articles 6.3, 7.4 or 8.3 within the applicable timeframe for such Interconnection Study, **then Interconnection Customer may require Transmission Provider to utilize a third party consultant reasonably acceptable to Interconnection Customer and Transmission Provider to perform such Interconnection Study under the direction of Transmission Provider**. At other times, Transmission Provider may also utilize a third party consultant to perform such Interconnection Study, either in response to a general request of Interconnection Customer, or on its own volition.[57]

The provision continues and provides further restrictions on the use of a third-party consultants, including requiring that they be subject to Article 26 of the Standard Oregon Qualifying Facility Large Generator Interconnection Agreement ("QF-LGIA") (provisions generally applicable to subcontractors), and limited to situations where the public utility "determines that doing so will help maintain or accelerate the study process" for the interconnection customer and otherwise not interfere with the public utility's progress on studies for other pending interconnection requests.[58]

The QF-LGIA also expressly includes an "Option to Build," which gives the Interconnection Customer the right to assume responsibility for the design, procurement, and construction of the interconnection facilities and stand alone network upgrades.[59] The Option to Build only applies when the utility notifies the Interconnection Customer that the customer's designated in-service, initial synchronization, and commercial

[57] *In the Matter of Public Utility Commission of Oregon, Investigation into Interconnection of PURPA Qualifying Facilities With Nameplate Capacity Larger Than 20 Megawatts to a Public Utility's Transmission or Distribution System,* Docket No. UM 1401, Order No. 10-132, Appendix A at 40 (QF-LGIP at Section 13.4) (Apr. 7, 2010) (emphasis added).
[58] *Id*.
[59] *Id*., Appendix B at 23 (QF-LGIA at Section 5.1.3).

operation dates are unacceptable.[60] If the Interconnection Customer exercises the Option to Build, a number of safeguards apply to protect the utility, including, but not limited to:

- The Interconnection Customer must use "Good Utility Practice" to construct the facilities and upgrades and using specifications provided in advance by the utility;
- The Interconnection Customer's construction must comply with all requirements of law and reliability standards to which the utility would be subject when the utility constructs facilities and upgrades;
- The utility must review and approve the design and construction of the facilities and upgrades;
- Prior to construction, the Interconnection Customer must provide the utility with a schedule for construction, and must respond promptly to requests for information from the utility;
- At any time during construction, the utility has the right to gain unrestricted access to inspect the construction of the facilities and upgrades;
- The customer must indemnify the utility for claims arising from the customer's construction of the facilities and upgrades; and
- The customer must deliver to the utility "as-built" drawings, information, and any other documents reasonably required by the utility to assure the facilities and upgrades are built to the standards and specifications required by the utility.[61]

In other words, where the Commission intended to include an obligation on the public utility to allow interconnection customers to construct interconnection facilities and system upgrades—and to use third-party consultants to do that work—it did so.

[60] *Id*. Oregon's QF-LGIA mirrors the LGIA under FERC. FERC recently adopted rules that expanded the Option to Build beyond circumstances when the utility does not accept the customer's designated dates. Honoré Decl., Ex. 10 at 14 (163 FERC ¶ 61,043, Order No. 845 at Section 5.1.3). FERC recognized that the QF-LGIA had sufficient safeguards to protect utilities in the event the customer exercises the option, including the safeguards in Section 5.2. *Id*. ¶¶ 91, 93-94, 103. Further, FERC refused to apply these same changes to the SGIA and SGIP (which do not include the option to build), noting that "the differences between the large and small interconnection processes are significant enough to prevent us from acting in this proceeding." *Id*. at ¶ 549.

[61] Docket No. UM 1401, Order No. 10-132, Appendix B at 17-19, Section 5.2.

"[W]hen the legislature includes an express provision in one statute but omits such a provision in another statute, it may be inferred that such an omission was deliberate."[62] Had the Commission intended to allow a small generator interconnection customer to require a public utility to use a third-party consultant, it would have used language similar to that used in the QF-LGIP and QF-LGIA, and it would have included the extensive safeguards enumerated—in detail—in Section 5.2 of the QF-LGIA. The fact that the Commission omitted that language from the small generator rules demonstrates the Commission did not intend to impose the same standard in the small generator interconnection process. Instead, the Commission meant what it said in OAR 860-082-0060(8)(f): it intended to leave it up to the public utility's discretion whether to permit the use of third-party consultants with small QFs.[63]

3. Sandy River's interpretation of the rule would create an impermissible internal conflict in the rule.

The plain language of OAR 860-082-0060(8)(f) also cannot permit an interconnection customer to dictate the selection of and use of third-party consultants for

[62] *Emerald People's Utility Dist. v. Pac. Power & Light Co.*, 302 Or 256, 269 (1986) (citation omitted).

[63] The same distinction applies under the Federal Energy Regulatory Commission's interconnection rules governing interconnection to PGE's transmission system under PGE's Open Access Transmission Tariff ("OATT"). Under its FERC-mandated and approved OATT, PGE is required to allow a large interconnection customer (capacity greater than 20 MW) to hire a third-party consultant to construct needed interconnection facilities and stand-alone network upgrades under certain limited circumstances. (Honoré Decl., Ex. 11 at 7-11 (PGE Open Access Transmission Tariff, Volume No. 8 ("PGE-8"), Attachment O, Appendix 6, Standard Large Generator Interconnection Agreement (LGIA) at Sections 5.1-5.3).) (Available at http://www.oasis.oati.com/PGE/PGEdocs/PGE-8_OATT.pdf.) But PGE's FERC-mandated and approved OATT does not require PGE to agree to allow small interconnection customers (capacity of 20 MW or less) to hire third-party consultants to construct interconnection facilities or system upgrades. (*See generally*, *id.* at 2-4 (PGE-8, Attachment M, Small Generator Interconnection Procedures.) Instead, under the small generator interconnection procedures found in the OATT, PGE remains free to insist that PGE or its consultants will construct any required interconnection facilities or system upgrades. (*Id*. at 4 (PGE-8, Attachment M at Section 3.5.4.)

the interconnection process, because it would render additional language in that same provision meaningless.[64]

The first sentence of OAR 860-082-0060(8)(f) provides, without limitation, that the "public utility may contract with a third-party consultant to complete the interconnection facilities and system upgrades identified in the facilities study."[65] It does not give the interconnection customer any oversight or input into that decision—it leaves it up to the discretion of the utility.

However, under Sandy River's interpretation of the second sentence of that rule, the interconnection customer would have control over the public utility's decision with respect to third-party contractors. As discussed above, Sandy River requires the second sentence to be interpreted as follows:

> A public utility ~~and an applicant may~~ [*must*] agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades [*so long as applicant's request is reasonable*], subject to public utility oversight and approval.

If the rule is read to require the utility to allow the interconnection customer to hire a third-party consultant, then the customer would effectively have a "veto" over the utility's authority to hire its own consultant to conduct the work. There would be no meaning to the first sentence of the rule.

A proper reading of the entire provision that harmonizes the first two sentences gives the public utility full authority and discretion to dictate the use of third-party

[64] *See* ORS 174.010 (when possible, the court should adopt statutory construction that will give effect to all particulars of a statute); *see also Brown v. Saif Corp.*, 361 Or 241, 281 (2017) (courts should not interpret statutes in a way that renders a provision meaningless, particularly when the result is to "conclude that an entire section that the legislature took the trouble to enact has no effect whatever.").
[65] OAR 860-082-0060(8)(f).

contractors. The public utility *may* choose to hire its own third-party contractor, or it *may* agree to permit the interconnection customer to hire a third-party contractor. By clear implication, the public utility may also decide to complete the interconnection facilities and systems upgrades on its own.[66] Regardless, the public utility – not the interconnection customer – has the sole authority to make that decision.

B. IF THE COMMISSION HAD INTENDED TO GIVE THE QF THE RIGHT TO USE THIRD-PARTY CONTRACTORS, IT WOULD HAVE INCLUDED MORE PROTECTIONS FOR THE PUBLIC UTILITY IN THE EVENT THE QF EXERCISED THAT RIGHT.

The rulemaking history of OAR 860-082-0060(8)(f), and a comparison of similar provisions in the QF-LGIP, show that the plain language must control, because the Commission would have included more protections for the public utility had it intended to allow QFs to demand to use third-party contractors.

1. The rulemaking history supports PGE's interpretation.

Although legislative history may be considered as part of statutory interpretation, regardless of whether a judge finds any ambiguity in the language of the statute, a court (and in this case, the Commission) has discretion to decide how much weight to give that history.[67] Furthermore, "not all legislative history is entitled to equal weight . . . ."[68]

[66] Indeed, the default assumption, stated expressly in OAR 860-082-035(2) and (4), is that the utility will construct the required interconnection facilities and systems upgrades.
[67] ORS 174.020; *Gaines*, 346 Or at 172. The text and context of the language of the statute or rule "remain primary, and must be given primary weight in the analysis." *Id.* at 171; *see also Ransom v. Radiology Specialists of Nw.*, 363 Or 552, 576 (2018) ("If the legislature's intentions as revealed in the legislative history do not find expression in the text of the law, that legislative history is of 'no weight' at all." (citation omitted)).
[68] *Topolic v. Rolie*, 131 Or App 72, 76 (1994) (citation omitted).

Statements made by persons who are not part of the rulemaking authority—even if they are made before a legislative committee—have little or no significance.[69]

Because the plain language of the rule gives PGE the discretion over whether to use third-party consultants, the rulemaking history should be given little to no weight—particularly to the extent that it is used to contradict the plain language. Regardless, the rulemaking history does not support Sandy River's interpretation of the rule.

Sorenson and ETO, through formal comments, advocated to change the rule to give the QF the "option" to use a third-party contractor.[70] A party with an option to do something has the right or power to force the desired result.[71] Sorenson and ETO therefore proposed rules that would have given the QF the right or power to choose whether to use a third-party contractor. This proposal would have essentially made the rules under the QF-LGIP and LGIA applicable to small generators as well. The Commission rejected these changes, and instead adopted language that gave the public utility that discretion. The history therefore shows that this exact issue was proposed by QF-aligned groups, considered by the Commission, and ultimately rejected when the Commission adopted the current rule.

Furthermore, when Sorenson proposed its revisions, it proposed additional language that would give the public utility protections in the event a third-party contractor was used, similar to the protections provided to the public utility when a large generator interconnection customer exercises the Option to Build: the interconnection

[69] *See id*.; *Thompson v. IDS Life Ins. Co.*, 274 Or 649, 652 (1976) (discounting a witness's comments before the House Committee on State and Federal Affairs as "of little or no help" in interpreting antidiscrimination law in insurance context, and noting comments made after a statute is enacted "are of little value").
[70] Honoré Decl., Ex. 3 at 6 (Docket No. AR 521, Comments of Sorenson Engineering, Inc. at 6); Honoré Decl., Ex. 4 at 3 (Docket No. AR 521, ETO's Comments at 3).
[71] *Black's Law Dictionary* (10th ed 2014).

customer would have to "waive the required timeframes associated with the Interconnection Facilities Study, and hold the Utility harmless with regard to its results . . . ."[72] Sorenson therefore recognized that giving QFs the right to use third-party contractors would impact the public utility, including creating liability concerns.

In response, PGE commented that even those additions would not be enough if the option language were adopted, and that "significant additional protections" would be needed beyond the proposed rules.[73] The fact that the current rules do not have either the option language, or the additional protections for the public utility, shows that the Commission could not have intended to allow a QF to control this process.

2. The Commission provided additional protections for the utilities in the QF-LGIP and QF-LGIA in connection with giving the QFs the option to use third-party contractors.

As discussed above, the QF-LGIP and QF-LGIA permit large generator interconnection customers to use third-party contractors, and give those customers the option to build the interconnection facilities and upgrades under certain circumstances. However, those rules contain a number of additional protections for the public utility. The rules specifically require the interconnection customer to retain all liability to the public utility for the acts of their contractor, and to indemnify the utility for claims arising from the customer's construction of the facilities and upgrades.[74] And the use of third-party contractors is limited to situations where the public utility or transmission provider determines that the use of the contractor will not interfere with the utility's work for other

[72] Honoré Decl., Ex. 3 at 6 (Docket No. AR 521, Comments of Sorenson Engineering, Inc. at 6).
[73] Honoré Decl., Ex. 5 at 6 (Docket No. AR 521, PGE's Comments at 3).
[74] Docket No. AR 1401, Order No. 10-132, Appendix A at 40 (QF-LGIP at Section 13.4) and Appendix B at 18, 66-67 (QF-LGIA at Sections 5.2(7) and 26.1).

pending interconnection requests.[75] Further, the QF-LGIA details certain safeguards that apply throughout the design and construction process that ensure the utility has sufficient oversight of the construction.[76] If the Commission had intended to give small QFs the right to construct upgrades on the utility's system over the utility's objection, the Commission would have established similar controls in the small generator rules.

C. IT MAKES SENSE THAT THE STANDARD OREGON QUALIFYING FACILITY SMALL GENERATOR INTERCONNECTION PROCEDURES ("SGIP") AND THE LGIP/LGIA TAKE DIFFERENT APPROACHES.

The small generator rules are supposed to be streamlined, less complex, and therefore easier for less sophisticated, small QFs. The process and other controls that need to be in place if a QF is going to take responsibility for construction on the utility's system, especially over the utility's objection, need to be significant, and built into the rule. The fact that the rule does not currently contain these protections means that Sandy River's interpretation of the rule must be rejected.

The plain language of the rule makes sense given the context of the interconnection process. The Tier 4 Interconnection Review process governed by OAR 860-082-0060 requires public utilities to approve applications to interconnect small generator facilities only "if the public utility determines that the safety and reliability of the public utility's transmission or distribution system will not be compromised by interconnecting the small generator facility."[77] The demands of small generator facilities must give way to the public utility's obligations to maintain the safety and reliability of

[75] *Id.,* Appendix A at 40 (QF-LGIP at Section 13.4).
[76] *Id*., Appendix B at 17-19 (QF-LGIA at Section 5.2).
[77] OAR 860-082-0060(2).

its system. This means that the public utility must have authority and discretion over whether to permit third-party consultants to perform work on the utility's system.

Furthermore, it would be impracticable to impose a reasonableness standard into the decision over whether to use third-party contractors for small generator interconnection facilities and system upgrades. Allowing an interconnection customer to hire a third-party consultant to construct the interconnection facilities and system upgrades that will become a part of PGE's system would unnecessarily complicate the interconnection process because PGE would need to develop and enter into a contractual relationship with the interconnection customer that establishes the standards to which the customer's third-party consultant would construct the improvements and that establishes and appropriately assigns responsibility, liability, testing, approval and oversight rights as between PGE, the interconnection customer, and the customer's third-party consultant. It is more complex and administratively burdensome for PGE to attempt to exercise appropriate control and oversight over a third-party consultant hired by the customer and lacking privity of contract with PGE, than it is for PGE to exercise the requisite control and oversight over its own employees or its own consultants, with whom PGE enjoys privity of contract.

Small QF interconnections are standardized in order to minimize transaction costs and ultimately to make such interconnections simpler and less burdensome than large QF interconnections.[78] As part of that simplification, the small QF interconnection rules lack many of the protections associated with the large QF interconnection rules. It is therefore

[78] *See, e.g.*, Honoré Decl., Ex. 12 at 2-3 (*In the Matter of Public Utility Commission of Oregon, Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities,* Docket No. UM 1129, Order No. 05-584 at 15-16 (May 13, 2005)).

impracticable and inappropriate to infer that a small QF interconnection customer has a right to compel the utility to approve the customer's use of a third-party consultant to construct the utility's facilities or improvements when the utility has expressed a preference to construct such improvements itself.

In addition, the public utility owes an obligation to interconnection customers higher in the queue. Practically, under many situations (including this case) the use of a third-party contractor will not expedite the interconnection process, because higher-queued projects still must be completed before lower-queued projects can be placed in-service.

D. ANY CHANGES TO THE COMMISSION'S RULE GOVERNING THIRD-PARTY CONSULTANTS SHOULD BE CONSIDERED, IF AT ALL, IN A GENERAL POLICY DOCKET, NOT IN THIS PROJECT-SPECIFIC COMPLAINT PROCEEDING.

The discussions in general policy Docket No. UM 1610 further show that the current rule prohibits the relief requested by Sandy River. If REC and Sandy River want to advocate for a rule change, the issue should be examined in a new general policy docket focusing on interconnection, and not in this case-specific proceeding.

REC and PGE both participated in Docket No. UM 1610,[79] which initially contemplated discussing modifications to the rules governing the use of third-party contractors in the interconnection process. REC acknowledged in that proceeding that the current rules do not permit an interconnection customer to control a public utility's decision to use third-party contractors. Specifically, REC stated that it wanted the Commission to consider a "potential solution" to concerns that REC had with respect to

[79] *See* Docket No. UM 1610, PGE's Petition to Intervene; *see also,* Docket No. UM 1610, REC's Petition to Intervene.

the interconnection process.[80] REC's solution was "allowing QFs the ability to use and contract with utility-approved third parties for portions of the interconnection work, from studies to construction."[81] REC stated further that it wanted the Commission to "consider specific and limited revisions to its interconnection rules, practices, and policies" that would broaden that role.[82]

In 2012, REC knew that the current rules did not permit QFs to elect any role for third-party contractors in the interconnection process. That is why REC advocated for a rule change. If the Commission chooses to address the use of third-party contractors, it should do so in a general policy docket. The issue is complicated and involves a number of long-term implications for public utilities. The parties to Docket No. UM 1601 knew this—that is why Issue 7.B expressly asked how to accomplish the QFs' goal. Interested parties need to be able to discuss this issue in more depth, and determine whether there is a functional way for successful interconnection customers to offer input into the use of third-party contractors in the interconnection process.

[80] Honoré Decl., Ex. 8 at 8 (Docket No. UM 1610, REC Resp. to Disputed Issues at 5).
[81] *Id.*
[82] *Id*. at 6.

V. CONCLUSION

For the foregoing reasons, PGE respectfully requests the Commission grant its motion for partial summary judgment and deny Sandy River's second claim for relief.

DATED this 27th day of February, 2019.

Respectfully submitted,

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February 27, 2019

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
PO Box 1088
Salem, OR 97308-1088

Re: UM 1967 - Sandy River Solar, LLC v. Portland General Electric Company

Attention Filing Center:

Enclosed for filing today in the above-named docket is the Declaration of Molly K. Honoré in Support of Portland General Electric Company's Motion for Partial Summary Judgment.

Thank you for your assistance.

Very truly yours,

Jeffrey S. Lovinger

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1967

SANDY RIVER SOLAR, LLC, Complainant, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	**DECLARATION OF MOLLY K. HONORÉ IN SUPPORT OF PORTLAND GENERAL ELECTRIC COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

I, Molly K. Honoré, declare:

1. I am defendant's attorney, and I make this declaration in support of Portland General Electric Company's Motion for Partial Summary Judgment. The following statements are true and correct and, if called upon, I could competently testify to the facts averred herein.

2. Attached as **Exhibit 1** is a true and accurate copy of excerpts of Portland General Electric's Response to Complainant's First Set of Data Requests (Dec. 7, 2018).

3. Attached as **Exhibit 2** is a true and accurate copy of excerpts of *In the Matter of a Rulemaking to Adopt Rules Related to Small Generator Interconnection,* Docket No. AR 521, Staff Second Set of Comments and Workshop Edits (Oct. 2, 2007).

4. Attached as **Exhibit 3** is a true and accurate copy of excerpts of *In the Matter of a Rulemaking to Adopt Rules Related to Small Generator Interconnection,* Docket No. AR 521, Comments of Sorenson Engineering, Inc. (Nov. 27, 2007).

5. Attached as **Exhibit 4** is a true and accurate copy of *In the Matter of a Rulemaking to Adopt Rules Related to Small Generator Interconnection,* Docket No. AR 521, Comments of Energy Trust of Oregon, Inc. (Nov. 9, 2007).

6. Attached as **Exhibit 5** is a true and accurate copy of *In the Matter of a Rulemaking to Adopt Rules Related to Small Generator Interconnection,* Docket No. AR 521, Comments of Portland General Electric (Nov. 27, 2007).

7. Attached as **Exhibit 6** is a true and accurate copy of *In the Matter of a Rulemaking to Adopt Rules Related to Small Generator Interconnection,* Memorandum and Notice of Workshop (June 4, 2008).

8. Attached as **Exhibit 7** is a true and accurate copy of *In the Matter of Public Utility Commission of Oregon, Staff Investigation Into Qualifying Facility Contracting and Pricing,* Docket No. UM 1610, Staff's Proposed Issues List (Oct. 3, 2012).

9. Attached as **Exhibit 8** is a true and accurate copy of *In the Matter of Public Utility Commission of Oregon, Staff Investigation Into Qualifying Facility Contracting and Pricing,* Docket No. UM 1610, Renewable Energy Coalition's Response to Disputed Issues (Oct. 10, 2012).

10. Attached as **Exhibit 9** is a true and accurate copy of *In the Matter of Public Utility Commission of Oregon, Staff Investigation Into Qualifying Facility Contracting and Pricing,* Docket No. UM 1610, Parties' Brief in Support of Stipulation Re: Issues List (Feb. 26, 2015).

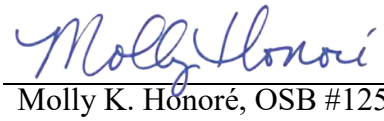
11. Attached as **Exhibit 10** is a true and accurate copy of excerpts of *Reform of Generator Interconnection Procedures & Agreements,* 163 FERC ¶ 61,043, 18 CFR Part 37, Order No. 845 (Apr. 19, 2018). This document is also available at https://www.ferc.gov/whats-new/comm-meet/2018/041918/E-2.pdf.

12. Attached as **Exhibit 11** is a true and accurate copy of excerpts of PGE Pro Forma Open Access Transmission Tariff (OATT), Volume No. 8. This document is also available at http://www.oasis.oati.com/PGE/PGEdocs/PGE-8_OATT.pdf.

13. Attached as **Exhibit 12** is a true and accurate copy of excerpts of *In the Matter of Public Utility Commission of Oregon, Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities,* Docket No. UM 1129, Order No. 05-584 (May 13, 2005).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 27th day of February, 2019.

By: 
Molly K. Honoré, OSB #125250

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1967

SANDY RIVER SOLAR, LLC, Complainant, vs. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	**PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSES TO COMPLAINT'S FIRST SET OF DATA REQUESTS**

Defendant Portland General Electric Company ("PGE") responds as follows to Complainant Sandy River Solar's First Set of Data Requests:

GENERAL OBJECTIONS

1. PGE's responses are made to the best of its knowledge, information, and belief. PGE's responses are at all times subject to such additional discovery or investigation that further discovery or investigation may disclose and are subject to such refreshing of recollection, and such additional knowledge of facts, as may result from further discovery or investigation.

2. By stating in these responses that PGE will produce documents or provide information (subject to protective order or otherwise), PGE does not represent that any documents or information actually exists, but rather that in good faith PGE will search and attempt to ascertain whether such documents or information does, in fact, exist.

3. PGE objects to Complainant's requests to the extent those requests seek documents or information that is subject to the attorney-client privilege, the work produce doctrine, or any other applicable privilege on the ground that such documents or information is exempt from discovery.

4. PGE objects to all definitions, instructions, and document requests to the extent Complainant seeks documents not currently in PGE's possession, custody, or control, or refer to persons, entities or events not known to PGE, on the grounds that such definitions or requests seek to require more of PGE than any obligation imposed by law, would subject PGE to unreasonable and undue annoyance, oppression, burden, and expense, and would seek to impose on PGE an obligation to investigate or discover information or materials from third parties or sources that are equally accessible to Complainant.

5. PGE reserves all objections or other questions as to the competency, authenticity, relevance, materiality, privilege, or admissibility as evidence in any subsequent proceeding in, or trial of, this or any other action for any purpose whatsoever of this response and any document or thing produced in response to Complainant's requests.

6. PGE objects to Complainant's requests to the extent they seek to impose obligations on PGE not authorized by Public Utility Commission of Oregon ("Commission") rules or the Oregon Rules of Civil Procedure.

7. PGE objects to the instructions set forth in Complainant's First Set of Data Requests to the extent that those instructions impose obligations on PGE that exceed, are unauthorized by, or are inconsistent with applicable discovery rules, including OAR 860-001-500 to OAR 860-001-540.

8. PGE objects to Complainant's requests to the extent they are vague, ambiguous, unintelligible, overly broad as to time and subject matter, seek irrelevant and/or immaterial information, to the extent they are not reasonably calculated to lead to the discovery of admissible evidence, and/or to the extent they cause undue burden, harassment, or annoyance.

9. Each of these general objections is incorporated into each of PGE's specific responses as if set forth in full below.

RESPONSES TO INDIVIDUAL REQUESTS

Sandy River Solar Data Request No. 001:

Please indicate the higher-queued projects that the Sandy River Solar interconnection is subject to. For each of these higher-queued projects, please provide:

a. The Feasibility, System Impact, and Facilities studies;

b. The current construction timeline including all milestones;

c. The construction timeline including all milestones that existed on January 7, 2018 when PGE provided Sandy River with the System Impact Study;

d. The construction timeline including all milestones that existed on April 25, 2018 when PGE provided Sandy River with the Facilities Study; and

e. The construction timeline including all milestones that existed on July 27, 2018 when PGE provided Sandy River with the Revised Facilities Study.

Response to Sandy River Solar Data Request No. 001:

In addition to the general objections stated above, PGE objects to Sandy River Solar's Data Request No. 001 and each of its sub-parts on the grounds that they are vague, ambiguous, unintelligible, overbroad, unduly burdensome, seek irrelevant information, and/or seek information whose probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, subjecting PGE to undue burden, or needlessly presenting cumulative evidence. Notwithstanding and without waiving PGE's general objections or these specific objections, PGE responds to each sub-part of Complainant's Data Request No. 001 as follows:

Please indicate the higher-queued projects that the Sandy River Solar interconnection is subject to.

PGE has received three interconnection requests for the Dunns Corner-13 feeder that are or were higher-queued than the Sandy River Solar interconnection request: SPQ0010, SPQ0051 and SPQ0070. SPQ0051 withdrew its application on February 21, 2018, after receiving a System Impact Study. As a result, there are currently two higher-queued interconnection applications on the Dunns Corner-13 feeder: SPQ0010 and SPQ0070.

For each of these higher-queued projects, please provide:

a. The Feasibility, System Impact, and Facilities studies;

SPQ0010: There was no Feasibility Study conducted for SPQ0010. A copy of the System Impact Study Report for SPQ0010 with project identifying information redacted is provided in Attachment 001A. A copy of the Facilities Study Report for SPQ0010 with

project identifying information redacted is provided in Attachment 001B.

SPQ0051: There was no Feasibility Study for SPQ0051. A copy of the System Impact Study Report for SPQ0051 with project identifying information redacted is provided in Attachment 001C. There was no Facilities Study for SPQ0051 because the applicant withdrew after the System Impact Study.

SPQ0070: There was no Feasibility Study conducted for SPQ0070. A copy of the System Impact Study Report for SPQ0070 with project identifying information redacted is provided in Attachment 001D. A copy of the Facilities Study Report for SPQ0070 with project identifying information redacted is provided in Attachment 001E.

b. *The current construction timeline including all milestones;*

It is unclear what Sandy River Solar seeks when it requests the construction timelines and milestones in effect on the dates specified in sub-parts (b), (c), (d) and (e). PGE assumes that Sandy River Solar seeks the construction timeline and associated milestones stated in the Interconnection Agreement for each higher-queued interconnection request that was in effect on the dates specified in each sub-part. Alternatively, if there was no Interconnection Agreement on the date specified, PGE assumes Sandy River Solar seeks the construction timeline and associated milestones that were proposed in the Facilities Study that was in effect on the dates specified in each sub-part. PGE has responded based on these assumptions.

SPQ0010: A copy of the current construction timeline, including all milestones, from the Interconnection Agreement for SPQ0010 is provided in Attachment 001F.

SPQ0051: There is no current construction timeline or milestones for SPQ0051 because the applicant withdrew after the System Impact Study and no Facilities Study or Interconnection Agreement was issued.

SPQ0070: A copy of the current construction timeline, including all milestones, from the Interconnection Agreement for SPQ0070 is provided in Attachment 001G.

c. *The construction timeline including all milestones that existed on January 7, 2018 when PGE provided Sandy River with the System Impact Study;*

SPQ0010: A copy of the current construction timeline, including all milestones, from the Interconnection Agreement for SPQ0010 is provided in Attachment 001F. This construction timeline existed on January 7, 2018 when PGE provided Sandy River Solar a System Impact Study.

There were no construction timelines in existence for SPQ0051 and SPQ0070 on January 7, 2018, because there were no Facilities Studies or Interconnection Agreements for those projects on that date.

d. The construction timeline including all milestones that existed on April 25, 2018 when PGE provided Sandy River with the Facilities Study; and

SPQ0010: A copy of the current construction timeline, including all milestones, from the Interconnection Agreement for SPQ0010 is provided in Attachment 001F. This construction timeline existed on April 25, 2018 when PGE provided Sandy River Solar a Facilities Study.

SPQ0070: A copy of the proposed construction timeline, including all proposed milestones, from the Facilities Study for SPQ0070 is provided in Attachment 001E. This proposed construction timeline existed on April 25, 2018 when PGE provided Sandy River Solar a Facility Study.

There were no construction timelines in existence for SPQ0051 on April 25, 2018, because there was no Facilities Study or Interconnection Agreement for the project on that date.

e. The construction timeline including all milestones that existed on July 27, 2018 when PGE provided Sandy River with the Revised Facilities Study.

SPQ0010: A copy of the current construction timeline, including all milestones, from the Interconnection Agreement for SPQ0010 is provided in Attachment 001F. This construction timeline existed on July 27, 2018 when PGE provided Sandy River Solar with a Revised Facilities Study.

SPQ0070: A copy of the current construction timeline, including all milestones, from the Interconnection Agreement for SPQ0070 is provided in Attachment 001G. This construction timeline existed on July 27, 2018 when PGE provided Sandy River Solar with a Revised Facilities Impact Study.

There were no construction timelines in existence for SPQ0051 on July 27, 2018 when PGE provided Sandy River Solar with a Revised Facilities Impact Study, because there was no Facilities Study or Interconnection Agreement for the project on that date.

Sandy River Solar Data Request No. 011:

Admit or deny that PGE stated that the "actual work will likely take around three weeks and potentially longer if we need to replace poles."

a. Is this a true statement?

b. Will PGE need to replace poles?

c. If PGE will need to replace poles, how long will the actual work take?

Response to Sandy River Solar Data Request No. 011:

In addition to the general objections stated above, PGE objects to Sandy River Solar's Data Request No. 011 and each of its sub-parts on the grounds that they are vague, ambiguous, unintelligible, overbroad, unduly burdensome, seek irrelevant information, ask PGE to speculate, and/or seek information whose probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, subjecting PGE to undue burden, or needlessly presenting cumulative evidence. Notwithstanding and without waiving PGE's general objections or these specific objections, PGE responds to each sub-part of Complainant's Data Request No. 011 as follows:

Admit or deny that PGE stated that the "actual work will likely take around three weeks and potentially longer if we need to replace poles."

PGE admits that in a June 6, 2018 email from PGE employee Jason Zappe to Troy Snyder, Mr. Zappe stated: "The actual work will likely take around three weeks and potentially longer if we need to replace poles to accommodate the transfer trip." A copy of this email communication was filed with the Commission as Exhibit H to PGE's Answer in this matter.

a. Is this a true statement?

Yes, it's a true statement. If it is not necessary to replace any poles to accommodate the transfer trip, PGE believes the work of installing the necessary interconnection facilities or system upgrades should take approximately three weeks. However, the work could take considerably longer if it proves necessary to replace poles to accommodate the transfer trip. As PGE has previously explained to Sandy River Solar, most of the time provided for in the estimated construction schedule is to allow time for higher queued interconnection project SPQ0070 to be completed. That project includes the installation of new relays at the substation that are a necessary requirement for the Sandy River Solar interconnection. If Sandy River Solar wishes to proceed without taking responsibility for the procurement and installation of these new substation relays, it is necessary to build time into the construction schedule to wait for the higher queued interconnection to be completed.

b. Will PGE need to replace poles?

PGE does not currently know whether it will be necessary to replace any poles, and if so, how many poles will need to be replaced. The detailed engineering determination on pole replacement takes place after a signed interconnection agreement and funding has been received.

c. If PGE will need to replace poles, how long will the actual work take?

The duration of the work is highly dependent on the number of poles to be replaced and the permitting requirements of the jurisdiction where the work is performed. As previously stated, PGE does not currently know whether it will be necessary to replace any poles or how many poles may need to be replaced. As a result, PGE cannot estimate how much time may be required, if any, to conduct pole replacement work.

Sandy River Solar Data Request No. 014:

Please list the equipment required to safely interconnect the Sandy River Solar facility.

Response to Sandy River Solar Data Request No. 014:

Given the assumptions stated in the Revised Facilities Study, the following facilities are required to interconnect the Sandy River Solar facility (if any of the underlying assumptions change before an Interconnection Agreement is executed, then the required facilities may also change):

Distribution Modifications:

- New Primary Service Conductor
- Bi-Directional Meter
- CTs and PTs

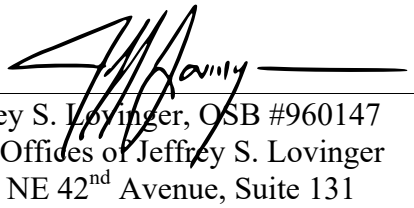
Communication Requirements: (Transfer Trip using SEL Mirrored Bits Protocol)

- Fiber Optic Cable from the Substation to the Sandy River Solar Facility
- Meet Me Cabinet at Generation Site
- New Fiber Optic Terminations, Patch Panel Work at both the Substation and the Sandy River Solar Facility
- Potential Pole Replacements as Determined During detailed Engineering Analysis

Additionally, the SEL-487E transformer relay requirements being installed under SPQ0070 must be complete for Sandy River Solar to interconnect. The estimated construction schedule proposed as part of the Revised Facilities Study includes time to allow the completion of such work as part of the interconnection of SPQ0070, which is a necessary requirement for the Sandy River Solar interconnection.

Dated this 7th day of December 2018.

By,



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SPQ0070

Form 8
1-19-10 rev.

Attachment D

Scope of Work/Milestones

In-Service Date: February 17, 2020

Critical milestones and responsibility as agreed to by the Parties:

	Milestone/Date	Responsible Party
(1)	Executed Interconnection Agreement / 11-28-2018	SPQ0070
(2)	$10,000 of Estimated Cost / 11-28-2018	SPQ0070
(3)	Engineering Design Starts / 12-21-2018	PGE
(4)	$71,000 of Estimated Cost / 4-19-2019	SPQ0070
(5)	*Engineering Design Complete / 4-19-2019	PGE
(6)	PGE Construction Scheduled / 8-1-2019	PGE
(7)	Remaining Balance of $81,000 / 9-1-2019	SPQ0070
(8)	Switchgear Installed and Inspection / 12-16-2019	SPQ0070
(9)	Interconnection Facilities Complete / 1-17-2020	PGE
(10)	Testing and Commissioning / 2-3-2020	SPQ0070
(11)	In-Service Date / 2-17-2020	PGE

* During the design of the communication scheme additional costs or time may be incurred should the existing utility poles need to be replaced or modified to accommodate the fiber optic line.

PGE does not guarantee completion of any project on a targeted date as the schedule is dependent on a number of variables, including but not limited to, construction of other potential interconnection projects.

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 521

In the Matter of a Rulemaking to Adopt Rules Related to Small Generator Interconnection.	)))	STAFF COMMENTS

Staff Second Set of Comments

Workshop Edits

Staff has revised the Draft Rules and associated Forms based on the input of Participants at the September 25 AR 521 Workshop. In the attached documents the modifications are indicated using strikethrough and highlights. This represents Staff's best effort to capture omissions, mistakes and revisions discussed at the workshop. Staff does not attempt to discuss all the revisions made in these brief comments. Rather Participants are encouraged to review the draft Rules and Forms and consider the changes in the context in which they were made. Included with the revised Rules and Forms is an AR 521 Rulemaking Schedule indicating activities and dates discussed at the workshop. Although comments will be received at any time during the rulemaking, participants are encouraged to make comments on the recent workshop and the current draft Rules and Forms by October 16, 2007. Any comments submitted to the OPUC filing center for Docket AR 521 will be posted and available for all participants to review.

Thanks to all the participants to the recent workshop for their suggestions and comments. This concludes Staff's second set of comments.

Respectfully submitted,

Ed Durrenberger
Senior Utility Analyst
Electric & Natural Gas Division
Resource & Market Analysis

deficiencies. The Parties may mutually agree to extend the time period for resolving any deficiencies. If the Applicant fails to resolve the deficiencies to the satisfaction of the EDC within the agreed upon time period, the Application is deemed withdrawn.
(8) Operation: The Applicant must notify the EDC prior to commencing operation and must operate the Small Generator Facility in accordance with the executed Interconnection Agreement.

Stat. Auth.: ORS Ch. 183, 756 & 757
Stats. Implemented: ORS 756.040 & 756.060
Hist.: NEW

OAR 860-082-0055
Tier 4 Interconnection
(1) Applicability: The EDC must use the Tier 4 interconnection review procedures for an Application that does not qualify for Tier 1, Tier 2, or Tier 3 review and for which the Small Generator Facility has an Electric Nameplate Capacity that is 10 MW or less.
(2) Approval: The EDC must approve interconnection under the Tier 4 interconnection review procedure set forth in section (3) and studies set forth in sections (4) through (6) of this rule. The EDC may not impose requirements in addition to those set forth in the OSGIR.
(3) Tier 4 Interconnection Review Procedure:
(a) The Applicant must submit its Application and appropriate fees to the EDC at its designated address. The Application form is available on the Commission web site as Form 2.
(b) The EDC must, within 10 business days of receipt of the Application, inform the Applicant that the Application is either complete or incomplete. If the application is incomplete, the EDC must indicate what information is missing. In the event the Applicant does not receive notification within 10 business days, the Applicant may contact the EDC to determine the status of the Application.
(c) If the EDC does not have a record of receipt of the Application, the Applicant must provide the EDC with an additional copy of the Application. If the Applicant can demonstrate that the original completed Application was delivered to the EDC, the EDC must forgo the initial 10 business day response period and complete its review within 20 business days of its receipt.
(d) Queuing Priority: Once the EDC deems the Application to be complete, it must assign the project a Queue Position unless a queue position was already assigned under a previous lower-Tier Application that was not approved. The Queue Position of each Application is used to determine any potential Adverse System Impacts of the proposed Small Generator Facility based on the relevant data contained in the Application, the outcomes of the various studies and the Applicant's desired interconnection location. The Applicant must proceed under the timeframes of this section. The EDC must schedule a Scoping Meeting to notify the Applicant about other higher-queued Applications including, but not limited to, Net Metering Facility Applications and FERC Interconnection Applications on the same radial line or Area Network to which the Applicant is seeking to interconnect.

(e) If in the process of evaluating the completed Application ~~interconnection request~~, the EDC determines that supplemental or clarifying information is required, the EDC must request the information. The time required for the receipt of the additional information may extend the time before the Scoping Meeting can be convened but only to the extent of the time required for the receipt of the additional information. The EDC may not alter the Applicant's Queue Position. Supplemental or clarifying information can be provided in the scoping meeting.

(f) Studies: By mutual agreement of the Parties, the Scoping Meeting, Interconnection Feasibility Study, Interconnection Impact Study, or Interconnection Facilities Studies (or any combination thereof) as set forth in these Tier 4 procedures may be waived.

(g) Scoping Meeting: A Scoping Meeting must be held within 10 business days, or as agreed upon by the Parties, after the EDC has notified the Applicant that the Application is deemed complete. The purpose of the meeting is to review the Application including any existing studies relevant to the Application, (such as the results from the Tier 1, Tier 2 or Tier 3 screening criteria and studies or, if available, the Applicant's analysis of the proposed interconnection using the same criteria as the EDC applies to the Application). Parties are expected to bring to the Scoping Meeting such personnel, including system engineers and other resources, as may be reasonably required to accomplish the purpose of the meeting. Some Scoping Meeting outcomes may include:

(A) An identification of the need for further studies as described in sections (4), (5) and (6) of 860-082-0055 ~~this rule~~;

(B) Possible changes or modifications to the Application to facilitate the interconnection or reduce costs; or

(C) No changes at all and the EDC being able to proceed with the application without further studies.

In any case, where changes result from the scoping meeting, the Applicant maintains the assigned queue position so long as the additions or changes to the Application can be rectified within a 10 business day window, or a period mutually agreed upon by parties, from the date of notification.

(h) If the Parties agree at the Scoping Meeting that an Interconnection Feasibility Study needs to be performed, the EDC has up to 15 business days to complete an Interconnection Feasibility Study Agreement that provides the Applicant with an outline of the scope and a good faith, non-binding estimate of the cost to perform the study. A model form of an Interconnection Feasibility Study Agreement is provided on the Commission's website.

(4) Interconnection Feasibility Study:

(a) If the Applicant agrees to the cost estimate, the EDC must perform an Interconnection Feasibility Study. The study must evaluate the effects of the proposed Small Generator Facility on the existing EDC's T&D System and look for possible Adverse System Impacts. Some Feasibility Study outcomes may include:

(A) Initial identification of any circuit breaker short circuit capability limits exceeded as a result of the interconnection;

(B) Initial identification of any thermal overload or voltage limit violations resulting from the interconnection;

(C) Initial review of grounding requirements and system protection; and

(D) Description and estimated cost of Interconnection Facilities and System Upgrades required to interconnect the Small Generator Facility to the EDC in a safe and reliable manner.
(b) If the Applicant asks that the Interconnection Feasibility Study evaluate multiple potential points of interconnection, the EDC will perform the additional evaluations at the Applicant's expense.
(c) If the Interconnection Feasibility Study identifies possible Adverse System Impacts from the Small Generator Facility, an Interconnection System Impact Study is required. The EDC has up to 15 business days to complete an Interconnection System Impact Study Agreement that provides the Applicant with an outline of the scope and a good faith, non-binding estimate of the cost to perform the study. A model form of an Interconnection System Impact Study Agreement is provided on the Commission's website.
(5) Interconnection System Impact Study:
(a) If the Applicant agrees to the cost estimate, the EDC must conduct an Interconnection System Impact Study. The study must evaluate the Adverse System Impacts identified in the Interconnection Feasibility Study, and study other potential impacts including, but not limited to, those identified in the Scoping Meeting.
(b) The study must consider all generating facilities that, on the date the Interconnection System Impact Study is commenced:
(A) Are directly interconnected with the EDC's system;
(B) Have a pending higher Queue Position to interconnect to the system; or;
(C) Have a signed Interconnection Agreement.
(c) The study must include, among other things:
(A) A short circuit analysis,
(B) A stability analysis,
(C) A power flow analysis,
(D) Voltage drop and flicker studies,
(E) Protection and set point coordination studies, and
(F) Grounding reviews.
(d) The Interconnection System Impact Study must:
(A) State the underlying assumptions of the study,
(B) Show the results of the analyses, and
(C) List any potential impediments to providing the requested interconnection service.
(e) If the Applicant sponsored a separate independent impact study, the EDC must also evaluate and address any alternative findings from that study.
(f) The outcome of the System Impact Study must include a report of any Interconnection Facilities and System Upgrades to the EDC's T&D system and any System Upgrades to Affected Systems required to allow the proposed interconnection to occur including an estimate of the equipment costs and standard delivery schedules.
(g) If Interconnection Facilities are found to be necessary in the System Impact Study, the EDC must determine the price and delivery of the facilities. The EDC has up to 15 business days after completion of the Interconnection System Impact Study, or a period mutually agreed upon by parties, to develop an Interconnection Facilities Study Agreement that provides the Applicant with the scope and a good faith, non-binding estimate of the cost to

perform the study. A model form of an Interconnection Facilities Study Agreement is provided on the Commission's website.
(6) Interconnection Facilities Study:
(a) If the Applicant agrees to the cost estimate, an Interconnection Facilities Study must be performed by the EDC to evaluate the cost of equipment, and the engineering, procurement and construction work (including overheads) needed to implement the conclusions of the Interconnection Feasibility Study and Interconnection System Impact Study for interconnection of the proposed Small Generator Facility. The Interconnection Facilities Study must also identify:
(A) The electrical switching configuration of the equipment, including, without limitation, transformer, switchgear, meters, and other station equipment;
(B) The nature and estimated cost of the EDC's Interconnection Facilities;
(C) System Upgrades required at the EDC and on Affected System that are necessary to accomplish the interconnection; and
(D) A detailed estimate of the time required to procure materials and equipment and complete the construction and installation of such facilities.
(b) Parties may agree to permit the Interconnection Customer to separately arrange for a third party to design and estimate the construction costs for the required Interconnection Facilities. In such a case, the EDC must review the design and cost estimates of the facilities, under the provisions of the Interconnection Facilities Study Agreement. If the Parties agree to separately arrange for design and construction estimates, and comply with any security and confidentiality requirements, the EDC must make all relevant information and required specifications available to the Applicant at no cost in order to permit the Applicant to obtain an independent design and cost estimate for the facilities, to be built in accordance with such specifications.
(7) Approval: Upon completion of the Interconnection Facilities Study, and with the agreement of Applicant to pay for necessary Interconnection Facilities and System Upgrades identified in the Interconnection Facilities Study as approved by the EDC, and provided the EDC determines, based in the studies in 860-082-0055 (4) through (6) ~~of this rule~~, that safety and reliability will not be compromised from interconnecting the Small Generator Facility, the EDC must approve the application
(a) The interconnection customer must provide the EDC at least 20 days notice of the planned commissioning for the small generator facility.
(b) The EDC has the option of conducting a witness test at a mutually agreeable time within 10 business days of the scheduled commissioning or waiving the test and notifying the Applicant. If the EDC does not conduct the witness test within the 10 business days or within the time otherwise mutually agreed upon by the parties, or if the EDC notifies the Applicant of its intent not to perform the test, the witness test is deemed waived.
(8) Non-Approval: If the Application is denied, the EDC must provide a written explanation explaining why the Application was denied.
(9) Interconnection of the Small Generator Facility: The Interconnection is not final until:
(a) Any facilities and upgrades agreed upon in sections (3) through (6) are satisfied;
(b) The Small Generator Facility installation is inspected and approved by the electric code inspector with jurisdiction over the interconnection;
(c) The Parties execute a Certificate of Completion; and

(d) There is a successful completion of the Witness Test, if conducted by the EDC.
(10) Witness Test Not Acceptable: If the Witness Test is conducted and is not acceptable to the EDC, the Applicant must be allowed a period of 30 calendar days to resolve any deficiencies. The Parties may mutually agree to extend the time period for resolving any deficiencies. If the Applicant fails to resolve the deficiencies to the satisfaction of the EDC within the agreed upon time period, the Application is deemed withdrawn. The Applicant has the right to submit a new Interconnection Request for consideration at a later time but relinquishes the current Small Generation Facility's position in the queue.
(11) Operation: The Applicant must notify the EDC prior to commencing operation and must operate the Small Generator Facility in accordance with the executed Interconnection Agreement and the executed Power Purchase Agreement.

Stat. Auth.: ORS Ch. 183, 756 & 757
Stats. Implemented: ORS 756.040 & 756.060
Hist.: NEW

860-082-0060
Recordkeeping and Reporting Requirements
(1) The EDC must maintain, for a period of not less than two years, a record of all Applications received, the time required to complete its review of each Application, and reasons for the actions taken on the Applications.
(2) The EDC must maintain, for as long as the interconnection is in place, a record of all Interconnection Agreements completed and including the related "As Built" Form 7 that records equipment specifications and initial settings. The utility must provide a copy of these records to the Applicant or Interconnection Customer within 15 business days upon receipt of a written request.
(3) The EDC must prepare and submit to the Commission, an annual report summarizing the EDC's interconnection activities including, but not necessarily limited to, the following information:
(a) For all Tiers of Interconnection Applications:
(A) The number Interconnection Applications made,
(B) The number of interconnections established,
(C) The individual types of generators applying for interconnection and their capacity,
(D) Interconnection Application location by Zip code, and
(E) A report of any disputes and their resolution.
(b) For Tier 2 through Tier 4 Interconnection Applications:
(A) Estimated facilities costs from studies,
(B) Whether telemetry is required and if so, its basic configuration, and
(C) System upgrades required and their estimated costs.
(c) For all applications that led to successful interconnections:
(A) Whether or not timelines were met and if not an explanation of why they were not met, and
(B) A record of any item(s) that Parties mutually agreed to waive.

Stat. Auth.: ORS Ch. 183, 756 & 757

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Attorneys for Sorenson Engineering, Inc.

BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

IN THE MATTER OF RULEMAKING TO ADOPT RULES RELATED TO SMALL GENERATOR INTERCONNECTION	CASE NO. AR 521 COMMENTS OF SORENSON ENGINEERING, INC.

COMES NOW, Sorenson Engineering, Inc. ("Sorenson") by and through its attorney of record, Peter J. Richardson, and pursuant to the schedule established by the Administrative Law Judge in the above captioned matter and hereby lodges its Comments to the Commission Staff's proposed rules and forms.

I

INTRODUCTION

Sorenson is an engineering firm with offices located in Idaho Falls, Idaho. It is a successful engineer, developer, owner and operator of numerous small power production facilities. Sorenson Engineering is working with or is in the planning stages of developing similar

projects in Oregon. Sorenson has many years of experience in the subject matter of this proceeding. Sorenson's comments have been prepared with the expert assistance of Mr. John Lowe, who has many years of experience in facilitating the interconnection of small power production facilities to the electric system of investor-owned utilities. Sorenson appreciates the opportunity to comment herein and applauds this Commission's efforts to make the interconnection and operation of small power production facilities in Oregon a transparent, efficient and safe transaction.

II

INTERCONNECTION FACILITIES O&M REIMBURSEMENT

Interconnection costs include both initial costs to study and interconnect a generating project ("Interconnection Customer") as well as ongoing costs to operate and maintain both the project's interconnection equipment and the Public Utility's Interconnection Facilities. The Interconnection Customer is responsible for all these costs. The proposed rule AR-521 ("Rule") emphasizes the process of interconnect study and initial interconnection. The Rule should provide both the Public Utility and the Interconnection Customer with assurances as to the timing, process and responsibilities of the parties in completing the study process and in managing or controlling the cost of such studies. The Rule also addresses interconnection standards and provides an excellent basis by which the interconnection requirements can be determined and the costs therefore controlled. However, the Rule does not adequately address the subject of operation and maintenance (O&M) costs of the Public Utility's Interconnection Facilities usually paid for by the Interconnection Customer in the form of an annual O&M reimbursement.

These annual reimbursements in total over the term of an agreement can be very significant and in most cases dwarf the actual study costs. This is particularly significant for distribution level interconnections where such reimbursement may be as much as 12% of the original total interconnection cost annually. Average system O&M costs for the Public Utility's distribution system in the State of Oregon is the derivation for the O&M percentage applied to distribution interconnections in Oregon.

The Rule and the proposed interconnection agreement is generally vague regarding the Interconnection Customer's obligations regarding O&M reimbursements. The historic method of using average system cost for distribution interconnections should be abandoned in favor of a method utilizing actual costs incurred by the Public Utility. This actual cost approach has several advantages because it: (1) aligns more closely with the underlying cornerstone of ratepayer neutrality, which is elemental to any PURPA transaction; (2) creates consistency between the transmission and distribution interconnection O&M reimbursements where a Public Utility may already be utilizing actual cost for transmission interconnections; (3) creates consistency among the Interconnection Facilities for an Interconnection Customer to the extent that certain elements of such Interconnection Facilities are anticipated to reimburse the Public Utility based upon actual O&M costs. (*See* PacifiCorp initial comments, page 6, Metering . . . "The Interconnection Customer should pay the actual cost of such metering and its maintenance"); (5) minimizes the significance of the actual original interconnection costs, especially when such costs may be disputable; (6) establishes consistent treatment of Interconnection O&M reimbursements among all Public Utilities operating in Oregon; and most importantly (7) it will likely result in a dramatic reduction in O&M reimbursements during the period when most Interconnection Customers are making debt payments usually for ten to

twenty years. This is demonstrated by existing Interconnection Customers who have observed little need on the Public Utility's behalf to incur costs maintaining or replacing their Interconnection Facilities.

(A) SORENSON'S SPECIFIC RECOMMENDATIONS

Rule § 860-082-0010 – Definitions:

Add the following new definition:

"Actual Cost of Interconnection Facility Operation and Maintenance" means the total documentable cost of services provided by the Public Utility associated with maintaining and operating the Public Utility's Interconnection Facilities for a Small Generator Facility.

Rule § 860-082-0030:

Add the following language to the end of the paragraph (3) on Cost Responsibility:

The Interconnection Customer is also responsible for reimbursing the Public Utility for the Actual Cost of Interconnection Facility Operation and Maintenance (O&M) as further described in the Interconnection Agreement.

Form 8: Article; add the following language as a new paragraph

4.7 The Public Utility may bill the Interconnection Customer not more often than annually for the Actual Cost of Interconnection Facility Operation and Maintenance (O&M) for the previous year.

IV

INTERCONNECTION CUSTOMER'S OPTION TO PERFORM STUDIES, DESIGN, CONSTRUCT, OWN AND OPERATE INTERCONNECTION FACILITIES

The Interconnection Customer should be permitted to minimize potential interconnection costs and to maximize the financial benefits of self operation, maintenance, and ownership of

faculties that may otherwise be Interconnection Facilities. Therefore, the Interconnection Customer should have the option -- provided in all circumstances that electrical system safety and reliable operations are not compromised; and provided further that the Interconnection Customer pays all appropriate costs -- to perform interconnection studies or portions thereof. The Interconnection Customer also should have the option to design, construct, own, operate and maintain electrical facilities necessary for the project which otherwise might be designed, constructed, owned, operated and maintained by the Public Utility as Interconnection Facilities. Typical examples would be a line extension to be located on property controlled or owned by the Interconnection Customer or a substation for the Small Generating Facility that has intermingled electrical facilities. The Rule anticipates the Interconnection Customer having the rights described above, but may not go far enough to encourage or facilitate the Interconnection Customer's option. Additionally, there may be circumstances within a Utility where design, construction, operation and maintenance of transmission extensions is a requirement of the Interconnection Customer, and in trying to create some uniformity, it would be appropriate for a distribution Interconnection Customer to have at least the option, but certainly not be foreclosed from the benefits by the Public Utility.

(A) SORENSON'S SPECIFIC RECOMMENDATIONS

Rule 860-082-0030, § (1) Study Costs:

Add the following language to the end of Paragraph (1)

The Interconnection Customer or Applicant shall have the option to perform studies or portions of studies through an agreed-upon third party consultant provided that the Interconnection Customer: (i) pays all appropriate costs incurred by the Public Utility; (ii) waives any timeframes in the Rule associated with that required study; and (iii) holds the Utility harmless.

Rule 860-082-0055

Tier 4 Interconnection, (6) Interconnection Facilities Studies, subparagraph (b). Delete the first sentence and replace it with the following:

The Interconnection Customer shall have the option of having an agreed-upon third party consultant design and estimate the construction costs for the required Interconnection Facilities.

Add to the end of the subparagraph (4) the following language:

The Interconnection Customer must waive the required timeframes associated with the Interconnection Facilities Study, and hold the Utility harmless with regard to its results.

Rule 860-082-0030: Cost Responsibilities, paragraph (3)

Revise this paragraph by adding the following language to the end of the paragraph:

The Interconnection Customer shall have the option to design, construct, own, operate and maintain certain electrical facilities, i.e. line extension, that otherwise may have been designated as Interconnection Facilities, provided such facilities are located on property owned or adequately controlled by the Interconnection Customer, are for the exclusive use of the Interconnection Customer, and the design and construction of such facilities have been reviewed and inspected by the Public Utility (or inspected and certified by a registered professional electrical engineer), and the Interconnection Customer pays all costs. Such facilities will be designated as Interconnection Equipment regardless of the location of the Interconnection Customer's metering.

V

METERING AND MONITORING

PacifiCorp's initial comments on page 6, Section 4 indicate that PacifiCorp believes that the requirement for telephonic access to its metering for the Interconnection Customer is

appropriate. While this is a noble objective and one that utilizes technological advances and efficiencies, it dos not impact safety or reliability of the electrical system and adds an interconnection requirement or standard that could raise the overall Interconnection Facility's costs. Also, for small projects approximately 1,000 kW or less, this requirement could be especially burdensome if both cellular service or hardwire telephone system are unavailable. Many small facilities may not have the sophisticated communications equipment that larger facilities typically have for operational monitoring. The requirement is generally reasonable for those projects afforded low-cost access to cellular service but should not be an absolute requirement if an expensive extension of a hardwire system is the only alternative. The parties should have the flexibility to resolve the meter reading issue as creatively as necessary, provided that the Interconnection Customers pays all the costs. As long as the telephone access requirement is universal, it may cause some existing small projects to shut down operations or potential new projects to not be able to afford moving forward. Sorenson understands that creative alternatives to cellular/hardwire connections are already being utilized for some projects in Oregon.

An Interconnection Customer's obligation to provide and/or pay for a telemetry system should be limited to those circumstances or conditions on a Public Utility's system when the lack of such telemetry system would have negative impacts upon safety, reliability or efficient operations. The proposed 3 MW threshold for Tier 4 interconnections is a significant improvement over PacifiCorp's past threshold of 1 MW. However, the 3 MW threshold is not necessarily the appropriate threshold to be applied to all Public Utilities and may not be the appropriate value for any of the Public Utilities. For example, Sorenson Engineering is aware of at least two hydroelectric projects of 4 MW or greater that have been connected to PacifiCorp's

distribution system for a least fifteen years where the required and installed telemetry has not been maintained and the potential data not utilized by PacifiCorp for a very long time. Each Public Utility should be required to provide the evidence supporting their telemetry needs and requirements. Telemetry data for existing projects connected to distribution systems is irregularly utilized and projects over 5 MW connected to distribution systems are very rare. Therefore, Sorenson recommends that the telemetry requirement for all distribution system interconnections be either eliminated or raised to 5 MW. Additionally and typically, the larger the project the easier to absorb telemetry expenses. The Commission should raise the telemetry threshold to 5 MW until such time that the Public Utilities demonstrate and provide evidence of their actual needs. Alternatively, the Commission should require the Public Utilities to provide evidence of their existing telemetry applications and demonstrate their usefulness. That is the only way to provide resolution of this controversial issue.

(A) SORENSON'S SPECIFIC RECOMMENDATIONS

Rule 860-082-0065: Metering and Monitoring, paragraph (1)

Revise paragraph (1) by adding the following language at the very end:

<u>The Interconnection Customer shall provide for remote or telephonic access of the Public Utility's metering either through cellular, hardwire or other technologically appropriate means except this requirement shall not apply to an Interconnection Customer who is operating or plans to operate a facility of 1,000 kW or less if such Interconnection Customer does not have cellular service available at the time of entering into the Interconnection Agreement.</u>

Rule 860-082-0065

Change the reference to 3 MW to 5 MW throughout this rule.

Respectfully submitted this 27th day of November 2007.

RICHARDSON & O'LEARY PLLC

By _____
Peter J. Richardson
Attorneys for Sorenson Engineering, Inc.

CERTIFICATE OF SERVICE

I certify that I have caused to be servedd the foregoing Sorenson Engineering Comments in OPUC Docket No. AR 521 by electronic mail and first class mail to those who have not waived paper service on the attached service list. Dated this 27th day of November 27, 2007.

Peter Richardson OSB # 066687

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Facsimile 503 546-6862
www.energytrust.org

EnergyTrust of Oregon, Inc.

November 8, 2007

Ted Durrenberger
Oregon Public Utility Commission
Via email

Re: Draft Proposed Small Generator Interconnection Rules

Dear Ted,

Energy Trust appreciates the opportunity to comment on staff's draft small generator interconnection rules. We congratulate the OPUC staff for your work with all the stakeholders to develop these interconnection rules.

Energy Trust has supported numerous small generators as part of its mission to support new clean energy sources for customers of Pacific Power and Portland General Electric. We have found that interconnection procedures and requirements can easily become the most significant impediment to funding and completing projects.

With the passage of SB 838, Energy Trust now has a requirement to focus even more on small generator projects. Open, clear, fast and cost effective interconnections procedures and requirements will be critical to meeting goals for our revised focus. We have to recognize that burdening small generation with processes and costs similar to large projects will not help us reach the community energy goals in SB 838.

We offer the following comments, including suggested improvements for specific sections in the draft rules, as noted below:

860-082-0005 (3)(b)(Scope and Applicability- unilateral timeline waiver)

We request that the Public Utility not be allowed a unilateral waiver from the timelines set forth in the OSGIR and instead propose that the utility provide adequate staff resources or subcontract out the work to a third party. The demand for small generator interconnections will only increase in the future as developers respond to the community energy goals of SB 838 and it is the responsibility of the utility to respond in a timely fashion to interconnection requests.

860-082-0060 (Recordkeeping and Reporting Requirements)

We support the recordkeeping and reporting requirements as a set of valuable tools to add transparency of the process but are suggesting changes to further increase their value.

Knowing whether issues are repetitive allows improvements to be made to the rules. Further, it allows participants to see what solutions worked so the small generators can come in with the right solutions first or at least know what the acceptable solutions cost.

An issue we face today is the process always taking the maximum amount of time for each step, no matter how simple or complex the circumstance. It is also common for a utility to present very expensive upgrade requirements that require additional time to negotiate to a more acceptable solution. Negotiation timelines are not in the rules and can add considerable time to the process. The additional data points will help define whether additional rules are needed or situations are truly unique and separable.

In addition to the data requirements in the draft rules, we recommend adding the follow requirements for Tier 2 through Tier 4 Interconnection Applications:

- Actual facilities costs
- Actual system upgrades and costs
- Estimated telemetry basic configuration
- Actual telemetry basic configuration
- Estimated telemetry cost
- Actual telemetry cost
- Number of days to deliver each agreement
- The number of days to complete each study
- The number of days to complete the facility installation and system upgrades.

Due to the potential confidential nature of this data we suggest that 1) the interconnection customer be asked to waive this data for reporting purposes or 2) if they refuse, report it to the commission on a confidential basis for commission staff review.

With the proposed rules is the need for transparency to ensure non-discriminatory interconnection of small generators. To this end, we recommend a periodic review of interconnection applications with modifications to the small generation interconnection rules as necessary. The rules are inherently flexible due to the technical complexity of interconnection. With this flexibility comes the opportunity of abuse that can be addressed through periodic reporting and reviews of interconnection applications

860-082-0080 (Dispute Resolution)

We agree with the small generator community that a streamed-line arbitrator-based dispute resolution process is better than the more formal OPUC complaint process. OPUC staff has stated that this provision is not necessary and should be removed from the rules. Respectfully, we disagree. We recognize the desire to not reinvent the wheel and staffs and utility familiarity

with today's procedure. However, longer, formal processes are time consuming and expensive. They put a disproportionate cost burden on small projects and can increase above-market costs. The process proposed by the small generator community appears to us faster, clear and cheaper. We appreciate that it remains in the draft rules allowing the topic to be aired in the rulemaking process.

860-082-055 (7) Approval

The proposed rules are silent about the time allowed for the construction of upgrades. The Applicant has no means to ensure the construction of the upgrades occurs in a reasonable timeframe as dictated by the scope of the construction. There needs to be an agreed period.

We suggestion additional language in this section to address this issue. The following points should be included:

1. The Public Utility and the Applicant will identify a mutually agreed timeline for the construction of the upgrades and the date that the system will be able to accommodate the project for witness testing, commissioning and operation.
2. If the Public Utility and the Applicant can not mutually agree to a timeline and cost, the applicant shall have the option to have the upgrades contracted to an independent contractor to obtain a more favorable timeline.

Form 4 (11-2 rev) Interconnection Facilities Study Form Agreement

Item 6 specifies a thirty calendar day study period when no upgrades are required. When upgrades are required, no timeline or guidance is offered. We request there be language to require the Public Utility to provide a timeline when upgrades are necessary. If timelines cannot be mutually agreed to, the Applicant then has the option to arrange for a third party to perform the facilities study as provide in section 860-082-055 (6)(b) of the proposed rules.

Small generators can't be held up if some other utility issue has diverted their internal staff. Certainly not when acceptable alternatives exist. Utilities often use consultants to speed or outsource work on interconnection. Small generators should also have this option to hurdle time constraints.

Again, we thank the OPUC staff for the all the work involved in these small generator interconnection rules. The issues can be difficult, complex and polarized. This proceeding is a very important step to helping small generators connect and provide clean power for Oregon.

Sincerely,

Alan Cowan
Renewable Energy Program Manager

Portland General Electric Company
Legal Department
121 SW Salmon Street • Portland, Oregon 97204
(503) 464-7611 • Facsimile (503) 464-2200

Richard George
Assistant General Counsel

November 27, 2007

Via Electronic Filing and U.S. Mail

Oregon Public Utility Commission
Attention: Filing Center
550 Capitol Street NE, #215
PO Box 2148
Salem OR 97308-2148

Re: AR 521

Attention Filing Center:

Enclosed for filing in the captioned dockets are an original and one copy of:

- **COMMENTS OF PORTLAND GENERAL ELECTRIC COMPANY.**

This document is being filed by electronic mail with the Filing Center.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

J. RICHARD GEORGE

JRG:smc
Enclosure

cc: Service List-AR 521

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused **COMMENTS OF PORTLAND GENERAL ELECTRIC COMPANY** to be served by electronic mail to those parties whose email addresses appear on the attached service list, and by First Class US Mail, postage prepaid and properly addressed, to those parties on the attached service list who have not waived paper service from OPUC Docket No AR 521.

Dated at Portland, Oregon, this 27th day of November, 2007.

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 521

In the Matter of a Rulemaking to Adopt Rules Related to Small Generation Interconnection	Comments of Portland General Electric Company

PGE appreciates the opportunity to provide formal comments on the proposed Oregon Small Generator Interconnection Rules ("Proposed Rules"). As we stated during the hearing on November 13th, we appreciate the collaborative efforts of all the parties involved including the Oregon Public Utility Commission Staff's ("Staff") significant work in organizing stakeholder participation and producing the draft rules.

Largely, the Proposed Rules incorporate changes proposed by PGE that address most of the informal comments and issues PGE has had in the course of their development. PGE has the following additional comments on the rules:

1) Dispute Resolution. PGE supports the proposal offered by the Oregon Department of Energy as Appendix I to its November 27, 2007 comments, which provides for an expedited dispute resolution process before the Commission. PGE does not support binding arbitration or other forms of dispute resolution that would prevent the Commission from being the decision maker concerning disputes. PGE anticipates that disputes, if any arise, may concern the nature and scope of upgrades to be constructed on the utility's system to accommodate the interconnection. In the event PGE is going to be required to compromise or deviate from what it believes is necessary for safety and reliability, it should only do so upon Commission order.

2) Insurance. PGE agrees with and supports comments offered by Pacificorp and others that small generators should be required to obtain reasonable amounts of insurance to cover risks to the system and individuals associated with electrical disturbances created by their generation equipment. PGE believes that the level of insurance necessary should be analyzed in this rulemaking solely from the perspective of the risks associated with interconnection of an operating generator, and not with respect to contractual risks associated with the delivery or sale of electricity. Some parties in comments have referenced that the recent Order No. 07-360 (in docket UM 1129) examined both transactional and electrical risks with respect to small QF facilities and set a precedent that facilities under 200Kw in size should not be required to carry insurance. While the order did reference interconnection risks, PGE notes that the UM 1129 docket specifically addressed developing terms and conditions regarding QF power purchases, not interconnections. *See, e.g.*, Jan. 20, 2004 Staff Report, adopted by the Commission and initiating the docket. The parties did not sufficiently develop the record concerning interconnection safety or risks, and therefore the UM 1129 policies towards insurance required for standard contracts for QFs should not be precedential here.

Likewise, in the AR 521 docket, no party provided dispositive evidence that it is cost prohibitive for a less than 200Kw facility to obtain general liability insurance covering the facility. Some parties did suggest that specialized policies specifically designed for generating facilities might be hard to acquire for small facilities; however, we are not suggesting such specialized policies be required, only that claims regarding facilities be covered, whatever the form of insurance.

Moreover, PGE believes that it is not in the best interests of small generators to be underinsured. In the event of an electrical disturbance, a small generator could be significantly damaged, taking the facility out of service. Without insurance to help small generator's recover or repair the facility, they may be at significant financial risk. Facilities that receive financing for their construction must be able to produce electricity and use proceeds from sales of that electricity to cover debt obligations.

Additionally, if a third party is seriously injured or possibly killed due to a generation facility, the ensuing litigation or claims that may be made against the facility owner place the owner at risk of financial catastrophe. PGE believes that a prudent generator should carry reasonable amounts of insurance covering claims related to the interconnection of its facility.

3) Third-Party Contracting for Construction or Interconnection Studies. While in principle, PGE supports the ideas raised by the Energy Trust of Oregon, Inc. ("ETO") in its November 8, 2007 comments concerning using third-party contractors for interconnection construction, we believe the Proposed Rules would need to include significant additional protections. Specifically, ETO suggested that if the utility and generator cannot agree on timelines to construct necessary facilities or conduct studies for larger Tier 4 facilities, the generator should be able to substitute third parties to carry out the work.

For PGE to allow third-party contractors to work on its system, there would need to be a review process by the utility to ensure that the contractor is qualified to perform

such work. Due to critical system stability and safety risks, any contractor working on our system would need to be screened to ensure they had the experience and knowledge to properly and safely do the work. Also, there would need to be a process for the utility to review any design work, and an inspection prior to energization of any facilities constructed. Similar safeguards would need to apply to any studies performed by third-parties regarding upgrades needed on the utility's system. PGE believes strongly that it would need to be compensated for any costs associated with this oversight.

Dated this 27th day of November, 2007

Respectfully Submitted,

/S/ J. Richard George
Assistant General Counsel
Portland General Electric Company

ISSUED: June 4, 2008

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 521

In the Matter of	)	
	)	MEMORANDUM AND NOTICE
Rulemaking to Adopt Rules Related to	)	OF WORKSHOP
Small Generator Interconnection.	)	

The Public Utility Commission of Oregon (Commission) opened this rulemaking docket on July 24, 2007, to consider the adoption of rules governing the interconnection of small generator facilities to the transmission or distribution systems of public utilities. The Commission held several workshops, received written comments, and held a public comment hearing on November 13, 2007. After the close of the comment period on November 27, 2007, the Commission substantially revised the proposed rules in response to the comments received from the rulemaking participants, as well as to further refine and clarify the rules. Because of these substantial revisions, the Commission re-filed the proposed rules with the Secretary of State on April 15, 2008, and established a new schedule for public comment, including a workshop on May 28, 2008, and a public comment hearing on June 11, 2008.

During the May 28 workshop, it became clear that further informal discussions would be beneficial. Therefore, the hearing scheduled for June 11 is postponed, and another workshop will be held as follows:

DATE: June 11, 2008

TIME: 9:00 a.m.

LOCATION: Public Utility Commission of Oregon
Main Hearing Room
550 Capitol Street NE – 1st Floor
Salem, OR 97301

To facilitate discussion at the workshop, I have revised the proposed rules to incorporate some of the comments received during the May 28 workshop. A copy of the revised proposed rules is attached.

Dated this 4th day of June, 2008, at Salem, Oregon.

Sarah K. Wallace
Administrative Law Judge

(c) The witness test, if conducted by the public utility, is successful; and

(d) The applicant and public utility execute a certificate of completion. The certificate of completion must follow the standard form certificate developed by the public utility and approved by the Commission.

(5) If a small generator facility is not approved under the Tier 3 interconnection review procedures, then the applicant may submit a new application under the Tier 4 review procedures. At the applicant's request, the public utility must provide a written explanation of the reasons for denial within 10 business days of the request.

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Stat. Auth.: ORS Ch. 183, 756 & 757
Stats. Implemented: ORS 756.040, 756.060
Hist.: NEW

860-082-0060
Tier 4 Interconnection Review

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(1) A public utility must use the Tier 4 interconnection review procedures for an application to interconnect a small generator facility that meets the following requirements:

(a) The small generator facility does not qualify for or failed to meet the Tier 1, Tier 2, or Tier 3 interconnection review requirements; and

(b) The small generator facility must have a nameplate capacity of 10 megawatts or less.

(2) A public utility must approve an application to interconnect a small generator facility under the Tier 4 interconnection review procedures if the public utility determines that the safety and reliability of the public utility's transmission or distribution system will not be compromised by interconnecting the small generator facility. The applicant must pay the costs of any interconnection facilities or system upgrades necessitated by the interconnection.

(3) In addition to the time lines and requirements in OAR 860-082-0025, the time lines and requirements in subsections (5) through (12) apply to Tier 4 interconnection reviews.

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(4) A public utility and an applicant may agree to waive the requirement for a scoping meeting, the feasibility study, the system impact study, or the facilities study.

(5) A public utility must schedule a scoping meeting within 10 business days after notifying an applicant that its application is complete.

(a) The public utility and the applicant must bring to the scoping meeting all personnel, including system engineers, as may be reasonably required to accomplish the purpose of the meeting.

(b) The public utility and applicant must discuss whether the public utility should perform a feasibility study or proceed directly to a system impact study, a facilities study, or an interconnection agreement.

(c) If the public utility determines that no studies are necessary, then the public utility must approve the application within 15 business days of the scoping meeting if:

(A) The application meets the criteria in subsection (2); and

(B) The interconnection of the small generator facility does not require system upgrades or interconnection facilities different from or in addition to the applicant's proposed interconnection equipment.

(d) If the public utility determines that no studies are necessary and that the small generator facility could be interconnected safely if minor modifications to the transmission or distribution system were made (for example, changing meters, fuses, or relay settings), then the public utility must offer the applicant a good-faith, non-binding estimate of the costs of such proposed minor modifications. If the applicant authorizes the public utility to proceed with the minor modifications and agrees to pay the entire cost of the modifications, then the public utility must approve the application within 15 business days of receipt of the applicant's agreement to pay for the minor modifications.

(6) If a public utility reasonably concludes that an adequate evaluation of an application requires a feasibility study, then the public utility must provide the applicant with an executable feasibility study agreement within five business days of the date of the scoping meeting.

(a) The feasibility study agreement must include a detailed scope for the feasibility study, a reasonable schedule for completion of the study, and a good-faith, non-binding estimate of the costs to perform the study.

(b) The feasibility study agreement must follow the standard form agreement developed by the public utility and approved by the Commission.

(c) The applicant must execute the feasibility study agreement within 15 business days of receipt of the agreement or the application is deemed withdrawn.

(d) The public utility must make reasonable, good-faith efforts to follow the schedule set forth in the feasibility study agreement for completion of the study.

(e) The feasibility study must identify any potential adverse system impacts on the public utility's transmission or distribution system or an affected system that may result from the interconnection of the small generator facility. In determining possible adverse system impacts, the public utility must consider the aggregated nameplate capacity of all generating facilities that, on the date the feasibility study is commenced, are directly interconnected to the public utility's transmission or distribution system, have a completed pending application to interconnect with a higher queue position, or have an executed interconnection agreement with the public utility.

(f) The public utility must evaluate multiple potential points of interconnection at the applicant's request. The applicant must pay the costs of this additional evaluation.

(g) The public utility must provide a copy of the feasibility study to the applicant within five business days of the study's completion.

(h) If the feasibility study identifies any potential adverse system impacts, then the public utility must perform a system impact study.

(i) If the feasibility study does not identify any adverse system impacts, then the public utility must perform a facilities study if the public utility reasonably concludes that a facilities study is necessary to adequately evaluate the application.

(A) If the public utility concludes that a facilities study is not required, then the public utility must approve the application with 15 business days of completion of the feasibility study if the application meets the criteria in section (2) and the interconnection of the small generator facility does not require system upgrades or

interconnection facilities different from or in addition to the applicant's proposed interconnection equipment.

(B) If the public utility concludes that a facilities study is not required and that the small generator facility could be interconnected safely if minor modifications to the transmission or distribution system were made (for example, changing meters, fuses, or relay settings), then the public utility must offer the applicant a good-faith, non-binding estimate of the costs of such proposed minor modifications. If the applicant authorizes the public utility to proceed with the minor modifications and agrees to pay the entire cost of the modifications, then the public utility must approve the application within 15 business days of receipt of the applicant's agreement to pay for the minor modifications.

(7) If a public utility is required to perform a system impact study under subsection (6)(h), or if an applicant and a public utility agree in the scoping meeting to waive the feasibility study and proceed directly to the system impact study, then the public utility must provide the applicant with an executable system impact study agreement within five business days of completing the feasibility study or within five business days from the date of the scoping meeting, whichever is applicable.

(a) The system impact study agreement must include a detailed scope for the system impact study, a reasonable schedule for completion of the study, and a good-faith, non-binding estimate of the costs to perform the study.

(b) The system impact study agreement must follow the standard form agreement developed by the public utility and approved by the Commission.

(c) The applicant must execute the system impact study agreement within 15 business days of receipt of the agreement or the application is deemed withdrawn.

(d) The public utility must make reasonable, good-faith efforts to follow the schedule set forth in the system impact study agreement for completion of the study.

(e) The system impact study must identify and detail the impacts on the public utility's transmission or distribution system or on an affected system that would result from the interconnection of the small generator facility if no modifications to the small generator facility or system upgrades were made. The system impact study must include evaluation of the adverse system impacts identified in the feasibility study and in the scoping meeting.

(f) In determining possible adverse system impacts, the public utility must consider the aggregated nameplate capacity of all generating facilities that, on the date the system impact study is commenced, are directly interconnected to the public utility's transmission or distribution system, have a completed pending application to interconnect with a higher queue position, or have an executed interconnection agreement with the public utility.

(g) The system impact study must include:

(A) A short circuit analysis;

(B) A stability analysis;

(C) A power flow analysis;

(D) Voltage drop and flicker studies;

(E) Protection and set point coordination studies;

(F) Grounding reviews;

(G) The underlying assumptions of the study;

(H) The results of the analyses; and

(I) Any potential impediments to providing the requested interconnection service.

(h) If an applicant provides an independent system impact study to the public utility, then the public utility must evaluate and address any alternative findings from that study.

(i) The public utility must provide a copy of the system impact study to the applicant within five business days of completing the study.

(j) If a public utility determines in a system impact study that interconnection facilities or system upgrades are necessary to safely interconnect a small generator facility, then the public utility must perform a facilities study.

(k) If the public utility determines that no interconnection facilities or system upgrades are required, and the public utility concludes that the application meets the criteria in section (2), then the public utility must approve the application with 15 business days of completion of the system impact study.

(l) If the public utility determines that no interconnection facilities or system upgrades are required and that the small generator facility could be interconnected safely if minor modifications to the transmission or distribution system were made (for example, changing meters, fuses, or relay settings), then the public utility must offer the applicant a good-faith, non-binding estimate of the costs of such proposed minor modifications. If the applicant authorizes the public utility to proceed with the minor modifications and agrees to pay the entire cost of the modifications, then the public utility must approve the application within 15 business days of the applicant's agreement to pay for the minor modifications.

(8) If a public utility is required to perform a facilities study under subsection (7)(j), or if an applicant and a public utility agree in the scoping meeting to waive the system impact study and proceed directly to the facilities study, then the public utility must provide the applicant with an executable facilities study agreement within five business days of completing the system impact study or within five business days from the date of the scoping meeting, whichever is applicable.

(a) The facilities study agreement must include a detailed scope for the facilities study, a reasonable schedule for completion of the study, and a good-faith, non-binding estimate of the costs to perform the study.

(b) The facilities study agreement must follow the standard form agreement developed by the public utility and approved by the Commission.

(c) The applicant must execute the interconnection facilities study agreement within 15 business days after receipt of the agreement or the application is deemed withdrawn.

(d) The public utility must make reasonable, good-faith efforts to follow the schedule set forth in the facilities study agreement for completion of the study.

(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. Design for any required interconnection facilities or system upgrades must be performed under the facilities study agreement. The public utility must also identify the electrical switching configuration of the equipment, including transformer, switchgear, meters, and other station equipment.

(f) The public utility may contract with a third-party consultant to complete the interconnection facilities and system upgrades identified in the facilities study. A public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight.

(g) The interconnection facilities study must include a detailed estimate of the time required to procure, construct, and install the required interconnection facilities and system upgrades.

(h) If the applicant agrees to pay for the interconnection facilities and system upgrades identified in the facilities study, then the public utility must approve the application within 15 business days of the applicant's agreement.

(9) The interconnection process is not complete until:

(a) The public utility approves the application;

(b) Any interconnection facilities or system upgrades have been completed;

(c) Any minor modifications to the public utility's transmission or distribution system required under subsections (5)(d), 6(i)(B), or (7)(l) have been completed;

(d) The witness test, if conducted by the public utility, is successful; and

(e) The applicant and public utility execute a certificate of completion.

(10) If a small generator facility is not approved under the Tier 4 interconnection review procedures, then the public utility must provide a written explanation of the denial to the applicant.

Stat. Auth.: ORS Ch. 183, 756 & 757
Stats. Implemented: ORS 756.040, 756.060
Hist.: NEW

860-082-0065
Recordkeeping and Reporting Requirements

(1) The public utility must maintain a record of the following information for at least two years:

(a) The number of completed small generator interconnection applications received;

(b) The time required to complete the review process for each application; and

(c) The reasons for the approval or denial of each application.

(2) For as long as an interconnection customer's small generator facility is interconnected to a public utility's transmission or distribution system, the interconnecting public utility must maintain copies of the interconnection application, interconnection agreement, and certificate of completion for the small generator facility. The public utility must provide a copy of the interconnection customer's records to the interconnection customer within 15 business days after receipt of a written request.

(3) The public utility must submit an annual report to the Commission summarizing the public utility's interconnection activities. The annual report must include the following information:

(a) The number of complete small generator interconnection applications received;

(b) The number of small generator facility interconnections completed;

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1610

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Staff Investigation Into Qualifying Facility Contracting and Pricing.	STAFF'S PROPOSED ISSUES LIST

Background and Procedural History

On July 10th, 2012, the Public Utility Commission held a prehearing conference in Docket UM 1610, and issued a Prehearing Conference Memorandum, setting forth the schedule for identification of the issues. The Hearings Division issued a revised schedule on August 24, 2012. Staff files this issues list in accordance with that revised schedule.

On August 10, 2012, parties to docket UM 1610 held an issues identification workshop. On August 27, 2012, parties including Staff, Idaho Power, PacifiCorp, PGE, ICNU, CREA, Renewable Energy Coalition and ODOE filed initial issues lists. RNP and OSEA filed letters in support of other parties' issues. Staff compiled the parties' issues into one master list and circulated that compilation to the parties on September 12, 2012.

On September 19, 2012 the parties held a second issues workshop. Some of the issues were consolidated or clarified, and a few were eliminated. On September 27th, 2012, Staff distributed to all parties a consolidated issues list based on the discussion at the September 19th workshop. Staff attempted to further consolidate the issues agreed to at the workshop to facilitate the Commission's review of the issues. By further consolidating the issues proposed by parties, Staff did not intend to eliminate any issue that was important to any party. Instead, Staff attempted to draft an issues list sufficiently broad to subsume the issues in the draft issues lists that were circulated by parties and discussed at the workshop on September 19, 2012.

Staff now files its list of consolidated issues in accordance with the schedule stated in the August 24th 2012 ruling. The ruling also directed parties to file, also on October 3rd, proposed issues that were not agreed to by all parties. Parties shall respond by October 10th regarding "disputed" issues. It is Staff's understanding that no party "objects" to the inclusion of any particular issue. Accordingly, Staff anticipates that to the extent a party makes a filing on October

3 or October 10, it would be to clarify that a particular issue that is not expressly set forth below is presented in this proceeding.

I. Standard Avoided Cost Price Calculation

A. What is the most appropriate methodology for calculating avoided cost prices?
   a. Should the Commission retain the current method based on the cost of the next avoidable resource identified in the company's current IRP, allow an "IRP" method based on computerized grid modeling, or allow some other method?
   b. Should the methodology be the same for all three electric utilities operating in Oregon?

B. Should QFs have the option to elect standard or renewable avoided cost prices that are levelized or partially levelized?

C. Should QFs seeking renewal of a standard contract during a utility's sufficiency period be given an option to receive an avoided cost price for energy delivered during the sufficiency period that is different than the market price?

D. Should the Commission eliminate unused pricing options?

These address concerns raised in existing dockets over the last two years, several of which are still open. Issue I.A is the question raised by Idaho Power in UM 1590, and was the issue that led the Commission to open UM 1610. Issues I.B and I.C both are related to concerns (raised primarily by REC) arising because some existing QFs are nearing the end of their current Power Purchase Agreement (PPA). These QFs seek to renew their PPA but may not remain viable if, under the renewed PPA, they receive the market price during the utility's current sufficiency period. (Docket No. UM 1457.) Staff recommends addressing issue I.D because to our knowledge some of the current avoided cost price options such as the "gas market" and "deadband" options have not been used and unnecessarily complicate the schedule.[1] This issue is not included in any other docket.

II. Renewable Avoided Cost Price Calculation

A. Should there be different avoided cost prices for different renewable generation sources? (E.g. different avoided cost prices for intermittent vs. base load renewables; different avoided cost prices for different technologies, such as solar, wind, geothermal, hydro, and biomass.)

B. How should environmental attributes be defined for purposes of PURPA transactions?[2]

[1] Parties at the September 19th workshop identified this issue as one that can likely be settled.
[2] Parties at the September 19th workshop identified this issue as one that can likely be settled.

C. Should the Commission revise OAR 860-022-0075, which specifies that the non-energy attributes of energy generated by the QF remain with the QF unless different treatment is specified by contract?

Issue II.A warrants Commission consideration because two Oregon utilities have testified in prior dockets that different renewable QFs impose different costs on the utility and therefore have different true avoided costs. Idaho Power illustrated this position in testimony supporting its petition for investigation of avoided cost methodology. (Docket No. UM 1593.) PacifiCorp proposed different avoided cost prices for intermittent and renewable QFs in its compliance filing with Order 11-505 (Docket No. UM 1396).

Issue II.B anticipates the implementation of carbon offset credits in addition to renewable energy credits. The Commission should consider this issue in UM 1610 because carbon offset credits would be another environmental attribute that has value to its owner. This issue is not addressed in any other docket.

Issue II.C was proposed by Idaho Power. Idaho Power states that the current rule will potentially expose its customers to significantly higher energy costs in the future. It is not currently addressed in any other docket. PacifiCorp's initial issues list also included the more general question of ownership of environmental attributes.

III. Schedule for Avoided Cost Price Updates

A. Should the Commission revise the current schedule of updates at least every two years and within 30 days of each IRP acknowledgement?
B. Should the Commission specify criteria to determine whether and when mid-cycle updates are appropriate?
C. Should the Commission specify what factors can be updated in mid-cycle? (E.g. factors including but not limited to gas price or status of production tax credit.)
D. To what extent (if any) can data from IRPs that are in late stages of review and whose acknowledgement is pending be factored into the calculation of avoided cost prices?
E. Are there circumstances under which the Renewable Portfolio Implementation Plan should be used in lieu of the acknowledged IRP for purposes of determining renewable resource sufficiency?

The Commission should address Issues III.A, III.B and III.C in this docket because the timing of avoided cost price updates was the subject of debate in PacifiCorp Biennial Avoided Cost Update in March 2012, and Idaho Power's Request for Investigation. (Docket No. UM 1593). Timing of avoided cost updates is also raised in the REC petition initiating Docket No. UM 1457.

Issue III.D was the major area of disagreement during the Commission's review of PacifiCorp's March 2012 two-year update. (Advice 12-005). It is one of the issues in UM 1457. Issue III.E is not addressed in any other docket and is a new issue raised by ODOE. It warrants consideration because there may be circumstances where the RPIP is more current than the IRP as an indicator of the utility's next avoidable renewable resource.

IV. Price Adjustments for Specific QF Characteristics

A. Should the costs associated with integration of intermittent resources (both avoided and incurred) be included in the calculation of avoided cost prices or otherwise be accounted for in the standard contract? If so, what is the appropriate methodology?
B. Should the costs or benefits associated with third party transmission be included in the calculation of avoided cost prices or otherwise accounted for in the standard contract?
C. How should the seven factors of 18 CFR 292.304(e)(2) be taken into account?[3]

Issues IV.A, B and C apply to both the standard avoided cost price stream and the renewable avoided cost price stream. Issue IV.A is significant because PacifiCorp and PGE both propose to include integration in the avoided cost price calculation in their UM 1396 compliance filings, and Idaho Power cited the impact of wind integration as the major driver in its request for investigation. (Docket No. UM 1593). Issue IV.B is the principal issue in Docket No. UM 1546.

The Commission considered issue IV.C in Docket No. UM 1129, but we suggest revisiting it because the FERC lists seven factors that avoided cost calculations should take into account, but there is still no agreement among the parties on how to do so. This issue is not currently addressed in any other docket.

V. Eligibility Issues[4]

A. Should the Commission change the 10 MW cap for the standard contract?
B. What should be the criteria to determine whether a QF is a "single QF" for purposes of eligibility for the standard contract?

[3] The seven factors are (i) ability of the utility to dispatch the QF; (ii) reliability of the QF; (iii) terms of the contract or legally enforceable obligation, termination notice requirement and sanctions for non-compliance; (iv) extent to which scheduled outages of the QF can be usefully coordinated with those of the utility's facilities; (v) usefulness of energy and capacity from the QF during system emergencies including its ability to separate its load from its generation; (vi) individual and aggregate value of energy and capacity from QFs on the utility system and (vii) smaller capacity increments and shorter lead times available with additions of capacity from QFs.

[4] Regarding the issue of ETO funding of QFs, ALJ Grant's letter to Margie Harris of September 13, 2012 includes the Commission's direction to staff to continue working with the ETO on incentive policies.

C. Should the resource technology affect the size of the cap for the standard contract cap or the criteria for determining whether a QF is a "single QF"?
D. Can a QF receive Oregon's Renewable avoided cost price if the QF owner will sell the RECs in another state?

The Commission investigated issue V.A extensively in Docket No. UM 1129. However, almost every party to UM 1610 recommended that we address it again, asserting that new facts and circumstances have arisen since the issuance of Order 05-584. Issue V.A is not currently addressed in any other docket, although Idaho Power did petition for a lower eligibility cap in January 2012 (Docket No. UM 1575). Issue V.B is the subject of Docket No. UM 1616. It is significant because utilities have repeatedly raised the concern over disaggregation, notably Idaho Power in the petitions that initiated Docket Nos. UM 1575 and UM 1593. Idaho Power stated in its recommended issues list that a lower cap could resolve the underlying concerns regarding the definition of a "single facility." Issue V. C was proposed by PacifiCorp and is likely to be raised in any discussion of the eligibility cap. It is not addressed in any current docket. Issue V.D was raised during the review of PGE and PacifiCorp compliance filings with Order 11-505. (Docket No. UM 1396).

VI. Contracting Issues

A. Should the standard contracting process, steps and timelines be revised? (Possible revisions include but are not limited to: when an existing QF can enter into a new PPA and the inclusion of conditions precedent to the PPA including conditions requiring a specific interconnection agreement status.)
B. When is there a legally enforceable obligation?
C. What is the maximum time allowed between contract execution and power delivery?
D. Should QFs <10 MW have access to the same dispute resolution process as those > 10 MW?
E. How should contracts address mechanical availability?
F. Should off-system QFs be entitled to deliver under any form of firm point to point transmission that the third party transmission provider offers? If not, what type of method of delivery is required or permissible? How does method of delivery affect pricing?
G. What terms should address security and liquidated damages?
H. May utilities curtail QF generation based on reliability and operational considerations, as described at 18 CFR §292.304(f)(1)? If so, when?
I. What is the appropriate contract term? What is the appropriate duration for the fixed price portion of the contract?

Issues VI.A through D are concerns raised by QF stakeholders in existing dockets, for example Docket No. UM 1457. ODOE, REC and CREA have

identified the PPA negotiation process as a concern equal to the avoided cost calculation method. Issues VI.E and F are the issues raised in Docket No. UM 1566. Issues VI. G, H and I are issues raised by the Oregon utilities. The question of appropriate contract term is significant particularly to ODOE's Small Scale Energy Loan program, because the term of the PPA is a factor in the term of the loan.

VII. Interconnection Process

A. Should there be changes to the interconnection rules, policies or practices to facilitate the timely execution of PPAs under PURPA and a more expeditious process for constructing a QF and bringing it on line?

B. Should the interconnection process allow, at QFs request or upon certain conditions, third-party contractors to perform certain functions in the interconnection review process that are currently performed by the utility?

Issues VII.A and B are significant because the PPA process and interconnection process are interrelated through conditions in the PPA process that refer to milestones in the interconnection process. A detailed discussion of the PPA process is likely to include a discussion of its interrelation with the interconnection agreement process. REC, CREA and ODOE all raise this interrelation as a concern. These issues are described in detail in the initiating petition for Docket No. UM 1457.

Dated at Salem, Oregon, this 3rd day of October, 2012.

Adam Bless

Adam Bless
Senior Utility Analyst
Electric Rates and Planning

CERTIFICATE OF SERVICE

UM 1610

I certify that I have, this day, served the foregoing document upon all parties of record in this proceeding by delivering a copy in person or by mailing a copy properly addressed with first class postage prepaid, or by electronic mail pursuant to OAR 860-001-0180, to the following parties or attorneys of parties.

Dated this 3rd day of October, 2012 at Salem, Oregon

Kay Barnes

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UM 1610
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October 10, 2012

Via Electronic and FedEx

Public Utility Commission
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Re: In the Matter of Public Utility Commission of Oregon Investigation Into Qualifying Facility Contracting and Pricing
Docket No. UM 1610

Dear Filing Center:

Enclosed please find the original and five (5) copies of the Comments on behalf of the Renewable Energy Coalition in the above-referenced docket.

Thank you for your assistance.

Sincerely,

/s/ Sarah A. Kohler
Sarah A. Kohler

Enclosures
cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Comments on behalf of the Renewable Energy Coalition upon the parties, on the service list, by causing the same to be deposited in the U.S. Mail, postage-prepaid, and via electronic mail.

Dated at Portland, Oregon, this 10th day of October, 2012.

Sincerely,

/s/ Sarah A. Kohler
Sarah A. Kohler

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1610

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Investigation Into Qualifying Facility Contracting and Pricing	)	RENEWABLE ENERGY COALITION RESPONSE TO DISPUTED ISSUES

I. INTRODUCTION

The Renewable Energy Coalition ("REC") submits this response to PacifiCorp's objection to the inclusion of issues related to the interconnection process in the Oregon Public Utility Commission's (the "Commission" or "OPUC") investigation into qualifying facility ("QF") contracting and pricing under the Public Utility Regulatory Policies Act ("PURPA"). The interconnection issues raised by REC, the Community Renewable Energy Association ("CREA") and the Oregon Department of Energy ("ODOE") are directly related to the QF contracting and pricing issues and have caused some of the disputes that have resulted in the Commission opening this investigation. Contrary to PacifiCorp's comments, consideration of discrete and limited issues regarding the interconnection process will not significantly expand the scope of the process or cause unnecessary delay, but will instead allow the Commission to establish policies and resolve some core issues in a holistic manner. Therefore, the two issues included on Staff's proposed list ("List") related to changes to the interconnection rules, practices and policies regarding more timely and expeditious power purchase agreements

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("PPA"), and whether third-party contractors should be allowed to perform additional work should be considered in this proceeding. Both the CREA and the Renewable Northwest Project support this response and the inclusion of interconnection issues in this proceeding.

II. BACKGROUND

On June 29, 2012, the Commission opened this investigation to address, in a generic fashion, a number of QF-related controversies regarding PURPA implementation and QF contracting. Over the past few years, the Commission and the courts have been presented with a number of complaints by QFs over contracting, pricing, and interconnection issues. There also have been disputes about the timing and frequency of avoided cost updates, proposals by utilities to suspend or modify their obligations to purchase QF power, and the need to investigate the utilities' new renewable avoided cost rates. In addition, this proceeding is also related to REC's November 2009 request for an investigation to address a number of utility practices that discourage QF development.

Staff conducted a number of workshops to consider the scope of issues in this proceeding and to develop a consensus list of issues. Staff and many of the parties worked hard to consolidate, reduce, and narrow lists as much as possible using an approach that no issues of key importance to any of the other parties would be excluded. There are many issues on Staff's List that, during the workshops, one or more parties opposed including. Parties, however, recognized that the general approach was to include issues that at least one party believed should be considered.

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REC, CREA, and ODOE all raised a number of issues related to the interconnection process but eventually dropped some of their issues, and the interconnection process issues were narrowed and consolidated into the following:

- Should there be changes to the interconnection rules, policies, or practices to facilitate the timely execution of PPAs under PURPA and a more expeditious process for constructing a QF and bringing it on line?

- Should the interconnection process allow, at the QF's request or upon certain conditions, third-party contractors to perform certain functions in the interconnection review process that are currently performed by the utility?

These issues were included on Staff's List. In addition, REC has requested that Administrative Law Judge ("ALJ") Grant add an issue regarding the timing of the interconnection process and the PPAs. Specifically, REC believes that the interconnection milestones should be removed from the PPA. PacifiCorp filed its proposed issues list and was the only party to formally object to the inclusion of this or any other issue in the proceeding.

III. RESPONSE

The contracting and pricing negotiation process for QFs is intricately tied to the interconnection process, and it is impossible to resolve many contractual disputes without considering the interconnection process. This proceeding should not be the forum for a broad revision or modification of the Commission's existing interconnection rules, but should consider making a limited number of important changes that will better ensure that the interconnection and PPA contracting processes work together and do not provide unnecessary hurdles or impediments. Further, these changes will help to prevent certain future disputes between QFs and utilities.

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The Commission adopted rules for large and small generator interconnections. E.g., Re Rulemaking to Adopt Rules Related to Small Generator Interconnection, Docket No. AR 521, Order No. 09-196 (June 8, 2009); OAR §§ 860-029-0060, 860-082-0005. REC largely supports these rules and the intent or spirit of Order No. 09-196 as providing much needed clarity and consistency in the interconnection process. After several years of implementation of the rules, there are some limited areas that require revision due to ambiguity. The Commission's interconnection rules, policies, and practices should be revised to streamline the process, provide more clarity, and facilitate more cost effective and timely interconnections.

In submitting its proposed issues list, Staff recognized the importance of addressing interconnection and contracting issues holistically. Staff explained that the two interconnection process issues should be included in this proceeding and "are significant because the PPA process and interconnection process are interrelated through conditions in the PPA process that refer to milestones in the interconnection process." Staff Issues List at 6. As Staff recognized, QFs often face milestones in their PPA or interconnection process that provides them with little opportunity to review, question, or mitigate the interconnection requirements and estimates. The process has been presented as a take-it-or-leave-it proposition. This in turn causes problems for the QF meeting its PPA obligations, as defaults are commonly tied to the completion of major interconnection steps or a date certain to commence deliveries. Similarly, both the amount of time to complete the interconnection and the estimated costs often change dramatically.

PacifiCorp opposes addressing interconnection issues in this proceeding on the grounds that this will require the Company to bring different utility representatives into this case,

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and interconnection issues are different. PacifiCorp Issues List at 2. From the perspective of QFs, the interconnection and PPA contract process are inextricably linked, and many of the problems arise because they are often seen as two separate processes that do not consider how they impact each other. A QF cannot enter into a PPA without a valid interconnection, but the time lines, delays, and cost overruns associated with the interconnection process can result in a QF failing to meet its PPA obligations due to no fault of its own. While REC recognizes that there are some aspects of utility's operations that are not allowed to be communicated during the contract negotiation process, this functional separation supports the inclusion of both interconnection and PPA issues in this generic proceeding. Now, and not during the contract negotiation process, is the best time and opportunity to ensure that the interconnection process does not impose unnecessary burdens on the PPA contract process, and vice versa.

Another interconnection issue inter-related to the PPA contract process is the use of third-party contractors. There is a wide variety of interconnection-related issues in Oregon that allow the utilities to use their leverage in the interconnection process to force concessions in the PPA contract negotiation process or otherwise harm the QFs. These include inaccurate cost and time estimates, additional requirements, amounts for progress payments, timing, and final accounting. In lieu of raising these issues, REC and other parties agreed to focus on a potential solution: allowing QFs the ability to use and contract with utility-approved third parties for portions of the interconnection work, from studies to construction. Typically, such approved contractors are used to perform interconnection work but under the direction of the utility. Having the QF contract directly with the approved third-party contractor can provide the QF with the essential control of the costs, the time for completion, and meeting its power purchase

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obligations. Direct contracting with third parties can also limit the utilities' exposure to excessive cost claims and failure to meet critical deadlines.

PacifiCorp is wrong to assert that consideration of these issues will significantly expand the scope of the proceeding or cause unnecessary delay. The utilities propose to change the Commission's decisions from UM 1129 by reducing the 10 megawatt size threshold, changing the contract length, and suspending the utilities' PURPA obligations. These changes are far more likely to expand the scope of the proceeding and delay resolution of a number of time sensitive issues in this proceeding. New QFs and many long-standing older QFs that need to update their interconnections cannot enter into PPAs without a fair and timely interconnection process, and the Commission should consider specific and limited revisions to its interconnection rules, practices, and policies to ensure that the interconnection and PPA processes work as seamlessly as possible.

IV. CONCLUSION

The Commission has already established PURPA related policies and rules that attempt to balance carefully the interest of QFs and ratepayers, and REC is not proposing that the Commission make radical or wholesale changes in either the PPA or interconnection process. The Commission, however, should make changes to the interconnection process that would allow for negotiating both purchase power and interconnection agreements in a way that does not increase costs or risk to ratepayers and minimizes the number of disputes. REC appreciates the Commission considering these important issues and urges the ALJ not to exclude any important issues that can be resolved in a narrow and straight-forward manner.

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Dated this 10th day of October, 2012.

Respectfully submitted,

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1610

In the Matter of the PUBLIC UTILITY COMMISSION OF OREGON Investigation into Qualifying Facility Purchasing and Contracting and Pricing.	BRIEF IN SUPPORT OF STIPULATION RE: ISSUES LIST

The Stipulation regarding the Phase II Issues List (hereinafter the "Stipulation re: Issues List) is the culmination of a lengthy process to winnow the contested issues regarding implementation of the Public Utility Regulatory Policy Act (PURPA) that will be submitted to the Commission in the next phase of UM 1610. In the Stipulation re: Issues List, the Stipulating Parties agree to the addition of five issues to the Phase II Issues List. The Stipulating Parties have submitted a stipulation (the "Stipulation") resolving one of the four Phase II issues included on the Phase II Issues List by Order No. 14-058. In addition, the Stipulating Parties have agreed to resolve or defer most of the nine issues that ALJ Grant originally included on the Phase II issues list. Accordingly, if the Commission approves the Stipulation re: Issues List, the Phase II Issues List will have eight issues.

The Stipulating Parties' agreement to ask the Commission to consider an additional five issues in Phase II is based in part on their agreement to table other issues and on their substantive agreement regarding several issues that is set forth in the Stipulation. The Stipulating Parties have opposing positions on each of the five issues in the Stipulation re: Issues List.

I. Background.

The Commission opened this investigation into qualifying facility (QF) pricing and contracting in June 2012 and subsequently divided the docket (No. UM 1610) into two phases.

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On October 25, 2012, Administrative Law Judge (ALJ) Grant issued a ruling finalizing an issues list. On December 21, 2012, ALJ Grant issued a ruling adopting a procedural schedule, and dividing the investigation into two phases. On January 30, 2013, ALJ Grant issued a ruling modifying the schedule. ALJ Grant's rulings deferred consideration of the following issues to Phase II:

1. Should standard contracting process, steps and timelines be revised?
2. What is the maximum time allowed between contract execution and power delivery?
3. Should QFs smaller than 10 MW have access to the same dispute resolution process as those greater than 10 MW?
4. Should off-system QFs be entitled to deliver under any form of firm point to point transmission that the third party transmission provider offers? If not, what type of method of delivery is required or permissible? How does method o f delivery affect pricing?
5. What terms should address security and liquidated damages?
6. May utilities curtail QF generation based on reliability and operational considerations, as described at 18 CPR §292.304(f)(l)? If so, when?
7. What is the appropriate process for updating standard form contracts, and should the utilities' recently filed standard contracts be amended by edits from the stakeholders or the Commission?
8. Should PPAs include conditions that reference the timing of the interconnection agreement and interconnection milestones? If so, what types of conditions should be included?
9. Should QFs have the ability to elect a larger role for third party contractors in the interconnection process? If so, how could that be accomplished?

On February 24, 2014, the Commission issued Order No. 14-058 resolving several issues in Phase I and deferring consideration of the following four issues to Phase II:

1. What is the most appropriate methodology for calculating non-standard avoided cost prices? Should the methodology be the same for all three electric utilities operating in Oregon?
2. When is there a legally enforceable obligation?

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3. How should third-party transmission costs to move QF output in a load pocket to load be calculated and accounted for in the standard contract?

4. How should utilities calculate penalties for a QF's failure to meet the Mechanical Availability Guarantee (MAG)?

At a prehearing conference on September 14, 2014, ALJ Pines and Kirkpatrick instructed parties that they intended to revisit the Phase II Issues List established by ALJ Grant and that to the extent a party or parties wished to have the Commission consider an issue in Phase II, the they must explain to the ALJs the significance of the issue and why it is important to have a Commission resolution.

II. Stipulations.

Staff, stakeholders, and the utilities participated in several meetings since Spring 2014 to discuss significant PURPA implementation issues that should be addressed in Phase II and also, to attempt to resolve them. On February 19, 2015, parties submitted two stipulations, one including resolution of several issues ("the Stipulation") and one including a list of five issues to add to the Phase II Issues List (Stipulation re: Issues List). The parties to the Stipulation re: Issues List are Staff of the Public Utility Commission of Oregon (Staff), the Community Renewable Energy Association (CREA), the Renewable Energy Coalition (REC), OneEnergy, Inc., Obsidian Renewables, LLC, Small Utility Business Advocates (SBUA), PacifiCorp, Portland General Electric Company (PGE), Idaho Power Company (Idaho Power), and the Oregon Department of Energy (ODOE) (together "the Stipulating Parties).

III. Agreed-to issues.

If approved, the stipulations would result in all nine of ALJ Grant's previously identified issues being removed from Phase II. The only initially identified issues that would remain in the Phase II issues list are the first three issues that were deferred to Phase II by Order No. 14-058. The Commission already determined to include these three issues in Phase II. The five additional issues agreed to by the Stipulating Parties are set forth below, with an explanation of why they should be considered in Phase II.

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Issue No. 1: Who owns the RECs for a renewable QF's generation during the last five years of a 20-year PURPA contract?

In Order No. 05-584, the Commission ordered that standard contracts can last a maximum of 20 years, but that the prices should be fixed for only the first 15 years of the contract.[1] During the last five years of a 20-year standard contract, a QF is eligible for market-based prices only, regardless of whether the purchasing utility is resource sufficient or deficient:

> [W]e adopt ODOE's recommendation that the maximum term of a contract be raised to 20 years. * * * Given our desire to calculate avoided costs as accurately as possible, and the testimony of several parties that avoided cost should not be fixed beyond 15 years, we are persuaded that the standard contract prices should be fixed for only the first 15 years of the 20-year term. [2]

In Order No. 11-505 regarding renewable avoided cost rates, the Commission held that QFs receiving renewable avoided cost prices for their generation must transmit the associated RECs to the utility when the utility is resource deficient and may keep the RECs when the utility is resource sufficient:

> During periods of renewable resource sufficiency, the rate will be based on market prices. During periods of renewable resource deficiency, the rate will be based on the renewable avoided cost of the next utility scale renewable resource acquisition in that utility's IRP. The renewable resource QF will keep all associated Renewable Energy Certificates (RECs) during periods of renewable resource sufficiency, but will transfer those RECs to the purchasing utility during periods of renewable resource deficiency[.] [3]

At least one of the Stipulating Parties asserts that the Commission's decision that ownership of RECs passes to the utilities when the utility is resource deficient applies in the last five years of a 20-year standard contract. Meaning if the utility is resource deficient during this five-year period in which market-based rates apply, ownership of the RECs should pass to the utility.

Other Stipulating Parties believe that under Order No. 11-505, the QFs obligation to transmit RECs to the purchasing utility depends on whether the QF is being compensated for them with deficiency-period avoided cost prices. These parties assert that a QF is only

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[1] Order No. 05-584 at 20.

[2] *Id.*

[3] Order No. 11-505 at 1.

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compensated for RECs when the avoided cost prices are based on the utility's next avoided renewable resource but is not compensated for them when the avoided cost prices are based on market. These parties assert that even if the utility is resource deficient in the last five years of a 20-year standard contract, the QF need not transmit its RECs to the utility because the market-based prices paid to the QF do not compensate the QF for the RECs.

Resolution of this issue is important to provide utilities and QFs certainty regarding the value of a 20-year contract. This issue has proved irresolvable by agreement. The Commission will inevitably be asked to resolve it in a future complaint proceeding if the issue is not addressed in Phase II.

Issue No 2. Should avoided transmission costs for renewable and non-renewable proxy resources be included in the calculation of avoided cost prices?

In Order No. 14-058, the Commission ruled that when the proxy resource is on system, there are no avoided third-party transmission costs:

> We affirm the existing policy that if the proxy resource used to calculate a utility's avoided costs is an off-system resource, the costs of the third-party transmission are avoided, and are therefore included in the calculation of avoided cost prices. This is the situation for PGE, and it was not contested in these proceedings.
>
> If the proxy resource used to calculate a utility's avoided costs is an on-system resource, there are no avoided transmission costs, and thus the costs of third-party transmission are not included in the calculation of avoided costs prices. This is the situation for Pacific Power.[4]

After the Commission issued Order No. 14-058, OneEnergy and CREA asked the Commission to clarify the language regarding avoided transmission costs for an on-system resource. The Commission denied the request, noting that OneEnergy and CREA "ask for more than clarification of Order No. 14-058 yet fail to demonstrate that reconsideration of the order is

[4] Order No. 14-058 at 17.

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warranted, as opposed to raising any additional or unanswered question(s) in Phase II of this docket."[5]

Some of the Stipulating Parties are unclear as to the meaning of the Commission's conclusion regarding avoided transmission costs for proxy resources located on PacifiCorp's system. More specifically, it is not clear whether the Commission concluded that (1) no party demonstrated that PacifiCorp would avoid transmission costs when the resource is on its system, and therefore inclusion of transmission costs in the calculation of avoided cost prices is not appropriate, or (2) even if PacifiCorp would avoid transmission costs associated with an on-system proxy resource by purchasing QF energy, it is not appropriate to include avoided transmission costs in the calculation of avoided cost prices when the proxy resource is an on-system resource.

Some of the Stipulating Parties believe that PacifiCorp would incur transmission costs if it built a resource on its system, and accordingly would avoid these costs with QF purchases. Under Order No. 14-058, such costs would not be included in avoided cost prices. Some Stipulating Parties would like clarification as to whether this outcome is what the Commission intended, or whether the Commission intended to rule that transmission costs would not be included in the calculation of avoided cost prices when they are not avoided for an avoidable proxy resource that is on-system, but would be included if the utility would avoid transmission costs. This issue has proved irresolvable by agreement. The Commission may be asked to resolve it in a future avoided cost rate change filing if the issue is not addressed in Phase II.

Issue No. 3 **Should the capacity contribution calculation for the standard non-renewable avoided cost prices be modified to mirror any change to the solar capacity contribution calculation used to calculate the standard renewable avoided cost prices?**

[5] Order No. 14-229 at (Order Denying Reconsideration).

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In Order No. 14-058, the Commission adopted Staff's proposal to adjust the capacity payment to QFs during the utilities' deficiency periods to account for the different capacity contributions of different QF resource types.[6] Subsequently, Staff and other parties to UM 1610 asked the Commission to allow additional process to determine whether the capacity contribution calculation for standard renewable avoided cost prices that was proposed by Staff and adopted by the Commission is flawed. The Commission granted this request.[7] Parties have submitted opening and reply testimony and briefs regarding the issue, some parties arguing the calculation is flawed and others arguing the calculation does what the Commission intended.

The Stipulating Parties ask the Commission to address in Phase II whether the calculation for the capacity contribution adjustment for standard *non-renewable* avoided cost prices that was adopted by the Commission in Order No. 14-058 should be modified. The methodology for calculating the capacity contribution adjustment for non-renewable resources is based on the same logic as that used for renewable resources in that order If the Commission finds that the method is flawed for calculating the capacity contribution credit for standard renewable avoided cost prices, the Commission may reach the same conclusion regarding the method for non-renewable resources. As with the calculation of the capacity contribution adjustment for renewable resources, some of the Stipulating Parties believe the calculation does what was intended by the Commission, and others believe it does not.

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[6] Order No. 14-058 at 15.

[7] UM 1610 June 10, 2014 Ruling granting clarification.

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Issue No. 4: What is the appropriate forum to resolve disputed inputs and assumptions?

The Commission has stated that "[a]voided cost filings are subject to suspension and the same investigatory process that any tariff filing may undergo."[8] Natural gas price forecasts "that the utility use in avoided cost filings are * * * also subject to investigation and full review." The Commission has "encourage[d] *** interested parties to seek suspension of an avoided cost filing when necessary to address concerns about natural gas forecasts, or any other aspect of a utility's filing.[9]

Some of the Stipulating Parties have raised issues related to the process used by the Commission to review avoided cost prices. For example, the Commission's policy is that utilities use inputs from their last acknowledged IRPs as the basis for avoided cost prices:

> Calculation of each electric utility's standard avoided costs begins with the utility filing an integrated resource plan (IRP) for a 20-year planning horizon, as required every two years. Within thirty days of the Commission's acknowledgement of an IRP, the utility makes an avoided cost filing based on its IRP, but updated as appropriate. [OAR 860-029-0080(3).] Consistent with IRP filings, utilities calculate avoided cost for a period of 20 to 25 years.[10]

Some Stipulating Parties would like the Commission to consider whether it could take certain actions to address the time lag or at least the potential for time lag between the data used to create the IRP inputs and the avoided cost prices. These actions range from minimum filing requirements (MFRs) for information that the utilities must provide when they make avoided cost filings to a suspension and investigation process that runs concurrently with the IRP process rather than after it is concluded.

Some Stipulating Parties would also like the Commission to clarify what burden of proof it imposes on utilities and intervenors in the investigation to establish avoided

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[8] Order No. 05-584 at 36.

[9] *Id.*, at 36-37.

[10] Order No. 05-584 at 21.

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cost prices. This issue has proved irresolvable by agreement. Resolution of this issue will provide the Commission and all interested parties with clear guidance regarding how avoided cost inputs and assumptions should be addressed, which should reduce future disputes as well as save all the Commission and the parties time and resources.

Issue No. 5: Do the market prices paid during the Resource Sufficiency period sufficiently compensate for capacity?

Some Stipulating Parties rely on FERC's 2014 opinion in *Hydrodynamics Inc., et al.,* to assert that market prices do not adequately compensate QFs during periods the Commission has deemed utilities to be resource "sufficient."[11] These parties note that in *Hydrodynamics*, FERC held that "when the demand for capacity is zero, the cost for capacity may also be zero."[12] These Stipulating Parties believe that under *Hydrodynamics*, Oregon's avoided cost prices during sufficiency periods violate PURPA. Some Stipulating Parties note that this is particularly true when a utility acquires large amounts of capacity with consecutive short-term purchases. These Stipulating Parties initially planned to present this issue in response to PacifiCorp's recent avoided cost compliance filing (Advice No. 14-007) that included a 10-year sufficiency period. But these parties agreed to include the issue in Phase 2 to allow PacifiCorp's rates to go into effect without further delay. *See* Order No. 14-295 at App. A at 2-3. Other Stipulating Parties disagree that a change in the Commission's policy regarding sufficiency period price is warranted by FERC's opinion in *Hydrodynamics*.

This issue is significant in part because of the potential outcome. The utilities have lengthy periods of resource sufficiency in the next 15 years. Under existing Commission orders, QFs are not eligible for avoided cost prices based on the costs of the utilities' next avoided resource during periods of resource sufficiency. If a change in the Commission's policy regarding prices for sufficiency period avoided cost prices is warranted by FERC's opinion in

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[11] 146 FERC 61193 (2014 WL 61193).

[12] *Id.*, at 10.

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Hydrodynamics, the financial impact could be large. This issue has proved irresolvable by agreement. The Commission will inevitably be asked to resolve it in a future avoided cost rate change proceeding if the issue is not addressed in Phase II. In addition, a number of the Stipulating Parties agreed not to raise this issue as it applied to PacifiCorp's recent avoided cost rate change in exchange for the consideration of this issue on a more generic basis in Phase II.

IV. Other agreement.

The Phase II Issues List established by ALJ Grant in 2012 included interconnection process issues (Issues 7A and 7B). The Stipulating Parties agreed that interconnection process issues should be addressed in this in a third phase, or in a separate docket following the completion of Phase II.

DATED this 26th day of February 2015.

Respectfully submitted,

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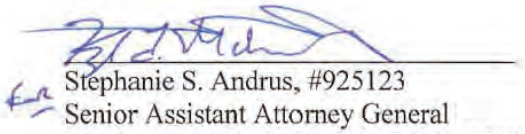

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CERTIFICATE OF SERVICE/SERVICE LIST

I hereby certify that on the 26th day of February 2015, I served the foregoing BRIEF IN SUPPORT OF STIPULATION RE: ISSUES LIST document upon all parties of record in this proceeding by electronic mail only as all parties have waived paper service.

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163 FERC ¶ 61,043
DEPARTMENT OF ENERGY
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 37

[Docket No. RM17-8-000; Order No. 845]

Reform of Generator Interconnection Procedures and Agreements

(Issued April 19, 2018)

AGENCY: Federal Energy Regulatory Commission

ACTION: Final rule.

SUMMARY: In this Final Rule, the Federal Energy Regulatory Commission (Commission) is amending the *pro forma* Large Generator Interconnection Procedures and the *pro forma* Large Generator Interconnection Agreement to improve certainty, promote more informed interconnection, and enhance interconnection processes. The reforms are intended to ensure that the generator interconnection process is just and reasonable and not unduly discriminatory or preferential.

EFFECTIVE DATE: This rule will become effective 75 **[Insert_Date days after publication in the FEDERAL REGISTER]**

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any facilities constructed by the interconnection customer that are transferred to the transmission provider comply with any applicable North American Electric Reliability Corporation (NERC) reliability standards.[159]

90. Other commenters disagree and argue that the expanded option to build would not affect system reliability.[160] NextEra, for example, states that there is little evidence that the NOPR proposal would compromise grid reliability, and any contrary arguments ignore the fact that this proposal only loosens the conditions for exercising this right with regard to the option to build.[161] AWEA asserts that expanding the option to build should not increase reliability concerns because it does not change existing approval requirements.[162]

ii. Commission Determination

91. Concerns that the option to build, as revised by the Final Rule, will compromise system reliability are misplaced because they ignore the safeguards for reliability already in place for the existing option to build. We note that a number of commenters expressed

[159] EEI 2017 Comments at 20.

[160] AWEA 2017 Comments at 14; Generation Developers 2017 Comments at 12; NextEra 2017 Comments at 10.

[161] *Id.*

[162] AWEA 2017 Comments at 14.

similar concerns in the Order No. 2003 proceeding.[163] There, in response to such concerns, the Commission established several safeguards.[164] These safeguards, embodied in article 5.2 of the *pro forma* LGIA, require, among other things, that the interconnection customer exercise good utility practice and adhere to the standards and specifications provided in advance by the transmission providers. Further, these safeguards give the transmission provider the right to approve the engineering design, equipment acceptance tests, and the construction itself. In Order No. 2003-A, the Commission stated that vague reliability concerns about the option to build are misplaced, and that articles 5.2.1, 5.2.3, 5.2.5, and 5.2.6 of the *pro forma* LGIA are sufficient to guarantee the reliability of the facilities in question.[165] In this Final Rule, we make no changes to the requirements in article 5.2. Furthermore, we note that because article 5.2 already gives the transmission provider a significant role with regard to the option to build and provides sufficient safeguards to ensure reliable operations, we see no reason why the expanded option to build should cause a new reliability concern.

92. In response to EEI's and CAISO's concerns about whether any facilities constructed pursuant to the option to build comply with applicable NERC reliability standards, we note that article 5.2 already addresses this concern. For example, article

[163] Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 341.

[164] *Id.* PP 356-357.

[165] Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 232.

5.2(2) states that the interconnection customer "shall comply with all requirements of law to which Transmission Provider would be subject."

d. Liability and Cost Responsibility Concerns

i. Comments

93. EEI, Xcel, and National Grid ask the Commission to ensure that interconnection customers indemnify the transmission owner or provider from any damages that result from facilities built pursuant to the option to build, including damages to adjacent facilities.[166] Six commenters maintain that interconnection customers should assume all additional costs that may result from this proposal without cash, transmission credit, or congestion revenue right reimbursement.[167] CAISO, NextEra, PG&E, and SoCal Edison also argue that the Commission should require that interconnection customers not receive such reimbursements to the extent that stand alone network upgrade costs exceed a specified cap.[168]

[166] EEI 2017 Comments at 23; Xcel 2017 Comments at 10; National Grid 2017 Comments at 8-11.

[167] CAISO 2017 Comments at 10; Bonneville 2017 Comments at 2-3; EEI 2017 Comments at 23-24; MISO TOs 2017 Comments at 16; Southern 2017 Comments at 12; SoCal Edison 2017 Comments at 5.

[168] CAISO 2017 Comments at 10; NextEra 2017 Comments at 11; PG&E 2017 Comments at 4; SoCal Edison 2017 Comments at 5.

ii. Commission Determination

94. In response to EEI's, Xcel's, and National Grid's comments, we note that article 5.2(7) of the *pro forma* LGIA requires the interconnection customer to "indemnify the Transmission Provider for claims arising from Interconnection Customer's construction of Transmission Provider's Interconnection Facilities and Stand Alone Upgrades." We consider this provision sufficiently broad to address EEI's, Xcel's, and National Grid's concerns.[169]

95. In response to arguments that interconnection customers should assume all additional costs that result from exercise of the option to build, we note that the Final Rule makes no changes with regard to cost assignment for transmission provider's interconnection facilities and stand alone network upgrades. Additionally, apart from the modifications to articles 5.1, 5.1.3, and 5.1.4 of the *pro forma* LGIA to allow interconnection customers to exercise the option to build regardless of whether the transmission provider can meet the interconnection customer's proposed dates, this Final Rule makes no changes to the option to build process. In response to CAISO, NextEra, PG&E, and SoCal Edison, we note that the issue of cost caps is currently unique to CAISO; therefore, issues regarding the interaction of the option to build and the CAISO network upgrade cost cap would be better addressed when CAISO submits its compliance filing to this Final Rule.

[169] We note that the *pro forma* LGIA states that the term transmission provider "should be read to include the Transmission Owner when the Transmission Owner is separate from the Transmission Provider." *Pro forma* LGIA Art.1 (Definitions).

agree as to what constitutes a stand alone network upgrade.[186] Generation Developers also request that transmission providers be required to provide written documentation and post on their website the reasons why they disagree that a facility is considered a stand alone network upgrade, in order to prevent undue discrimination.[187] Eversource asks the Commission to require the interconnection customer to obtain transmission owner approval before ordering electrical material and equipment.[188] Eversource and MISO recommend requiring that interconnection customers provide sufficient land rights for the transmission owners to access, operate, and maintain the transmission facilities and that the Commission terminate the interconnection customer's authority to construct during emergency situations.[189]

ii. Commission Determination

103. In response to AES's concern that the proposal increases transmission providers' risk regarding security compliance and project management, we again note that the Final Rule does not relax the established safeguards in article 5.2 of the *pro forma* LGIA. In response to concerns raised by APPA/LPPC, MISO TOs, and National Grid that transmission owners will have to expend significant resources to perform oversight functions, we note that the Final Rule does not alter the role that the transmission

[186] Generation Developers 2017 Comments at 9-10.

[187] *Id.* at 10.

[188] Eversource 2017 Comments at 9-11.

[189] *Id.* at 1; MISO TOs 2017 Comments at 15-16.

provider would play in overseeing the option to build process. However, it may result in more interconnection customers exercising the expanded option to build.

104. In response to AWEA's and APPA/LPPC's assertions about jurisdictional barriers, states laws, and eminent domain, we note that the specific purpose of this proposal is only to eliminate the *pro forma* LGIP's existing limitation on the option to build. It is not to ensure that there are no jurisdictional or other legal barriers to construction by interconnection customers. Although more interconnection customers are likely to exercise the option to build as a result of the Final Rule, there are still situations where an interconnection customer may not be able to do so due to jurisdictional or legal constraints. In those situations, we would not expect the interconnection customer to exercise its option to build if it could not do so effectively due to jurisdictional or legal constraints, such as limitations imposed by state law. Additionally, an interconnection customer might find that that there may be interconnection requests for which the option to build is unlikely to result in cost or time savings. Consequently, we believe that interconnection customers are in the best position to determine whether they will realize any cost or time savings from exercising the option to build for a particular interconnection request. Finally, the fact that this reform will not necessarily be useful to all interconnection requests does not mean that this reform will not afford an opportunity to some interconnection customers.

105. In response to CAISO's comment that later-queued projects may be adversely affected if a higher-queued customer withdraws from the queue or delays construction,

interconnection customers because they will ultimately bear the costs of the transmission provider's interconnection facilities and the stand alone network upgrades; thus, they have more incentive than transmission providers to select the most cost effective option.

108. We disagree with Duke and EEI regarding the need to revise article 9.7.1 of the *pro forma* LGIA to require parties to coordinate maintenance, testing, or installation actions for stand alone upgrades. Article 5.2 provides sufficient safeguards to ensure coordination of maintenance, testing, and installation by providing for transmission provider access and requiring the ultimate transfer of ownership. We also disagree with National Grid's and Eversource's proposals regarding the transfer of ownership because articles 5.2(8) and (9) already require the transfer of control and ownership to the transmission provider.

109. Furthermore, we disagree with Duke's proposal to revise article 11.5 of the *pro forma* LGIA to include stand alone upgrades. Duke provides no reason why such revision is necessary. Additionally, we read the phrase "applicable portion" in article 11.5 to exclude facilities that an interconnection customer would construct pursuant to the option to build. Since the purpose of article 11.5 is for the interconnection customer to provide funds to the transmission provider for construction costs, there would be no need for the interconnection customer to provide security to the transmission provider for facilities the transmission provider will not construct (because the interconnection customer is exercising the option to build).

110. We also see no need to revise article 26.1 of the *pro forma* LGIA, as Duke proposed, to limit the interconnection customer's ability to use subcontractors. Similarly, while we agree with Generation Developers, NextEra, and EEI that it could be helpful for transmission owners to maintain a list of contractors available to interconnection customers for the option to build, given the adequacy of the safeguards in article 5.2, we find that it is not necessary to require transmission owners to do so. We find the safeguards in article 5.2 to be sufficient because they give the transmission provider significant oversight authority to review and approve the design, equipment testing, and construction, "unrestricted access" to inspect the construction, and the ability to require the interconnection customer to remedy deficiencies that may arise at "any time during construction."[190] Similarly, we do not agree with Duke's and National Grid's suggestion that the transmission provider should have the right to approve subcontractors because of the multiple preexisting protections in article 5.2. Further, we are not persuaded by EEI's contention that revisions are necessary to supersede the option to build if facilities need to be expedited. First, article 5.2 already obligates the interconnection customer to "remedy deficiencies" should "any phase of the engineering, equipment procurement, or construction . . . not meet the standards and specifications provided by Transmission Provider."[191] Second, the option to build is limited to the construction of transmission provider's interconnection facilities and stand alone network upgrades, the latter of which

[190] *Pro forma* LGIA Articles 5.2 (3), (5), & (6)

[191] *Pro forma* LGIA Art. 5.2(6).

the *pro forma* LGIA defines as those network upgrades that the interconnection customer "may construct without affecting day-to-day operations of the Transmission System during their construction."[192] Together, these provisions minimize the likelihood that any delays in construction will adversely affect reliability.

111. In response to TVA and EEI, we find that article 5.2 already provides sufficient safeguards regarding transmission construction qualifications because it requires, for example, that interconnection customers use good utility practice and follow the standards and specifications outlined by the transmission provider. Additionally, while Generation Developers, EDP, and SEIA advocate that transmission providers post the standards and specifications for interconnection facilities and stand alone network upgrades on their websites, we will not require them to do so. Although posting such standards and specifications on a website could be useful, we do not think it appropriate to impose this requirement on transmission providers in this Final Rule given the questionable usefulness of this information.

112. In response to Generation Developers' request that transmission providers be required to provide an explanation when they disagree that a facility is a stand alone network upgrade, we find that it would be difficult for a transmission provider to determine whether or not a facility would be considered a stand alone network upgrade until it is presented with the results of a system impact study. While we recognize that

[192] *Pro forma* LGIA Art. 1 (Definitions).

outweighs the benefits.[983] PG&E states that, as explained in section 2.13 of the wholesale distribution access tariff, such interconnection facilities are considered distribution facilities for purposes of the wholesale distribution access tariff.[984]

b. Commission Determination

548. We decline to make the new requirements from this Final Rule applicable to the *pro forma* SGIP and the *pro forma* SGIA. Although the Commission sought comment on whether any of the proposed reforms should be applied to small generating facilities and implemented in the *pro forma* SGIP and *pro forma* SGIA, the Commission did not make any specific proposals as to the *pro forma* SGIP or *pro forma* SGIA. We also note that the majority of responsive commenters oppose such a change.[985]

549. In response to the parties that support adopting the Final Rule reforms for small generators, we find that, while some of these reforms have the potential to aid small generator interconnection, the differences between the large and small interconnection processes are significant enough to prevent us from acting in this proceeding.

[983] PG&E 2017 Comments at 2.

[984] *Id.* (citing *Pac. Gas & Elec. Co.*, 77 FERC ¶ 61,077 (1996); *see also* SoCal Edison 2017 Comments at 1-2.

[985] Duke 2017 Comments at 3-4; Modesto 2017 Comments at 22; SoCal Edison 2017 Comments at 2; Xcel 2017 Comments at 5; *see also* Imperial 2017 Comments 20-21.

2. Issues Not Raised in the NOPR

a. Comments

550. Multiple commenters have commented on issues not raised in the NOPR. For instance, Joint Renewable Partners argue that the Commission has allowed the states to continue to administer Qualifying Facility (QF) interconnections where the QF sells the entire net output to the interconnecting utility, which has resulted in less favorable interconnection practices for QFs.[986] Additionally, IECA urges the Commission to alter the QF minimum export threshold to be based on "total energy" exported to the grid and not on net system capacity because the current system discriminates against combined heat and power and waste heat recovery facilities in favor of other types of facilities.[987] Forecasting Coalition states that rates for interconnection service will decrease, and reliability will increase, if LGIPs require transmission providers to consider non-transmission alternatives, including dynamic line ratings.[988] First Solar states that there is also significant misalignment in CAISO's deliverability allocation procedures where upgrade cost caps deprive generators of the ability to deliver a plant's full output, which can prevent interconnection customers from competing in solicitations or force them to

[986] Joint Renewable Parties 2017 Comments at 13-15.

[987] IECA 2017 Comments at 3.

[988] Forecasting Coalition 2017 Comments at 1.

NOTE: Appendix C will not be published in the Federal Register. Square brackets indicate that the text should be filled in as appropriate by the transmission provider.

Appendix C: Compilation of Final Rule changes to the *pro forma* LGIA

The Commission modifies the following sections of the *pro forma* LGIA as indicated below:

Article 1. Definitions

Generating Facility shall mean Interconnection Customer's device for the production and/or storage for later injection of electricity identified in the Interconnection Request, but shall not include the interconnection customer's Interconnection Facilities.

Provisional Interconnection Service shall mean interconnection service provided by Transmission Provider associated with interconnecting the Interconnection Customer's Generating Facility to Transmission Provider's Transmission System and enabling that Transmission System to receive electric energy and capacity from the Generating Facility at the Point of Interconnection, pursuant to the terms of the Provisional Large Generator Interconnection Agreement and, if applicable, the Tariff.

Provisional Large Generator Interconnection Agreement shall mean the interconnection agreement for Provisional Interconnection Service established between Transmission Provider and/or the Transmission Owner and the Interconnection Customer. This agreement shall take the form of the Large Generator Interconnection Agreement, modified for provisional purposes.

Surplus Interconnection Service shall mean any unneeded portion of Interconnection Service established in a Large Generator Interconnection Agreement, such that if Surplus Interconnection Service is utilized the total amount of Interconnection Service at the Point of Interconnection would remain the same.

5.1 **Options**. Unless otherwise mutually agreed to between the Parties, Interconnection Customer shall select the In-Service Date, Initial Synchronization Date, and Commercial Operation Date; and either the Standard Option or Alternate Option set forth below ~~for completion of Transmission Provider's Interconnection Facilities and Network Upgrades, as set forth in Appendix A, Interconnection Facilities and Network Upgrades~~, and such dates and selected option shall be set forth in Appendix B, Milestones. At the same time,

Interconnection Customer shall indicate whether it elects to exercise the Option to Build set forth in article 5.1.3 below. If the dates designated by Interconnection Customer are not acceptable to Transmission Provider, Transmission Provider shall so notify Interconnection Customer within thirty (30) Calendar Days. Upon receipt of the notification that Interconnection Customer's designated dates are not acceptable to Transmission Provider, the Interconnection Customer shall notify Transmission Provider within thirty (30) Calendar Days whether it elects to exercise the Option to Build if it has not already elected to exercise the Option to Build.

5.1.3 **Option to Build.** ~~If the dates designated by Interconnection Customer are not acceptable to Transmission Provider, Transmission Provider shall so notify Interconnection Customer within thirty (30) Calendar Days and unless the Parties agree otherwise,~~ Interconnection Customer shall have the option to assume responsibility for the design, procurement and construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades on the dates specified in article 5.1.2. Transmission Provider and Interconnection Customer must agree as to what constitutes Stand Alone Network Upgrades and identify such Stand Alone Network Upgrades in Appendix A. Except for Stand Alone Network Upgrades, Interconnection Customer shall have no right to construct Network Upgrades under this option.

5.1.4 **Negotiated Option**. ~~If Interconnection Customer elects not to exercise its option under Article 5.1.3, Option to Build, Interconnection Customer shall so notify Transmission Provider within thirty (30) Calendar Days, and~~ If the dates designated by Interconnection Customer are not acceptable to Transmission Provider, the Parties shall in good faith attempt to negotiate terms and conditions (including revision of the specified dates and liquidated damages, the provision of incentives, or the procurement and construction of ~~a portion of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades by Interconnection Customer~~ all facilities other than Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades if the Interconnection Customer elects to exercise the Option to Build under article 5.1.3) ~~pursuant to which Transmission Provider is responsible for the design, procurement and construction of Transmission Provider's Interconnection Facilities and Network Upgrades~~. If the Parties are unable to reach agreement on such terms and conditions, then, pursuant to article 5.1.1 (Standard Option), Transmission Provider shall assume responsibility for the design, procurement and construction of ~~Transmission Provider's Interconnection Facilities and Network Upgrades~~ all facilities other than Transmission Provider's Interconnection

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PRO FORMA OPEN ACCESS

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ATTACHMENT M

SMALL GENERATOR INTERCONNECTION PROCEDURES (SGIP)

(For Generating Facilities No Larger Than 20 MW)

3.4.4 If a transmission system impact study is not required, but electric power Distribution System adverse system impacts are shown by the feasibility study to be possible and no distribution system impact study has been conducted, the Transmission Provider shall send the Interconnection Customer a distribution system impact study agreement.

3.4.5 If the feasibility study shows no potential for transmission system or Distribution System adverse system impacts, the Transmission Provider shall send the Interconnection Customer either a facilities study agreement (Attachment 8), including an outline of the scope of the study and a non-binding good faith estimate of the cost to perform the study, or an executable interconnection agreement, as applicable.

3.4.6 In order to remain under consideration for interconnection, the Interconnection Customer must return executed system impact study agreements, if applicable, within 30 Business Days.

3.4.7 A deposit of the good faith estimated costs for each system impact study may be required from the Interconnection Customer.

3.4.8 The scope of and cost responsibilities for a system impact study are described in the attached system impact study agreement.

3.4.9 Where transmission systems and Distribution Systems have separate owners, such as is the case with transmission-dependent utilities ("TDUs") – whether investor-owned or not – the Interconnection Customer may apply to the nearest Transmission Provider (Transmission Owner, Regional Transmission Operator, or Independent Transmission Provider) providing transmission service to the TDU to request project coordination. Affected Systems shall participate in the study and provide all information necessary to prepare the study.

3.5 Facilities Study

3.5.1 Once the required system impact study(s) is completed, a system impact study report shall be prepared and transmitted to the Interconnection Customer along with a facilities study agreement within five Business Days, including an outline of the scope of the study and a non-binding good faith estimate of the cost to perform the facilities study. In the case where one or both impact studies are determined to be unnecessary, a notice of the fact shall be transmitted to the Interconnection Customer within the same timeframe.

3.5.2 In order to remain under consideration for interconnection, or, as appropriate, in the Transmission Provider's interconnection queue, the Interconnection Customer

must return the executed facilities study agreement or a request for an extension of time within 30 Business Days.

3.5.3 The facilities study shall specify and estimate the cost of the equipment, engineering, procurement and construction work (including overheads) needed to implement the conclusions of the system impact study(s).

3.5.4 Design for any required Interconnection Facilities and/or Upgrades shall be performed under the facilities study agreement. The Transmission Provider may contract with consultants to perform activities required under the facilities study agreement. The Interconnection Customer and the Transmission Provider may agree to allow the Interconnection Customer to separately arrange for the design of some of the Interconnection Facilities. In such cases, facilities design will be reviewed and/or modified prior to acceptance by the Transmission Provider, under the provisions of the facilities study agreement. If the Parties agree to separately arrange for design and construction, and provided security and confidentiality requirements can be met, the Transmission Provider shall make sufficient information available to the Interconnection Customer in accordance with confidentiality and critical infrastructure requirements to permit the Interconnection Customer to obtain an independent design and cost estimate for any necessary facilities.

3.5.5 A deposit of the good faith estimated costs for the facilities study may be required from the Interconnection Customer.

3.5.6 The scope of and cost responsibilities for the facilities study are described in the attached facilities study agreement.

3.5.7 Upon completion of the facilities study, and with the agreement of the Interconnection Customer to pay for Interconnection Facilities and Upgrades identified in the facilities study, the Transmission Provider shall provide the Interconnection Customer an executable interconnection agreement within five Business Days.

Section 4. Provisions that Apply to All Interconnection Requests

4.1 Reasonable Efforts

The Transmission Provider shall make reasonable efforts to meet all time frames provided in these procedures unless the Transmission Provider and the Interconnection Customer agree to a different schedule. If the Transmission Provider cannot meet a deadline provided herein, it shall notify the Interconnection Customer, explain the reason

ATTACHMENT O

STANDARD LARGE GENERATOR INTERCONNECTION PROCEDURES (LGIP)

(Applicable to Generating Facilities that exceed 20 MW)

Appendix 6 to the Standard Large
Generator Interconnection Procedures

STANDARD LARGE GENERATOR

INTERCONNECTION AGREEMENT (LGIA)

Provider's Tariff and does not convey any right to deliver electricity to any specific customer or Point of Delivery.

4.5 Interconnection Customer Provided Services. The services provided by Interconnection Customer under this LGIA are set forth in Article 9.6 and Article 13.5.1.
Interconnection Customer shall be paid for such services in accordance with Article 11.6.

Article 5. Interconnection Facilities Engineering, Procurement, and Construction

5.1 Options. Unless otherwise mutually agreed to between the Parties, Interconnection Customer shall select the In-Service Date, Initial Synchronization Date, and Commercial Operation Date; and either Standard Option or Alternate Option set forth below for completion of Transmission Provider's Interconnection Facilities and Network Upgrades as set forth in Appendix A, Interconnection Facilities and Network Upgrades, and such dates and selected option shall be set forth in Appendix B, Milestones.

5.1.1 Standard Option. Transmission Provider shall design, procure, and construct Transmission Provider's Interconnection Facilities and Network Upgrades, using Reasonable Efforts to complete Transmission Provider's Interconnection Facilities and Network Upgrades by the dates set forth in Appendix B, Milestones. Transmission Provider shall not be required to undertake any action which is inconsistent with its standard safety practices, its material and equipment specifications, its design criteria and construction procedures, its labor agreements, and Applicable Laws and Regulations. In the event Transmission Provider reasonably expects that it will not be able to complete Transmission Provider's Interconnection Facilities and Network Upgrades by the specified dates, Transmission Provider shall promptly provide written notice to Interconnection Customer and shall undertake Reasonable Efforts to meet the earliest dates thereafter.

5.1.2 Alternate Option. If the dates designated by Interconnection Customer are acceptable to Transmission Provider, Transmission Provider shall so notify Interconnection Customer within thirty (30) Calendar Days, and shall assume responsibility for the design, procurement and construction of Transmission Provider's Interconnection Facilities by the designated dates.

If Transmission Provider subsequently fails to complete Transmission Provider's Interconnection Facilities by the In-Service Date, to the extent necessary to provide back feed power; or fails to complete Network Upgrades

by the Initial Synchronization Date to the extent necessary to allow for Trial Operation at full power output, unless other arrangements are made by the Parties for such Trial Operation; or fails to complete the Network Upgrades by the Commercial Operation Date, as such dates are reflected in Appendix B, Milestones; Transmission Provider shall pay Interconnection Customer liquidated damages in accordance with Article 5.3, Liquidated Damages, provided, however, the dates designated by Interconnection Customer shall be extended day for day for each day that the applicable RTO or ISO refuses to grant clearances to install equipment.

5.1.3 **Option to Build**. If the dates designated by Interconnection Customer are not acceptable to Transmission Provider, Transmission Provider shall so notify Interconnection Customer within thirty (30) Calendar Days, and unless the Parties agree otherwise, Interconnection Customer shall have the option to assume responsibility for the design, procurement and construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades on the dates specified in Article 5.1.2. Transmission Provider and Interconnection Customer must agree as to what constitutes Stand Alone Network Upgrades and identify such Stand Alone Network Upgrades in Appendix A. Except for Stand Alone Upgrades, Interconnection Customer shall have no right to construct Network Upgrades under this option.

5.1.4 **Negotiated Option**. If Interconnection Customer elects not to exercise its option under Article 5.1.3, Option to Build, Interconnection Customer shall so notify Transmission Provider within thirty (30) Calendar Days, and the Parties shall in good faith attempt to negotiate terms and conditions (including revision of the specified dates and liquidated damages, the provision of incentives or the procurement and construction of a portion of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades by Interconnection Customer) pursuant to which Transmission Provider is responsible for the design, procurement and construction of Transmission Provider's Interconnection Facilities and Network Upgrades. If the Parties are unable to reach agreement on such terms and conditions, Transmission Provider shall assume responsibility for the design, procurement and construction of Transmission Provider's Interconnection Facilities and Network Upgrades pursuant to 5.1.1, Standard Option.

5.2 **General Conditions Applicable to Option to Build** If Interconnection Customer assumes responsibility for the design, procurement and construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades,

(1) Interconnection Customer shall engineer, procure equipment, and construct Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades (or portions thereof) using Good Utility Practice and using standards and specifications provided in advance by Transmission Provider;

(2) Interconnection Customer's engineering, procurement and construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades shall comply with all requirements of law and Applicable Reliability Standards to which Transmission Provider would be subject in the engineering, procurement or construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades;

(3) Transmission Provider shall review and approve the engineering design, equipment acceptance tests, and the construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades;

(4) prior to commencement of construction, Interconnection Customer shall provide to Transmission Provider a schedule for construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades, and shall promptly respond to requests for information from Transmission Provider;

(5) at any time during construction, Transmission Provider shall have the right to gain unrestricted access to Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades and to conduct inspections of the same;

(6) at any time during construction, should any phase of the engineering, equipment procurement, or construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades not meet the standards and specifications provided by Transmission Provider, Interconnection Customer shall be obligated to remedy deficiencies in that portion of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades;

(7) Interconnection Customer shall indemnify Transmission Provider for claims arising from Interconnection Customer's construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades under the terms and procedures applicable to Article 18.1 Indemnity;

(8) Interconnection Customer shall transfer control of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades to Transmission Provider;

(9) Unless Parties otherwise agree, Interconnection Customer shall transfer ownership of Transmission Provider's Interconnection Facilities and Stand-Alone Network Upgrades to Transmission Provider;

(10) Transmission Provider shall approve and accept for operation and maintenance Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades to the extent engineered, procured, and constructed in accordance with this Article 5.2; and

(11) Interconnection Customer shall deliver to Transmission Provider "as-built" drawings, information, and any other documents that are reasonably required by Transmission Provider to assure that the Interconnection Facilities and Stand-Alone Network Upgrades are built to the standards and specifications required by Transmission Provider.

5.3 Liquidated Damages. The actual damages to Interconnection Customer, in the event Transmission Provider's Interconnection Facilities or Network Upgrades are not completed by the dates designated by Interconnection Customer and accepted by Transmission Provider pursuant to subparagraphs 5.1.2 or 5.1.4, above, may include Interconnection Customer's fixed operation and maintenance costs and lost opportunity costs. Such actual damages are uncertain and impossible to determine at this time. Because of such uncertainty, any liquidated damages paid by Transmission Provider to Interconnection Customer in the event that Transmission Provider does not complete any portion of Transmission Provider's Interconnection Facilities or Network Upgrades by the applicable dates, shall be an amount equal to ½ of 1 percent per day of the actual cost of Transmission Provider's Interconnection Facilities and Network Upgrades, in the aggregate, for which Transmission Provider has assumed responsibility to design, procure and construct.

However, in no event shall the total liquidated damages exceed 20 percent of the actual cost of Transmission Provider Interconnection Facilities and Network Upgrades for which Transmission Provider has assumed responsibility to design, procure, and construct. The foregoing payments will be made by Transmission Provider to Interconnection Customer as just compensation for the damages caused to Interconnection Customer, which actual damages are uncertain and impossible to determine at this time, and as reasonable liquidated damages, but not as a penalty or a method to secure performance of this LGIA. Liquidated damages, when the Parties agree to them, are the exclusive remedy for the Transmission Provider's failure to meet its schedule.

No liquidated damages shall be paid to Interconnection Customer if: (1) Interconnection Customer is not ready to commence use of Transmission Provider's Interconnection Facilities or Network Upgrades to take the delivery of power for the Large Generating Facility's Trial Operation or to export power from the Large Generating Facility on the

specified dates, unless Interconnection Customer would have been able to commence use of Transmission Provider's Interconnection Facilities or Network Upgrades to take the delivery of power for Large Generating Facility's Trial Operation or to export power from the Large Generating Facility, but for Transmission Provider's delay; (2) Transmission Provider's failure to meet the specified dates is the result of the action or inaction of Interconnection Customer or any other Interconnection Customer who has entered into an LGIA with Transmission Provider or any cause beyond Transmission Provider's reasonable control or reasonable ability to cure; (3) the Interconnection Customer has assumed responsibility for the design, procurement and construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades; or (4) the Parties have otherwise agreed.

5.4 **Power System Stabilizers**. The Interconnection Customer shall procure, install, maintain and operate Power System Stabilizers in accordance with the guidelines and procedures established by the Applicable Reliability Council. Transmission Provider reserves the right to reasonably establish minimum acceptable settings for any installed Power System Stabilizers, subject to the design and operating limitations of the Large Generating Facility. If the Large Generating Facility's Power System Stabilizers are removed from service or not capable of automatic operation, Interconnection Customer shall immediately notify Transmission Provider's system operator, or its designated representative. The requirements of this paragraph shall not apply to wind generators.

5.5 **Equipment Procurement**. If responsibility for construction of Transmission Provider's Interconnection Facilities or Network Upgrades is to be borne by Transmission Provider, then Transmission Provider shall commence design of Transmission Provider's Interconnection Facilities or Network Upgrades and procure necessary equipment as soon as practicable after all of the following conditions are satisfied, unless the Parties otherwise agree in writing:

5.5.1 Transmission Provider has completed the Facilities Study pursuant to the Facilities Study Agreement;

5.5.2 Transmission Provider has received written authorization to proceed with design and procurement from Interconnection Customer by the date specified in Appendix B, Milestones; and

5.5.3 Interconnection Customer has provided security to Transmission Provider in accordance with Article 11.5 by the dates specified in Appendix B, Milestones.

ORDER NO. 05-584

ENTERED 05/13/05

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1129

In the Matter of	)	
	)	
PUBLIC UTILITY COMMISSION OF OREGON	)	ORDER
	)	
Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities.	)	

that larger QFs have no more leverage in negotiating with utilities than small QFs, are often unable to sell electricity in the wholesale market or participate in utility RFPs, and experience unique problems in QF contract negotiations.

PacifiCorp dismisses what it calls the "black box" argument of the larger QFs, stating that the allegations that utilities exploit asymmetries in information and bargaining power when negotiating with QFs are unproven. PacifiCorp suggests that the proper manner to address concerns about an uneven playing field is to ensure greater transparency and efficiency in the negotiation process, not to expand eligibility for standard contract terms and conditions.

Idaho Power also comments that setting the capacity threshold as high as 100 MW would compromise utility resource planning. Idaho Power adds that a competitive bidding process for resources would be undermined if standard rates were available to 100 MW QFs. Moreover, the limit would be problematic if applied to Idaho Power, as the company's total load in Oregon is 108 average megawatts (aMW).

In lieu of raising the eligibility threshold to 100 MW, Weyerhaeuser recommends that the Commission provide detailed guidance about the proper scope and nature of rates, terms and conditions for non-standard contracts. Weyerhaeuser asserts that more detailed guidance would provide larger QFs with a stronger negotiation position, as well as a baseline against which to compare offered terms and conditions. Weyerhaeuser represents that evidence presented in the case, although initially introduced as support for parties' positions on appropriate standard contract terms, provides a record for the Commission to adopt more detailed guidelines for non-standard contract negotiations. Weyerhaeuser observes that Staff agrees that Commission approval of certain policies, including contract duration, calculation of avoided costs and the pricing based on gas indexing, for standard contracts should apply to non-standard contracts. Weyerhaeuser urges the Commission to use the record in this proceed to adopt a broader array of guidelines for non-standard contracts. In briefing, Weyerhaeuser sets forth proposed guidelines that it argues are supported by the record.

In briefing, ICNU also recommends that the Commission provide more specific requirements regarding negotiation of non-standard contract terms and conditions. In particular, ICNU calls for additional guidance about how Oregon's avoided cost calculation should be modified for non-standard contracts to address factors identified by FERC, such as dispatch, reliability, scheduling outages and line losses.[27] Without such guidance, ICNU argues that the standard contract eligibility threshold could practically function as a cap on the size of QF projects developed. ICNU acknowledges that the record was insufficient, however, to determine a full panoply of guidelines and urges the Commission to take up the issues in subsequent proceedings.

3. Resolution

[27] *See* 18 C.F.R. § 292.304(e).

We continue to adhere to the policy, as articulated in Order No. 91-1605, that standard contract rates, terms and conditions are intended to be used as a means to remove transaction costs associated with QF contract negotiation, when such costs act as a market barrier to QF development.[28] Standard contracts are designed to eliminate negotiations and to thereby remove transaction costs. In implementing PURPA, FERC recognized that some QF projects would be too small and have projected revenues too minimal to justify investing the upfront costs necessary to engage an attorney on an hourly basis to negotiate a QF power purchase contract. Classifying these costs as "transaction costs," FERC determined that it was appropriate to eliminate transaction costs for a defined class of very small QFs.[29] Consequently, FERC mandated that QF projects sized at 100 kW or smaller would be eligible for standard contracts.[30] FERC discerned, however, that experience might demonstrate that this threshold was insufficient and delegated authority to state commissions to increase it.[31] As individual states have gained greater familiarity with QF projects, many states have increased the minimal threshold. This Commission has done so in the past and is asked to do so again in this proceeding.

The evidence in this proceeding shows that market barriers other than transaction costs pose obstacles to a QF's negotiation of a power purchase contract. In addition to transaction costs, which in economics and related disciplines are traditionally considered to encompass only those costs that are incurred to make an economic exchange, parties identified other market barriers such as asymmetric information and an unlevel playing field that obstruct the negotiation of non-standard QF contracts. Just like transaction costs, these market barriers can render certain QF projects uneconomic to get off the ground if an individual contract must be negotiated. We conclude that it is appropriate and in keeping with the general PURPA policies of this Commission and FERC to increase the eligibility threshold for standard contracts in order to overcome economic impediments created by these market barriers.

At the same time, however, we recognize a need to balance our interest in reducing these market barriers with our goal of ensuring that a utility pays a QF no more than its avoided costs for the purchase of energy. With standard contracts, project characteristics that cause the utility's cost savings to differ from its actual avoided costs are ignored. No party presented evidence in this docket that the special characteristics of larger projects do not need to be considered in order to achieve rates that reflect actual avoided costs. Furthermore, the risk customers face because avoided costs in the future may be different from the prices paid under a standard contract (through the Fixed-Price Method, for example) is greater for a large QF than a small one.

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[28] Order No. 91-1605, at page 2 states: ". . . [T]he transaction costs associated with negotiating a QF/utility power purchase agreement could be prohibitive for small QFs and effectively eliminate them from the marketplace. The standard rate is intended to address this concern by minimizing the transaction costs of negotiating a power purchase agreement."

[29] *See supra* note 42.

[30] 18 C.F.R. § 292.304(c).

[31] 18 C.F.R. §292.304(c)(2).

We deem the recommendation of Staff and ODOE to raise the standard contract eligibility threshold to 10 MW to be reasonable.[32] We rely, in particular, on the facts that Staff's proposed threshold of 10 MW took into account the extent to which market barriers prevented successful negotiation of a contract and that ODOE, which has significant experience with the development of QF projects, indicated that 10 MW represented a point at which the costs of negotiation become a reasonable fraction of total investment costs.

We are persuaded that QFs greater in size than 10 MW face market barriers, such as asymmetric information and an unlevel playing field, that impede negotiation of a viable QF power purchase contract with electric utilities. We agree with PacifiCorp and PGE, however, and conclude that such market barriers will be best overcome for those QFs by improved negotiation parameters and guidelines and greater transparency in the negotiation process.

Although some of the evidence presented in this case could potentially support adoption of specific QF contract negotiation parameters and guidelines, as requested by Weyerhaeuser, the parties did not address the evidence from this standpoint. Even the evidence presented by Weyerhaeuser was initially introduced for the purpose of supporting appropriate standard contract terms and conditions that would be available to QFs as large as 100 MW. We conclude that the evidence in this proceeding did not receive the analysis and examination that would be needed to support the adoption of negotiation guidelines for non-standard contracts. Consequently, we direct parties to take up the issue of negotiation guidelines and parameters for non-standard contracts in the second phase of this proceeding. Although Staff identified certain issues, such as contract duration, that could potentially be resolved with regard to both standard and non-standard contracts, we conclude that it is preferable to address the full scope of non-standard rates, terms and conditions on a collective basis. Consequently, we decline to adopt rates, terms and conditions, or associated parameters or guidelines, for non-standard contracts, except to the extent that we do so explicitly.

B. STANDARD CONTRACT LENGTH

1. Parties' Positions

All parties proposed a significant increase in the term of standard contracts. Proposals to increase the maximum standard term from five years ranged up to thirty years and beyond for some QF technologies. Most parties advocate increasing the maximum standard term from five to either fifteen or twenty years. Parties preferring a fifteen year term for standard contracts raise concerns that standard rates will not track avoided costs over too long of a term. They caution that the risks are great, pointing to past history when high QF rates were locked in for terms up to thirty-five years. Parties that favor an increase to twenty years, however, express concern that financing for many QF projects requires the longer term.

[32] Having raised the eligibility threshold to 10 MW, we decline to distinguish between wind and non-wind QF resources by instituting a higher eligibility threshold for wind resources.

available upon request or electronically at a utility's website. Staff counters that the Commission's rules favor making all relevant information available through tariffs.[79]

2. Resolution

The goal of tariffs is to provide sufficient information about the terms, rates and conditions of utility service to an inquiring third party. We have already determined that information provided in tariffs will be supplemented with filed standard contract forms that contain full information about the terms, rates and conditions governing the sale and transfer of electrical energy between a utility and a QF project with a design capacity at or under 10 MW. We conclude, therefore, that the pertinent tariffs should provide information that will not be provided in the standard contract forms. Our objective is to ensure that the combination of tariffs and standard contract forms will provide a potential QF developer with readily accessible information that facilitates a decision by the QF developer about whether to contact a utility for further information.

We expect tariffs to contain information including the following: (1) full details about the process to enter into a standard contract or a negotiated contract, including instructions to contact a utility for further information; (2) specification of avoided costs including how they are calculated; (3) details about how non-standard contracts are negotiated, including a statement that the starting point for negotiation of price is standard avoided costs and that standard avoided costs may be modified to address specific factors mandated by federal and state law; (4) delineation of these factors; and (5) general information about pricing options.

ORDER

IT IS ORDERED that:

1. Within sixty days of the effective date of this order, each electric utility shall file by application, and serve upon all parties to this proceeding, one or more standard contract forms that set forth standard rates, terms and conditions that are consistent with the policy decisions made in this order.

2. The standard contract form shall become effective 30 days after the date of filing, unless otherwise suspended by the Commission. Prior to effectiveness, the standard contract forms shall be considered initial offers.

3. A QF or electric utility which signs an initial offer may not modify such offer until the term of the resulting contract expires. Any later modifications to a standard contract form will be prospective only and will not alter the terms of the initial offer.

[79] *See, e.g.*, OAR 860-022-0010.

4. Each electric utility shall also file, with its standard contract forms, revised tariffs that implement the resolutions made in this order.

5. Tariffs shall become effective 30 days after the date of filing, unless otherwise suspended by the Commission.

6. A subsequent phase of this proceeding will be opened to address issues previously identified by the parties, as well as those identified in this order.

7. Rate recovery of hedging costs to mitigate indexed QF rates may be addressed in appropriate future dockets, such as a utility's general rate case.

8. A rulemaking will be opened at a later date to revise, on a permanent basis, the Commission's PURPA regulations at Division 29 of the Oregon Administrative Rules.

Made, entered, and effective MAY 13 2005.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1967

SANDY RIVER SOLAR, LLC, Complainant, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	**COMPLAINANT'S RESPONSE TO PGE'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

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I. INTRODUCTION

Pursuant to OAR 860-001-0420(4), Sandy River Solar, LLC ("Sandy River") hereby files this Response to Portland General Electric Company's ("PGE's" or the "Company's") Motion for Partial Summary Judgment, filed in this case on February 27, 2019. Sandy River requests that the Commission deny PGE's motion. PGE is not entitled to summary judgment on the question it presents in its motion for partial summary judgment. PGE's motion for summary judgment is flawed in several respects because it addresses a hypothetical legal issue that does not resolve Sandy River's actual claims. It also rests on disputed facts, asserted within the motion itself. PGE's motion also fails because it is based on an incorrect legal analysis, and it does not meet the criteria for summary disposition because the relevant facts, when viewed in the light most favorable to Sandy River, show that Sandy River is entitled to the relief it requests.

Finally, Sandy River requests that the Commission issue an order on PGE's motion promptly because, as the schedule has been stayed, Sandy River will likely suffer irreparable harm because there may be insufficient time to require PGE to work with Sandy River to hire a third party consultant prior to Sandy River's commercial operation date. The extent of that harm, however, may be minimized by timely resolution of PGE's motion.

II. BACKGROUND

This case involves a complaint filed by Sandy River against PGE on August 24, 2018. Sandy River's complaint and testimony allege that PGE acted unreasonably and unlawfully during the interconnection process required for Sandy River to deliver power to PGE under its power purchase agreement ("PPA") as a qualifying facility under the

Public Utility Regulatory Policies Act ("PURPA"). Sandy River alleged and testified that PGE's actions are unreasonable and unlawful because PGE failed to provide reliable, timely, or accurate interconnection studies to Sandy River, and failed to meet its general obligations to Sandy River as an interconnection customer. Sandy River has been unable to rely on information provided by PGE to make informed business decisions, and has encountered unresponsiveness and other numerous challenges in its efforts to move forward with its interconnection.[1]

Sandy River's complaint and testimony and intervenor Renewable Energy Coalition's ("REC's") testimony explain that PGE's failures to appropriately administer its interconnection process are not limited to Sandy River's project, and both Sandy River and REC assert that Sandy River's problems with PGE in the interconnection process are part of a larger problem with PGE's interconnection department and the approach the Company has taken to interconnections in general. These issues include unreliable time estimates, cost estimates and statements regarding what interconnection facilities are required, frequently missed interconnection deadlines (both those required by the Oregon Administrative Rules and PGE's own estimates regarding how long it will take to complete its tasks), and significant variances in PGE's cost estimates between studies. PGE's studies have also contained mistakes and required unnecessary actions by interconnection customers, and PGE has charged interconnection customers for work it did not perform. Sandy River also alleged that PGE unlawfully discriminated against its project through its actions during the interconnection process.

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[1] *See generally,* First Amended Complaint (Sep. 27, 2018).

Prior to filing its complaint, and in an effort to remedy PGE's failures in the interconnection process, Sandy River requested that PGE allow it to hire a third-party, subject to PGE's oversight and approval, to assist with the construction of its interconnection facilities. The hiring of a third-party to assist with interconnection is allowed by OAR 860-082-0060(8)(f) of the Commission's rules, which provides that "[a] public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight and approval." This rule, as confirmed by the Commission's order adopting it and the rulemaking record, was developed to give interconnection customers an opportunity to use the assistance of a third-party as a remedy to challenges that they may face from the utility's administration of the interconnection process. The rule provides that the use of a third-party is to be subject to the utility's oversight and is to be governed by an agreement between the utility and the interconnection customer.

Sandy River desires to use a third-party to bring itself a greater ability to ascertain the requirements for interconnecting its facility, to expedite the process, to potentially bring down the costs, and to overcome the challenges it has faced in the process with PGE. PGE, however, flatly denied Sandy River's request. Sandy River asserted in its complaint that PGE's actions in denying its use of a third-party are also unreasonable and should be remedied by the Commission.

A procedural schedule was established for this case that included a July 31, 2019 date for a requested Commission order, which would be almost one year from the date

the Complaint was filed in August 2018.[2] On February 27, 2019, six months after the Complaint was filed and less than a month before PGE's testimony is due, PGE filed a motion for partial summary judgment, as well as a motion to stay discovery and the procedural schedule in this case.

In its motion for partial summary judgment, PGE seeks a Commission determination that the Commission's administrative rules do not authorize Sandy River a unilateral right to demand that a third-party can assist with the construction of its interconnection. PGE argues that it can refuse to allow a third-party's involvement under any circumstance, and that its refusal to allow an interconnection customer to use a third-party cannot be judged by the Commission to determine whether it was reasonable. PGE urges the Commission to grant its motion for summary judgment because, in PGE's view, it will resolve the "core legal issue" presented by Sandy River in the case.[3]

PGE's motion for partial summary judgment should be denied for several reasons. First, PGEs motion is defective in multiple respects. Because Sandy River has not argued the rules give it a "unilateral right" to demand use of a third-party, PGE's motion for summary judgment addresses a legal issue that has not been put forth in the case, and thus it will not dispose of any issue in the case, even if it were granted. PGE's motion is also defective because it fails to address the legal basis for what appears to be a PGE request for a sweeping Commission determination that PGE has no duty to exercise its discretion under the Commission's rules in a reasonable manner. To the extent PGE argues for such a conclusion from the Commission, its motion is devoid of support for

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2 Prehearing Conference Memorandum (November 11, 2018).

3 PGE Motion for Partial Summary Judgment at 1 (Feb. 27, 2019).

why its actions on this topic are not subject to its normal duties to act with reasonableness toward its customers, or its duties to approach its interconnection customers in good faith. Finally, PGE's motion for partial summary judgment is defective because it asserts, and relies on, certain factual matters that are disputed in the record. Rather than engage on those facts through a motions practice, the parties should be allowed to test and contest these facts through the Commission's normal contested case process.

PGE's legal argument, that the Commission's rules allow it to deny Sandy River the use of a third-party's assistance in its interconnection without regard to a reasonableness standard, also fails because its interpretation of the rule is founded on an incorrect legal analysis. Rather than representing a total delegation of authority to PGE, the Commission's rule represents an option to assist interconnection customers, and PGE must act with reason and good faith in dealing with requests to utilize third-parties pursuant to the rule.

Summary judgment on the issue presented by PGE is also inappropriate because there are relevant facts that must be explored to resolve the case, including Sandy River's second claim for relief, which PGE seeks to dismiss through its motion. PGE has also indicated (in filings outside of its motion) that it intends to have *all* of Sandy River's claims resolved by the motion, in contradiction to the language of the motion itself. In so asserting, PGE necessarily seems to argue for a Commission determination, through summary disposition, that its actions with respect to Sandy River's interconnection process have all been reasonable and lawful. Rather than being susceptible to a motion for summary judgment, these issues require PGE to contend with the evidence that has been offered in this case, which shows that PGE's administration of its interconnection

process has been unreasonable, has harmed Sandy River, and that PGE may be using its interconnection process to thwart development of qualifying facilities in contravention of federal and state law.

The Commission should also reject an argument, put forth by PGE in its motion for partial summary judgment, that Sandy River's claims should be subjected to a generic docket because Sandy River is not seeking to modify the Commission's rules as PGE contends.

Finally, Sandy River should be granted an opportunity for a sur-reply, to respond to PGE's reply to its motion for summary judgement. Although such a filing is normally not part of motions practice, a sur-reply is warranted because the awkward posture of PGE's motion forces Sandy River to prematurely set forth its actual legal arguments in order to contradict PGE's inaccurate assertions about Sandy River's legal claims. Because PGE already stated in its pleadings regarding the motion to stay that its self-titled Motion for Partial Summary Judgment is actually a motion for total summary judgment, Sandy River expects PGE may raise new arguments in its Reply to which Sandy River should have an opportunity to respond.

III. LEGAL STANDARD

The Commission may grant a motion for summary judgment only if the record shows that 1) there is no genuine issue as to any material fact and 2) the moving party is entitled to prevail on its argument as a matter of law.[4] No genuine issue as to a material fact exists if, based on the record and viewed in a manner most favorable to the non-

[4] ORCP 47C.

moving party, no objectively reasonable person could find in favor of the non-moving party on the matter that is the subject matter of the motion for summary judgment.[5] In other words, in evaluating PGE's motion for partial summary judgment, the Commission is to determine whether PGE is entitled to a decision as a matter of law, even where the Commission views the record "in the light most favorable to" Sandy River.[6]

Motions for summary judgment are to be used, under appropriate circumstances, to resolve legal issues that are actually presented by a case, and should not address factual scenarios that are disembodied from the case, and should not be used to resolve a "hypothetical legal proposition."[7]

IV. ARGUMENT

PGE is not entitled to summary judgment on the question it presents in its motion for partial summary judgment. PGE's motion is flawed in multiple respects, and rests on disputed facts asserted within the motion itself. PGE's motion also fails because it is based on an incorrect legal analysis. Finally, PGE's motion does not meet the criteria for summary disposition because the relevant facts, when viewed in the light most favorable to Sandy River, show that Sandy River is entitled to relief.

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5 *Id.*

6 *In re Nw. Pub. Commc'ns Council v. Qwest Corp.*, Docket No. DR 26, Order No. 11-504 at 5 (Dec. 15, 2011) (citing ORCP 47 C; *Jones v. Gen. Motors Corp.*, 325 Or 404 (1997); *Seeborg v. Gen. Motors Corp.*, 284 Or 695 (1978); *In re Petition of Metro One Telecomms., Inc. for Enforcement of an Interconnection Agreement with Qwest Corp.*, Docket No. IC 1, Order No. 02-126 at 2 (Feb 28, 2002); *City of Portland v. Portland Gen. Elec. Co.*, Docket No. UM 1262, Order No. 06-636 at 1-2 (Nov 17, 2006).

7 *Jones v. L.A. Cmty. Coll. Dist*., 244 Cal Rptr 37, 45 (Cal App 1988).

A. PGE's Motion for Partial Summary Judgment is Defective in Several Respects

1. PGE's Motion for Summary Judgment Addresses a Hypothetical Legal Issue, or a Strawman Argument Put Forth By PGE

In its motion for partial summary judgment, PGE asserts that the Commission should, through summary judgment, dispose of Sandy River's second claim for relief.[8] PGE characterizes Sandy River's claim as being that it has a right under the Commission's rules to "unilaterally opt to use a third-party consultant to complete interconnection facilities and system upgrades."[9] PGE's motion then presents an analysis of the wording of the rule that addresses third-party assistance with interconnections, and argues that Sandy River's claim of a unilateral right does not appear in the rules, and that PGE's motion should therefore be granted.[10]

PGE's motion for summary partial judgement is awkward and unusual because its legal argument is couched as a response to a legal argument that it anticipates Sandy River will make. Sandy River has not, however, asserted that the Commission's rules provide for a unilateral option to require PGE to allow a third-party to assist Sandy River with its interconnection. Instead, Sandy River's actual second claim for relief is:

> Sandy River Solar is entitled to relief because PGE unreasonably withheld its consent to allow Sandy River Solar to hire a third-party consultant to complete its interconnection facilities and system upgrades.[11]

Sandy River explains in its complaint that PGE has a duty to approach Sandy River's request to use a third-party in good faith, to consider its request in a reasonable manner,

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8 PGE Motion for Partial Summary Judgment at 1.
9 *Id.* at 9.
10 *Id.* at 1.
11 First Amended Complaint at 20.

and that PGE cannot unreasonably or perfunctorily refuse to allow an interconnection customer to use a third-party.[12]

By misapprehending Sandy River's argument, and then seeking to dispose of it through summary judgment, PGE is asking the Commission to determine a hypothetical legal question, which will not actually address Sandy River's claim. Said differently, even if the Commission were to decide that its rules do not specifically provide an interconnection customer with a *unilateral* right to demand the use of a third-party's assistance with its interconnection, Sandy River's second claim for relief would still need to be litigated to determine if PGE's actions, in this case, were in violation of its duties as a public utility to exercise its discretion in a reasonable and non-discriminatory manner. Because PGE's motion for summary judgment does not address an actual legal issue in this case, the Commission should deny it.

2. PGE's Motion for Partial Summary Judgement Provides No Legal Basis for Its Sweeping Argument that the Commission Lacks Authority to Impose a Reasonableness Standard on PGE's Exercise of its Discretion

As described above, PGE's legal assertion in its motion for partial summary judgment does not address the actual claims Sandy River has made in this case, or its

[12] *Id.* at 20-21, ¶¶ 117-118, 125, 130. Sandy River's complaint provides specific reasons why PGE's refusal to allow Sandy River to hire a third party in order to address its issues is unreasonable under the facts of this case, and seeks an order of the Commission allowing it to hire a third-party for those reasons. *See Id.* at ¶¶ 125-132 (Sept. 27, 2018) (identifying that PGE has not provided any explanation why it has refused to provide its consent; that PGE already hires third parties to conduct this work; that PGE has already admitted to a "strain on resources" that is impacting its ability to perform interconnections; that a third party could mobilize more quickly and perform the work; that a third party could more cost-effectively perform the work; and that PGE has simply unilaterally refused to let any applicant hire a third- party for design and construction).

second claim for relief. But perhaps more importantly, to the extent PGE's legal assertion in its motion is that PGE is *not bound by any duty of reasonableness or good faith* when it comes to responding to Sandy River's request to utilize a third-party's assistance in its interconnection, then PGE's motion seeks a sweeping determination by the Commission that is not supported by any legal justification in PGE's motion.

The actual relevant language of OAR 860-082-0060(8)(f) provides:

> A public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight and approval.

PGE asserts that because the language of the rule itself does not contain any expressed standard of reasonableness to govern PGE's discretion, then none exists. PGE argues:

> Contrary to the positions of both Sandy River and REC, the rules do not require PGE to agree to the use of third-party contractors to perform work on PGE's electrical system, and the rules simply do not provide for application of any 'reasonableness' standard on PGE's consideration of requests by interconnection customers to hire third party contractors.[13]

The full breadth of the PGE's argument appears in several places in PGE's motion. Specifically, PGE argues it has *no duty* to act reasonably in exercising its discretion under the rule, and that it can deny interconnection customers' requests for a third-party's assistance under any circumstance:

> The text and context of this rule make perfectly clear that the public utility is not required to agree, *under any circumstances*, to permit small generator interconnection customers to use third-party contractors to perform work on the public utility's system.[14]
>
> * * *

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13 PGE Motion for Partial Summary Judgment at 3.

14 *Id.* at 11 (emphasis added).

> The regulation provides only that the public utility 'may' agree—it is not required to permit the applicant to hire a third-party consultant, and *the public utility is not subject to any reasonableness standard with respect to its decision*.[15]
>
> * * *
>
> A proper reading of the entire provision that harmonizes the first two sentences gives the *public utility full authority and discretion to dictate* the use of third-party contractors.[16]

From these statements, PGE appears to be asking the Commission to determine that the Commission, itself, has no authority to impose a reasonableness standard on PGE's exercise of discretion about whether to allow third-parties to assist interconnection customers that are struggling with PGE's interconnection process.

Contrary to PGE's view, the Commission's authorities are rife with language giving it the rights and duty to impose upon public utilities an obligation to act in a reasonable manner. For instance, ORS 756.040 addresses the Commission's general powers, and states that in addition to any duties otherwise vested in the Commission, the Commission shall "protect [] customers, and the public generally, from unjust and unreasonable exactions and practices [by the utilities]." ORS 757.325 also requires that utilities not act unreasonably in giving preference or advantage to any person. This provision would include PGE itself, to whom PGE is reserving *all* of its activities with respect to interconnections, despite the fact that the rules make clear that there is an opportunity for interconnection customers to utilize third-parties' assistance, subject to PGE's oversight and approval.

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15 *Id.* at 12 (emphasis added).

16 *Id.* at 17-18 (emphasis added).

Sandy River also points out that PGE and Sandy River have signed contracts with each other. Sandy River and PGE signed a Power Purchase Agreement, as well as agreements to conduct interconnection studies.[17] Under basic contract principles, parties to a contract owe each other a duty of good faith and fair dealing in the performance of their contract, and are prohibited from taking actions that would frustrate the ability of the other party to gain the benefit of the contract.

With regard to this duty of good faith and fair dealing, the Court of Appeals has explained:

> In general, every contract has an obligation of good faith in its performance and enforcement under the common law. . . . The purpose of that duty is to prohibit improper behavior in the performance and enforcement of contracts, and to ensure that the parties will refrain from any act that would have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. . . .
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> . . . The common-law implied duty of good faith and fair dealing serves to effectuate the objectively reasonable expectations of the parties.[18]

The duty of good faith is traditionally applied by courts in situations where one party has the discretion to execute a substantial term of the agreement, and requires that "when one party has the authority to exercise discretion to determine an essential term of the contract, . . . the covenant of good faith and fair dealing requires the discretion to be reasonable."[19]

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17 First Amended Complaint at 9-10.

18 *Klamath Off-Project Water Users, Inc. v. PacifiCorp*, 237 Or App 434, 445 (2010) (internal citations omitted).

19 *Orff v. U.S.*, No. CV-F-93-5327 OWW SMS, 1999 WL 33945647, at *2 (E.D. Cal., Sept. 27, 1999).

In Sandy River's case, it has a PPA with PGE, requiring Sandy River to sell power to PGE, and requiring that interconnection to PGE's system be made.[20] Additionally, Sandy River and PGE signed a Facilities Study Agreement ("FSA") to conduct the interconnection studies, which stated that "the applicant and PGE will perform the FSA consistent with OAR 860-082-0060(8)." Thus, in light of the language of the FSA and purpose of the underlying power purchase agreement, Sandy River had an objectively reasonable expectation that PGE would only reject third party requests under this rule for valid reasons, and that otherwise it would have an opportunity to work with PGE to agree to use a third-party to assist with the interconnection. Because Sandy River had an objectively reasonable expectation under the FSA, the implied duty of good faith applies and PGE must exercise its discretion subject to a standard of reasonableness.

This Commission, as well as the Federal Energy Regulatory Commission have confirmed that utilities have an obligation to work with their customers in good faith, and to reasonably consider requests to take actions in furtherance of their relationship or obligations to each other. For example, in *Electric Lightwave, Inc. v. US West Communications, Inc.*, the Commission found that although the utility did not violate it in that case, the utility "does have a general duty to act in good faith" and to not act in a manner that is unreasonable when requested to negotiate a list of established facts for purposes of litigating a case.[21] Similarly, FERC found in *Xcel Energy Services, Inc. v. Southwest Power Pool, Inc.* that although PURPA's regulations do not specifically

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20 First Amended Complaint at 9.

21 Docket No. UC 377, Order No. 99-285 at 8 (1999).

require a utility to act as registrant for qualifying facilities, such agreements are "consistent with the PURPA purchase obligation, and we expect utilities, such as Xcel, that are requested to enter into such arrangements, will in good faith negotiate and enter into such arrangements").[22]

In its motion for partial summary judgment, however, PGE offers no view at all as to why these and other stated obligations for it to act reasonably would not apply to the circumstance presented in this case. Instead, PGE simply asserts, through reference to the rule itself, that under the rule it is "not required to agree, *under any circumstances*, to permit small generator interconnection customers to use third-party contractors," that it is "*not subject to any reasonableness standard with respect to its decision,*"[23] and that PGE has "*full authority and discretion to dictate* the use of third-party contractors."[24] Because PGE offers no legal theory for its view that it is subject to no general duty to act reasonably with respect to its interconnection customers, its motion for partial summary judgment should be denied.

3. PGE's Motion for Partial Summary Judgment Relies Upon Assertions of Disputed Facts

As PGE acknowledges in its motion, summary judgment is appropriate only where there are "no genuine issue as to any material fact" and where the moving party "is entitled to prevail as a matter of law."[25] Thus, PGE's motion for partial summary

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22 118 FERC ¶ 61,232 at P. 27 (2007).
23 PGE Motion for Partial Summary Judgment at 12 (emphasis added).
24 *Id.* at 17-18 (emphasis added).
25 *Id.* at 8-9 (quoting ORCP 47C).

judgment is faulty for another basic reason—it asserts new facts that are disputed in the record, and relies on those in arguing that its motion should be granted.

PGE asserts in its motion for partial summary judgment that if it were required to allow aggrieved interconnection customers to utilize a third-party's assistance, this would result in an "inefficient and unworkable" situation for small interconnection projects.[26] REC's witness, Mr. Lowe, however, has already testified to the contrary, that use of third-parties by interconnection customers should lower costs and could increase the quality of the interconnection, and that this was part of the purpose of the rules.[27] PGE's statements are also disputed by Sandy River's testimony, which explains that PGE already is required to have a system for allowing third-parties to work on its system, and that doing so does not prevent the operation of a safe and reliable system.[28] Sandy River's witnesses further testified that use of a third-party would reduce the strain on resources that PGE has already acknowledged exists.[29] Thus, this is not only a disputed fact, but there is no evidentiary support for PGE's claims because it has not filed testimony.

PGE also asserts in its motion for partial summary judgment that "[t]he process and other controls that need to be in place if a QF is going to take responsibility for construction on the utility's system, especially over the utility's objection, need to be significant, and built into the rule."[30] However, REC provided testimony that PacifiCorp

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26 *Id.* at 10-11.
27 *See* REC/100, Lowe/4-5.
28 Sandy River/100, Snyder/18-21.
29 Sandy River/100, Snyder/14.
30 PGE Motion for Partial Summary Judgment at 21.

routinely grants third-party assistance for interconnections, in accordance with the same rule.[31] Sandy River also provides evidence that the work it would have a third-party perform for its project is relatively straightforward and does not implicate PGE's concerns.[32] Again, this is a material fact with no contrary evidence in the record.

PGE also asserts in its motion that "[p]ractically, under many situations (including this case) the use of a third-party contractor will not expedite the interconnection process, because higher-queued projects still must be completed before lower-queued projects can be placed in-service."[33] REC testified, however, that part of the logic for the current rules was that it would reduce backlogs and lead to a more efficient interconnection process.[34] Sandy River has also testified that it has options for addressing upgrades assigned to higher queued projects, such that PGE's justifications for delay of Sandy River's interconnection are not warranted. Again, this is a material fact with no contrary evidence in the record.

PGE also makes several assertions about what was intended by parties to the rulemaking process, and what statements during the rulemaking process meant. For example, PGE asserts that the rulemaking record supports its view that OAR 860-082-0060(8)(f) forecloses a reasonableness obligation on utilities.[35] Sandy River notes that PGE inconsistently argues that the rulemaking record should not be reviewed in this case, but that PGE nevertheless argues that it supports its interpretation of the rule. To the

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31 REC/100, Lowe/6.
32 Sandy River/100, Snyder/17-18.
33 PGE Motion for Partial Summary Judgment at 23.
34 REC/100, Lowe/17.
35 PGE Motion for Partial Summary Judgment at 18-20.

extent PGE asks the Commission to consider the rulemaking record, the Commission must not rule in favor of PGE's motion for partial summary judgment because testimony has been put forth by REC in this proceeding that undermines PGE's assertions about the rulemaking record, and what its shows. John Lowe, executive director of REC, participated in those rulemaking proceedings and has already submitted testimony on the rulemaking process and the parties' statements and understanding of the rules, which contradicts PGE's statements.[36] To the extent the Commission views the review of the rulemaking record to be purely a legal exercise, then it should consider Sandy River's argument about what the rulemaking record actually shows, as described later in this Response. Again, this is a material fact.

All parties in the case are entitled to try to reconcile disputed facts through the evidentiary process, rather than through a motion for partial summary judgment at this stage. The truth of these assertions about whether it would be workable for Sandy River to utilize a third-party should be established through sworn testimony from witnesses,

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[36] *See* REC/100, Lowe/4-9 (describing John Lowe's view of the rulemaking proceedings in which he was involved). REC's testimony explains that the understanding of the parties to the rulemaking was that the utility's consent would not be unreasonably withheld, REC/100, Lowe/9, and also that the Commission's adoption of the current rules was based, in part, on a reliance of PGE's statements that it supported the idea of allowing third-party assistance so long as there was utility oversight and approval. REC/100, Lowe/17-18. PGE makes further assertions about even what was intended in the rulemaking proceedings, arguing that "[i]n other words, REC understood that the current rules did not allow the QF to demand to use third-party contractors, and wanted the Commission to consider revisions." PGE Motion for Partial Summary Judgment at 7. As described above, REC has already submitted testimony regarding Mr. Lowe's understanding of the rulemaking proceeding. REC/100, Lowe/9. Thus, PGE cannot claim that its view of the rulemaking history is undisputed.

subject to cross-examination, and thus the Commission should deny PGE's motion to resolve them through summary disposition.

B. PGE's Argument that the Rule's Use of the Term "May" Gives It Unfettered Discretion Regarding Third-Party Assistance is Based on a Flawed Legal Analysis

1. The Term "May" Must Be Interpreted In the Context of the Purpose of the Rules

PGE's position that it has no obligation, under any circumstances, to agree to allow a third-party to assist with interconnections to its system is based on an incorrect legal analysis and incorrect interpretation of the Commission's rules. This is because PGE's motion assumes, without any real analysis, that the term "may," as used in OAR 860-082-0060(8)(f) bestows ultimate authority on PGE to determine whether it will allow third-parties, with no associated duty of reasonableness attached to it. PGE reasons that "'[m]ay" is permissive, not mandatory. It gives PGE the authority to agree to allow the applicant to hire a third-party consultant, but does not require PGE to agree."[37]

PGE's analysis overlooks, however, that courts, including Oregon courts, have long and often held that the use of the word "may," when used in legislation does not always mean that an entity has total discretion whether or not to take some action. The Supreme Court has clarified, "[a]s this court long has acknowledged under its case law, even use of the word "may" -- often viewed as a purely discretionary term -- can be read

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[37] PGE Motion for Partial Summary Judgment at 12-13 (citing *PGE v. Bureau of Labor & Indus.*, 317 Or 606, 610 (1993) for the proposition that words of common usage typically should be given their plan meaning, and *Nibler v. Oregon Dept. of Transp.*, 338 Or 19, 26 (2006) for the proposition that the word 'may' ordinarily denotes permission or authority to do something).

to indicate a mandatory requirement when to do so reflects the legislature's intent."[38] For example, when a statute provided that school districts "may" release children from class under certain circumstances, the Supreme Court interpreted that to mean that children could insist on that right, when the intention of the legislature was determined to be that school districts would in fact do so.[39] Other numerous courts have also applied this analysis, finding it necessary and appropriate in order to preserve an intent to create a right, or remedy, when the legislative scheme shows that this was the intent of the legislation.[40]

These cases mean that in determining whether PGE's simplistic argument should be adopted, or whether the Commission should find that, in some circumstances, interconnection customers should be granted a remedy of assistance from a third-party, the Commission must review the rulemaking record, to determine what the intent of the rule was.

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38 *State v. Guzek*, 342 Or 345, 356 (2007) (citing *Dilger v. Sch. Dist. 24 CJ*, 222 Or 108 (1960).

39 *See*, *e.g.*, *Dilger v. School District 24 CJ*, 222 Or 108, 117 (1960) ("If necessary to carry out the intention of the legislature it is proper to construe the word 'may' as meaning 'shall.'")

40 *See Sloban v. Fla. Bd. of Pharmacy*, 982 So.2d 26, 33 (Fla. 1st DCA 2008) ("Under the plain meaning rule, 'may' denotes a permissive term; however, if reading 'may' as permissive leads to . . . [a result] contrary to legislative intent, courts may look to . . . the legislature's intent to determine whether 'may' should be read as a mandatory term.") (citations omitted); *See also Myles v. State*, 602 So.2d 1278, 1281 (Fla.1992) ("[I]t is settled that the word 'may' is not always permissive, but may be a word of mandate in an appropriate context."); *See also Bass v. Doughty*, 5 Ga App 458 (1909) ("To decide between these meanings [of 'may'] in any given case, the context and whole legislative scheme must be taken into consideration.").

2. The Rulemaking Record, the Rules Themselves, and the Commission's Order Show that PGE Must Approach Its Discretion Regarding Third-Party Assistance With Interconnections In Good Faith, and Not Withhold Its Consent Unreasonably

As described in testimony submitted by John Lowe, on behalf of REC in this proceeding, the discussion and record in the rulemaking shows that OAR 860-082-0060(8)(f) was adopted to give interconnection customers an additional option for completing their interconnection when the utility's actions made the interconnection process unworkable for a small generator. Mr. Lowe served as an expert consultant on Sorenson Engineering's behalf in AR 521, and participated in numerous workshops that occurred in the process, with the goal of securing rules that would grant remedies to interconnection customers that could be aggrieved by utilities' behavior in the interconnection process.[41]

Mr. Lowe testified:

> My understanding is that the rules were intended to allow an interconnection customer to hire and pay for a third party contractor, as long as the public utility retained oversight and the ability to approve the contractor. The idea was that the utility could provide a list of acceptable contractors, or could veto a specific contractor, but not that the utility could unreasonably withhold its approval and decide simply not to allow an interconnection customer to hire any third party contractor.[42]

In short, according to REC's witness, although the rules certainly conditioned the use of third-parties to construct interconnections for small generators on the utility's oversight, and agreements as to how the process would work, the purpose was in fact to provide a remedy, or option, for interconnection customers that needed to overcome

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41 REC/100, Lowe/3.
42 REC/100, Lowe/9.

obstacles with the utility in order to interconnect. And, it was envisioned that utilities would participate in this process in good faith, and approach requests to use third-parties in a reasonable manner, withholding their consent only for good reason.

Mr. Lowe observes in his testimony:

> A number of parties raised the issue and commented on it. The issue was extensively discussed in the workshops, which ultimately led to an agreement that an interconnection customer could retain third-party consultants to construct many of the interconnection facilities, as long as the utility retained the ability to approve the consultant and review the final work product. The understanding was that the utility's consent would not be unreasonably withheld, and I believe that most of the parties would be shocked that a utility would take the position that the rules provided it the unilateral right to simply reject an interconnection customer's ability to hire a third party consultant, regardless of the reasonableness of the request.[43]

The rulemaking record, when read in this light, confirms Mr. Lowe's reading of the rule. For example, the Energy Trust of Oregon ("ETO") noted that the originally-proposed rules were silent on the time allowed for construction of the upgrades and that the interconnection applicant would have no means to ensure the construction of the upgrades occurred in a reasonable timeframe. ETO therefore recommended that the utility and interconnection applicant should identify a mutually agreeable timeline for the construction of the upgrades and the date the system will be able to accommodate the project, and that if the utility and applicant could not mutually agree to a timeline, then the applicant should have the option to have the upgrades contracted to an independent contractor to obtain a more favorable timeline.[44] ETO went on to state its view that:

> Small generators can't be held up if some other utility issue has diverted their internal staff. Certainly not when acceptable alternatives exist. Utilities often use

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43 REC/100, Lowe/6.

44 *Small Generator Interconnection Rulemaking*, Docket No. AR 521, Energy Trust of Oregon's Comments (Nov. 8, 2007) (appearing in the record at REC/101).

> consultants to speed or outsource work on interconnection. Small generators should also have this option to hurdle time constraints.[45]

Other parties, including the Renewable Northwest Project (now Renewable Northwest) also commented on the rules being helpful in creating a remedy for aggrieved interconnection customers, noting that a solution to "dealing with backlogs of interconnection requests is to draft rules outlining under what situation it would be acceptable for interconnection customers to hire a private third-party contractor licensed to design, construct, and install the requisite system upgrades."[46] Sorenson Engineering, who Mr. Lowe represented and which is a REC member, raised the issue of the interconnection customer's option to construct, own and operate interconnection facilities, and proposed rule language that would give interconnection customers the right to insist on use of a third-party, subject to certain conditions.[47]

PGE expressed general support for the proposition that third-parties could serve a useful function in the interconnection process, but raised concerns about the conditions that should attend such an option. PGE explained:

> While in principle, PGE supports the ideas raised by the Energy Trust of Oregon, Inc. ("ETO") in its November 8, 2007 comments concerning using third-party contractors for interconnection construction, we believe the Proposed Rules would need to include significant additional protections. Specifically, ETO suggested that if the utility and generator cannot agree on timelines to construct necessary facilities or conduct studies for larger Tier 4 facilities, the generator should be able to substitute third parties to carry out the work. For PGE to allow third-party contractors to work on its system, there would need to be a review process by the utility to ensure that the contractor is qualified to perform such work. Due to critical

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45 *Id*.

46 *Small Generator Interconnection Rulemaking*, Docket No. AR 521, Renewable Northwest's Comments (Nov. 9, 2007) (appearing in the record as REC/102).

47 *Small Generator Interconnection Rulemaking*, Docket No. AR 521, Sorenson Engineering, Inc.'s Comments (Nov. 27, 2007) (appearing in the record as Exhibit REC/103).

> system stability and safety risks, any contractor working on our system would need to be screened to ensure they had the experience and knowledge to properly and safely do the work. Also, there would need to be a process for the utility to review any design work, and an inspection prior to energization of any facilities constructed. Similar safeguards would need to apply to any studies performed by third parties regarding upgrades needed on the utility's system. PGE believes strongly that it would need to be compensated for any costs associated with this oversight.[48]

PGE's comments show that it generally supported the use of third-parties, but that it had concerns about structure that should be in place for it to happen, and that it would insist on certain provisions.

In its motion for partial summary judgment, PGE now, however, makes a conclusory argument that "[t]he fact that the current rules do not have either the option language, or the additional protections for the public utility, shows that the Commission could not have intended to allow a QF to control this process."[49] PGE's conclusion about the rule's meaning overlooks two important items, however. First, Sandy River is not seeking to "control this process" of using a third-party. Instead, it is seeking to establish that PGE must act reasonably with regard to its consideration of this topic, and that it has failed to do so. Second, PGE's conclusion ignores what is a more obvious interpretation of the current rules. The rules do not contain a unilateral option, and they do not contain specific provisions regarding the additional protections PGE sought. But, they *instead* contain language stating that the use of a third-party is subject to oversight by the public utility, as well as an agreement that is to be entered into by the interconnection customer

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48 *Small Generator Interconnection Rulemaking*, Docket No. AR 521, Portland General Electric Company's Comments (Nov. 27, 2007) (appearing in the record as REC/104).

49 PGE Motion for Partial Summary Judgment at 20.

and the utility. The most reasonable interpretation of the rule, therefore, is that the Commission adopted rules that allowed a process by which PGE could insist on its reasonable protections (through requiring an agreement), and that the Commission agreed with PGE that it should have oversight over the third-party's work. Under this obvious reading of the rule, PGE is surely required to at least engage with customers on their request for third-parties, and see if reasonable provisions can be put in place, through agreement, that give PGE the reasonable protections it needs.

The Commission's order on the rules also confirms this very straightforward reading of what they mean. The Commission found:

> During the rulemaking proceedings*, the participants agreed that a public utility and an applicant to interconnect a small generator facility could agree to allow the applicant to hire third-party contractors to complete any interconnection facilities and system upgrades required by the interconnection*, at the applicant's expense and subject to public utility oversight and approval. The small generators also requested that the rules provide the option for a public utility and an applicant to agree to allow the applicant to hire third-party contractors to complete any studies necessary for a Tier 4 review of an interconnection application. We agree with the small generators that it is appropriate to allow a public utility and an interconnection applicant to agree to allow the applicant to hire third-party contractors to complete any required studies during a Tier 4 review and have amended OAR 860-082-0060 to reflect this conclusion. We clarify, however, that *work conducted by third-party contractors is always subject to the public utility's review and approval*. If the public utility, *in its reasonable opinion*, does not believe that a third-party contractor's work is adequate, then the public utility may rebuild the interconnection facilities or system upgrades, or repeat the applicable study. The applicant must pay for both the third-party consultant's work and the public utility's work.[50]

As expressly stated by the Commission, its rules regarding the use of third-parties are founded upon an understanding that the interconnection customers and utility "could

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[50] *In Re Rulemaking to Adopt Rules Related to Small Generator Interconnection*, Docket No. AR 521, Order No. 09-196 at 4 (emphases added).

agree" to use third-parties, that utilities will nevertheless exercise oversight in such circumstances, and that the utility will exercise their oversight function in a "reasonable" manner.

In light of the Commission's statements, PGE's argument is disappointing—that on summary judgement, *without any application of facts*, it is entitled to shut down the whole process regarding third-party assistance that was provided for in the Commission's rules, and which the Commission clearly expected PGE would approach in good faith. Indeed, PGE's lack of good faith on the topic of third-parties is very evident in its motion for partial summary judgment, where it essentially seeks to establish that the whole idea was never worth pursuing in any event. PGE asserts,

> Allowing an interconnection customer to hire a third-party consultant to construct the interconnection facilities and system upgrades that will become a part of PGE's system would unnecessarily complicate the interconnection process because PGE would need to develop and enter into a contractual relationship with the interconnection customer that establishes the standards to which the customer's third-party consultant would construct the improvements and that establishes and appropriately assigns responsibility, liability, testing, approval and oversight rights as between PGE, the interconnection customer, and the customer's third-party consultant. It is more complex and administratively burdensome for PGE to attempt to exercise appropriate control and oversight over a third-party consultant hired by the customer and lacking privity of contract with PGE, than it is for PGE to exercise the requisite control and oversight over its own employees or its own consultants, with whom PGE enjoys privity of contract.[51]

PGE asserts all of this despite the fact that, under the Large Generator Interconnection Procedures, there are situations where PGE does not have the option to refuse an interconnection customer's request to hire a third party. As PGE articulated in its motion for partial summary judgment, "[t]he QF-LGIA also expressly includes an 'Option to

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[51] PGE Motion for Partial Summary Judgment at 22.

Build,' which gives the Interconnection Customer the right to assume responsibility for the design, procurement, and construction…"[52] Therefore, under that process PGE should already have a process in place to govern the contractual relationship with a customer's third-party consultant including the standards under which the consultant would construct the improvements, the assignment of responsibility, liability, testing, approval, and oversight. Hiring a third-party consultant for a small generator interconnection would not be any more complex or administratively burdensome than the process PGE presumably already has in place for large generator interconnections. Therefore, PGE's assertions that it will be unnecessarily complex fall flat, or at least present another issue of fact for resolution in this case.

PGE's assertions are especially exasperating in light of the fact that other utilities, including PacifiCorp, routinely grant such requests and have found ways to get it done. PGE's motion for summary judgment also sounds, regrettably, like an argument by PGE that it essentially "put to rest" the topic of third-parties assisting with interconnections by winning in the rulemaking process. Such a view of the outcome is clearly inconsistent with the Commission's view expressed in its order that the rules were adopted so that interconnection customers and utilities could agree to use third-parties, subject to certain safeguards and conditions. In light of the rulemaking record, and the Commission's statements regarding the purpose and intent of the rule, the Commission should reject PGE's overly-simplistic argument that because the rules use the term "may," that PGE has no obligations to seek a reasonable method for allowing third-party assistance to

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52 *Id.* at 14.

small generation customers aggrieved by the interconnection process with PGE. Such an interpretation would undermine the purpose of the rules, and nullify the remedy that the Commission's rules had set up for small generator interconnection customers.

C. PGE's Motion for Summary Judgment Does Not Meet the Standards For Summary Disposition of Sandy River's Complaint Because the Facts Establish that Sandy River is Entitled to Relief

In addition to all of the reasons described above, PGE's motion for partial summary judgment should be denied because it fails to meet the legal standard for deciding a matter through summary disposition. As described earlier, summary judgement on an issue is appropriate only when, based on the record and viewed in a manner most favorable to the non-moving party, no objectively reasonable person could return a verdict for the non-moving party on the matter that is the subject of the motion for summary judgment.[53]

Here, because PGE is claiming that its motion for partial summary judgment entitles it to dispose of Sandy River's second claim for relief, PGE must show that no reasonable person could find that:

> Sandy River Solar is entitled to relief because PGE unreasonably withheld its consent to allow Sandy River Solar to hire a third-party consultant to complete its interconnection facilities and system upgrades.[54]

Again, Sandy River notes that it is unclear exactly what PGE is trying to accomplish through its motion for partial summary judgment. On one hand, PGE seems to be essentially seeking a declaratory order that under no circumstances, regardless of reasonableness, can it be required by the Commission to allow an interconnection

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53 ORCP 47C.

54 First Amended Complaint at 20.

customer to use a third-party's assistance in interconnections. If so, then PGE's motion should be denied because PGE does not address the breadth of legal analysis required to support the assertion that it owes no duty of reasonableness and good faith to Sandy River, and because PGE bases its argument regarding the rule's language on an incorrect legal assumption that "may" provides it with unfettered discretion, despite the purpose of the rules.

On the other hand, PGE may be seeking to establish, through summary disposition, that its actions with respect to Sandy River's interconnection have all been reasonable and lawful. Such an outcome would seem incompatible with PGE's request for *partial* summary judgement. However, Sandy River views this unfounded outcome as the one that PGE is likely seeking to try to implement through its motion.

1. PGE's Motion Must Be Denied to the Extent It Seeks To Establish, Through Summary Disposition, That Its Actions Have Been Reasonable

That PGE is actually seeking a determination that it has acted reasonably is not evident from the motion for partial summary judgment itself, which states that its purpose is to dispose only of Sandy River's second claim for relief. However, it is clear, or at least implied, from PGE's motions practice related to its request to stay the case. In its Reply to Sandy River's Response to its Motion to Stay, PGE zealously asserted:

> PGE's motion for summary judgment—and the effect it will have on this case—is simpler than Sandy River and REC suggest. If the Commission grants PGE's motion for summary judgment, that will effectively dispose of *all* the prayers in Sandy River's complaint.[55]
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[55] PGE's Reply in Support of Motion to Stay at 2 (emphasis added).

> [I]f the Commission grants PGE's motion for summary judgment—and interprets OAR 860-082-0060(8)(f) as PGE contends it should—*all* of Sandy River's prayers will be resolved.[56]

If PGE believes that its motion for partial summary judgment resolves all of Sandy River's claims, then PGE has mischaracterized its motion for partial summary judgment, and PGE may be seeking a determination that it has acted reasonably, and that none of Sandy River's claims can be heard by the Commission if it interprets the rule in PGE's favor. In order for Sandy River's claims to be denied, however, PGE would need the Commission to decide, through summary judgment that none of Sandy River's claims are valid. This would require a finding that PGE: 1) provided complete information in its System Impact Study and in both its initial and revised Facilities Studies;[57] 2) reasonably withheld its consent to allow Sandy River Solar to hire a third-party consultant to complete its interconnection facilities and system upgrades;[58] 3) met its interconnection application deadlines required under the Commission's rules;[59] and 4) did not subject Sandy River to undue or unreasonable prejudice or disadvantage by treating other QFs and PGE's own projects with undue or unreasonable preference or advantage.[60] If these are determinations that PGE seeks to resolve through its motion for partial summary judgment, then PGE's motion can in no way be sustained.

Rather than being entitled to judgment as a matter of law on the topics of Sandy River's complaint, PGE must contend with the facts of the case as established to date.

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56 *Id.* at 3 (emphasis added).
57 *See* First Amended Complaint, at 16 (Sandy River's First Claim for Relief).
58 *See id.* at 20 (Sandy River's Second Claim for Relief).
59 *See id.* at 22 (Sandy River's Third Claim for Relief).
60 *See id.* at 24 (Sandy River's Fourth Claim for Relief).

Because Sandy River expects that PGE may assert in its Reply to this Response that its motion for partial summary judgment actually disposes of *all* of Sandy River's claims, Sandy River sets out below the factual assertions that exist in the record to date.

2. The Facts, Construed Most Favorably to Sandy River, Show that PGE Acted Unreasonably in its Interconnection Process, Violated the Commission's Rules, and Unreasonably Refused to Approach Sandy River's Request to Use Third-Party Assistance In Good Faith

On these topics, there is a robust record regarding PGE's actions that, if construed in the manner most favorable to Sandy River's claims, clearly establishes that PGE's actions have been unreasonable, and that Sandy River is entitled to relief. These facts appear in the testimony of three different witnesses: Troy Snyder, of TLS Capital, who has worked with PGE on many interconnections, and who is the principal for the Sandy River project, Jeremy Goertz, a Professional Engineer who works on power projects and interconnections like Sandy River's, and John Lowe, Executive Director of REC, who has worked on interconnections for almost his entire career, and who participated in the Commission's AR 521 rulemaking through which the Commission established its small generator interconnection rules. The testimony of these three witnesses is not yet even disputed by PGE in this case, and establishes at least several broad assertions relevant to the Commission's determination of Sandy River's complaint. These assertions, as well as relevant citations, are listed below:

Assertion 1: PGE cannot be relied upon to provide accurate or timely information required to complete interconnections.

These assertions are supported by the testimony of Troy Snyder, where he testifies, with specific examples, that his experience is that he is unable to rely on PGE's work,[61] and that its work is incomplete and inaccurate.[62] He explains that PGE has consistently, for both Sandy River and other projects, revised its estimated interconnection construction timelines,[63] its cost estimates vary significantly between studies[64] and, when questioned on certain costs, PGE has admitted that it makes mistakes, miscalculations, or otherwise changed its assessment of what is needed.[65] He testified that PGE fails to get

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61 Sandy River/100, Snyder/2.

62 *Id*. Mr. Snyder testified that with respect to the Sandy River project, he has experience numerous delays, missed deadlines, and inaccuracies in the information provided by PGE. For example, he submitted the complete Sandy River Solar interconnection application to PGE on May 23, 2017. PGE notified him that the application was complete on July 10, 2017, 48 calendar days after he submitted it. He executed and sent PGE the System Impact Study Agreement on July 27, 2017, which provided that the study would be completed and results transmitted within 30 calendar days after the agreement is signed by the parties. PGE did not provide the System Impact Study to him until January 7, 2018, 164 calendar days after he submitted it. On January 25, 2018, he executed a Facilities Study Agreement and sent it to PGE, which provided that the study shall be completed and results transmitted within 60 business days after receipt of the agreement. PGE provided the Facility Study on April 25, 2018.[62] After some back and forth with PGE regarding the study results, interconnection timeline, contradictory statements in the study, and third-party consultants, PGE issued a revised Facilities Study on July 27, 2018. The revised Facilities Study still did not resolve his concerns. Sandy River/100, Snyder/10.

63 Sandy River/100, Snyder/3.

64 *See, e.g.* Sandy River/100, Snyder/6 ("In several cases, PGE's cost estimates have varied radically between studies. On Eola Solar and River Valley Solar, PGE's cost estimate for interconnection facilities and upgrades nearly doubled from the system impact study phase to the facility study phase despite there being no change to the requirements. A similar issue occurred with Brush College Solar, but the cost estimate increased by about 61% from the system impact to facility study phase despite there being no change to the requirements.").

65 Sandy River/100, Snyder/3. *See also, e.g.,* Sandy River/100, Snyder/6. ("PGE has

basic information correct,[66] and that even when it issues revised studies, they still contain inconsistencies and inaccurate information.[67] For example, Mr. Snyder testified about an instance where PGE provided other applicants with a facility study that required the installation of fiber optic line for transfer trip because the higher-queued project would not be required to install it. It turned out that PGE had actually required it of the higher queued project, and that it was unnecessary.[68] Mr. Snyder testified of another instance where PGE required pole replacements after not having identified that in its system impact study, and even though PGE's process had not yet included an evaluation of whether poles needed to be replaced.[69] He also described PGE's inconsistent and inaccurate requirements related to remedying backfeeding[70] on PGE's system.[71] With

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also removed some requirements once I started asking questions about them, or added requirements in later studies that should have been identified earlier (or failed to tell me about those requirements earlier in the process). For example, on Brush College Solar, PGE provided a facility study, but when I questioned them on certain aspects of it, PGE determined that a voltage regulator was not actually needed. For Red Prairie Solar, following the facility study and draft interconnection agreement, PGE determined that Red Prairie was not required to replace a recloser, but it should have been the responsibility of a project built last year. I questioned PGE about this requirement after the system impact study and first draft of the facility study, but PGE waited until much later in the process to inform me it was not required.").

66 Sandy River/100, Snyder/4.

67 *Id*.

68 Sandy River/100, Snyder/6.

69 Sandy River/100, Snyder/5.

70 Backfeeding is the flow of electrical energy in the reverse direction from its normal flow. Backfeeding allows for unfiltered electricity to flow through circuits and can cause an overload of some of the equipment or appliances that are on those circuits.

71 *See* Sandy River/100, Snyder/5-6 ("PGE indicated that backfeeding occurs where generation interconnected to a substation exceeds the daytime minimum load. However, on the Mountain Meadow Solar project, PGE determined in the feasibility study that the project would cause backfeeding, despite there being a load on the line that far exceeded the generation. Also, PGE has not required the

respect to Sandy River, he testified that PGE provided him with a revised Facility Study listing an in-service date of December 2, 2019, although PGE had specifically found it to be subject to a higher-queued project for which it had, weeks before, given an in-service date of over two months later, thus knowingly or recklessly providing Sandy River with dates it presumably could not meet.[72]

Mr. Snyder testified that when questioned on these items, PGE often delays the process further by not responding in a timely manner.[73] For example, he testified, that where PGE provided an applicant with a study that double-counted costs for the facilities or upgrades, upon following up, it took PGE nearly two months to respond.[74] Although PGE is aware of the issues, it has failed on numerous occasions to give proper attention to resolving them.[75]

Jeremy Goertz also testified on this topic, finding that PGE's studies for Sandy River lack a description of work and procedure to an extent that it is "impossible to fully assess the options that may be available."[76]

Finally, John Lowe testified, with examples, that PGE has not adhered to the standard interconnection study and processing timelines for many projects, and has missed those deadlines for significant periods.[77] Mr. Lowe testified that in some

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same the protection requirements for higher-queued projects that create a backfeed condition as it has for Waconda Solar.").

72 Sandy River/100, Snyder/11.

73 Sandy River/100, Snyder/4.

74 Sandy River/100, Snyder/5.

75 Sandy River/100, Snyder/4.

76 Sandy River/200, Goertz/5.

77 REC/100, Lowe/10 (citing the complaints filed in UM 1902 through UM 1907 on behalf of the Amity, Butler, Duus, Firwood, Starlight and Stringtown solar projects, and testifying that PGE delayed those projects by a minimum of between

instances, "PGE failed to respond so often that applicants have felt that they have no other option but to show up at PGE's office and ask to speak to the PGE representative that they've been trying to get a hold of."[78]

Assertion 2: PGE's studies have not provided adequate information to allow Sandy River, or other developers, to assess what PGE is requiring and its reasonableness, and have not met the Commission's requirements.

This assertion is supported by Mr. Snyder's testimony that PGE has not provided sufficient information on its system to allow meaningful review of their work.[79] He testified that he is unable to have an independent engineer reproduce or confirm the results based on the little amount of information that is provided in PGE's studies.[80] He provided specific examples, citing that the System Impact Study Agreement states that the study will be performed consistent with OAR 860-082-0060(7), but Sandy River's study does not contain the analyses that would be required under the rule.[81] He testified that there are similar issues with the Facility Study and the associated rules.[82]

Mr. Goertz also testified that the level of detail in PGE's interconnections studies is not consistent with that of other utilities, and that a more specific breakdown is normally provided.[83] These allow the customer to adequately asses the nature of the work in order

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115 and 340 days). He testified that in another project, PGE did not provide the results of the first study until 12 months after the interconnection application was submitted, and PGE provided no data in the interim. REC/100, Lowe/10. PGE has even delayed interconnections by simply failing to respond to inquiries in a timely manner, like, for example, when PGE took 57 days to answer some follow up questions for the Mt. Hope Solar project. REC/100, Lowe/11.

78 REC/100, Lowe/11.

79 Sandy River/100, Snyder/4.

80 Sandy River/100, Snyder/10.

81 Sandy River/100, Snyder/12-13.

82 Sandy River/100, Snyder/13.

83 Sandy River/200, Goertz/2.

to determine suitability against an investment being made.[84] Based on the information provided by PGE's studies, Mr. Goertz does not believe the level of specificity is sufficient to provide an adequate assessment of the investment.[85]

Assertion 3: Sandy River's challenges with its interconnection reflect a larger problem at PGE, and PGE may be using the interconnection process to thwart qualifying facility development.

This assertion is supported by testimony from Troy Snyder,[86] who testified about PGE's actions with respect to other projects,[87] where it misses deadlines in the interconnection process, including the deadlines by which it is required to provide study agreements, and the deadlines by which it has agreed to provide the actual study results.[88] Mr. Snyder testified that PGE's interconnection department appears to be understaffed and overworked. He testified that PGE informed him that "the current volume of both interconnection and PGE's existing construction work has placed a strain on resources."[89] Mr. Snyder testified that he worked on two other projects that had nearly identical interconnection upgrades to Sandy River.[90] On those projects, PGE only proposed a 10-month schedule from execution of the interconnection agreement to the in-service date with only 2 months of construction, whereas for Sandy River, PGE is estimating 18 months to the in-service date with 10 months of construction.[91]

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84 *Id*.
85 Sandy River/200, Goertz/3.
86 Sandy River/100, Snyder/3.
87 *Id*.
88 Sandy River/100, Snyder/4.
89 PGE Answer at Exhibit H
90 *See Dunn Rd. Solar, LLC v. PGE,* Docket No. UM 1963, PGE's Answer at Exhibit Y at 18 (Aug. 29, 2018).
91 Sandy River/100, Snyder/14.

Mr. Snyder testified that PGE could also be using the interconnection process to slow down or thwart qualifying facility projects from being successful.[92] Mr. Lowe also testified that PGE can use this process to kill projects by delaying and giving inaccurate information.[93]

Assertion 4: PGE has caused significant delays to projects through its administration of the interconnection process.

This assertion is supported by specific detailed testimony in the record, with numerous examples, for both Sandy River and other projects.[94] Mr. Snyder testified that he made numerous attempts to get clarity out of PGE regarding the Sandy River interconnection process and resolve his concerns, but PGE has waited weeks to respond to even basic questions and has in some instances been wholly non-responsive.[95] He also testified that PGE's actions caused him financial harm with respect to the project, that PGE's actions negatively affect his ability to make informed business decisions,[96] and that PGE's insistence that he meet his deadlines (i.e. 15 business days to execute an

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92 *Id*.

93 REC/100, Lowe/15.

94 Mr. Snyder testified that in October 2016, he wrote a letter to PGE (Exhibit Sandy River/101) expressing his concern about their delays and how PGE had not met either the timelines outlined within the OARs or its own estimated timelines, and that the letter came as a result of trying to contact PGE nearly every day by phone or email for over a month in order to discuss his concerns with them, but with no response. He also testified that it took PGE over two years to complete the interconnection studies for Drift Creek and Brush Creek, and PGE did not inform him of a substation replacement until over a year into the process. Sandy River/100, Snyder/7.

95 *See* Sandy River/100, Snyder/11-12 (explaining the process of emails between May 4, 2018 and late June, when PGE stopped responding to requests for clarification altogether).

96 Sandy River/100, Snyder/24.

agreement) puts his application at risk of being deemed withdrawn, even while, in the meantime, PGE will not answer his questions.[97]

Mr. Lowe also testified that PGE is requiring unreasonably long time periods to complete interconnections,[98] and that these delays can cause a wide variety of negative impacts for projects.[99]

> ***Assertion 5: The Commission's rule allowing for the use of third-party assistance with interconnection projects was intended to provide a remedy for interconnection customers experiencing delays or problems with the utility, and it was understood that a utility's consent to use third-parties would not be unreasonably withheld.***

Mr. Lowe testified in this proceeding that there are many reasons why it was important for qualifying facilities to be able to use a third-party's assistance in their interconnection, and that these were considered in the rulemaking process. This included that "the utility may be overworked, may have insufficient expertise or experience, or may have insufficient resources to reasonably complete interconnection construction for QFs."[100] He testified that these issues can result in delays and poorly performed studies and interconnection work.[101] He also testified that the interconnection customer "may wish to have greater control over the work product, which can lower costs and increase the quality of the interconnection."[102] He also explained that "the utility is inherently biased against QFs, and has an economic incentive to put QFs out of business," and that "this conflict of interest is especially important when the utility is taking aggressive steps

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97 Sandy River/100, Snyder/7.
98 REC/100, Lowe/12.
99 REC/100, Lowe/11.
100 REC/100, Lowe/4-5.
101 *Id*.
102 *Id*.

to undermine its PURPA obligations, as PGE is now."[103] According to Mr. Lowe's testimony:

> the original justifications for allowing the applicant to hire third-party consultants, as provided for in the rules, were to deal with backlogs of interconnection requests, to get projects on-line by the applicant's desired on-line date, and to do so at potentially lower costs. These issues that PGE is facing are exactly the types of issues that the third-party consultant rules were designed to address.[104]

Assertion 6: Other utilities, including within Oregon, generally allow third-party assistance with interconnections.

Mr. Lowe testified that PacifiCorp has historically, and continues to allow third-parties to construct interconnection facilities subject to its review of the work.[105] Likewise, Mr. Goertz testified that generally, "utilities allow and sometimes prefer that an interconnection hire a third-party contractor in certain circumstances."[106] He also testified that utilities generally have "an effective process for bringing and allowing subcontractors to participate on work where workplace health and safety policies apply."[107] He testified that, in his experience, "[a] categorical denial to allow any third party involvement in installation of PGE infrastructure seems impractical and could impose an overly burdensome requirement and even potentially a risk to safety and/or system function.[108]

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103 REC/100, Lowe/5.
104 REC/100, Lowe/17.
105 REC/100, Lowe/5-6.
106 Sandy River/200, Goertz/3.
107 *Id*.
108 Sandy River/200, Goertz/4.

Assertion 7: PGE has flatly, without justification, denied use of third-party assistance with interconnections, even though doing so would be practical and benefit all parties involved.

Mr. Snyder has testified that PGE has flatly denied his requests, without adequate justification, to use a third-party, even though PGE had previously expressed openness to the idea.[109] He also testified that his issues with respect to Sandy River's interconnection could be mitigated if PGE were to agree to allow him to use a third-party's assistance, and would lessen the strain on PGE's resources by allowing him to take on some of the work, and that it would resolve numerous problems and take the pressure and possible risk off PGE for its failure to perform adequately and timely.[110] Mr. Snyder also testified that he has already agreed that any third-party consultant and the work performed would be subject to PGE's oversight and approval,[111] and that he is open to a contractual arrangement where the third party will have an obligation to conduct its work in a safe, reliable, timely, and cost-effective manner, and in a way that will allow PGE to easily maintain its system.[112] He testified that under the Large Generator Interconnection Procedures, PGE already is required to have a process in place to allow third-parties to work on its system, and that he would be open to discussing using the same process and safeguards that PGE has already developed.[113]

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109 Sandy River/100, Snyder/4. Mr. Snyder testified that on or about May of 2016, he attended an in person meeting with PGE staff to discuss the interconnections for a number of projects, and the use of third-party consultants. He testifies that PGE staff told him that that third-party consultants could be used to perform some of the interconnection construction, so long as they were approved by PGE. Sandy River/100, Snyder/8-9.

110 Sandy River/100, Snyder/14.

111 Sandy River/100, Snyder/15.

112 Sandy River/100, Snyder/16.

113 Sandy River/100, Snyder/17.

As is likely obvious from the above, if these facts are construed in the manner most favorable to Sandy River, then PGE's actions clearly have been in violation of its duties under the Commission's rules, its obligations to Sandy River as an interconnection customer, and its duty to act in a reasonable manner. Thus, PGE's motion for summary judgment should not be granted to the extent PGE intends it to cut off any of Sandy River's claims regarding PGE's actions.

D. The Commission Should Deny PGE's Request to Resolve Its Legal Argument Through Summary Judgment Because PGE's Motion Will Not Resolve Any of the Legal Issues in the Case In Any Event

Sandy River should not be required at this stage to put forth all of its legal arguments in this case. That is normally deemed appropriate only during the briefing stage of the case, after the factual record is established. However, Sandy River can articulate at least several of the legal questions that likely will be presented in this case, and feels compelled to do so given PGE's assertion of what Sandy River's "core" legal arguments are. These stand in contrast to PGE's narrowly-crafted legal question regarding a unilateral option to require third-party assistance with interconnections under the rule, and show that PGE's motion for partial summary judgment will not be dispositive of the questions in this case, even if granted by Commission.

Some of the likely legal issues include:

- Whether there is a general duty of reasonableness that applies to utilities' activities in administering its interconnection program;
- If so, does PGE act reasonably when it fails to administer a workable interconnection process, and instead provides erroneous and unreliable information to an interconnection customer?
- Does the Commission have broad enough authority to direct a utility to take measures to mitigate harm it has caused to an interconnection customer

through its unreasonable administration of its interconnection process, including an extension of the interconnection customer's Commercial Operation Date in its PPA?

- Would the use of a third-party by an interconnection customer that is aggrieved by a utility's unreliable interconnection process be an appropriate and reasonable remedy to the situation?

- Can a utility fail in its interconnection obligations, and still refuse to allow the use of third-party in those circumstances? Did the relevant rulemaking show an intent for the rule to have a different result?

- Can a utility be an unreliable counterpart in the interconnection process and still enjoy a sole monopoly over the planning and construction of interconnections by generators that are entitled to sell their power to the utility? Does the existence of a rule that allows use of third-parties represent a remedy that the Commission may impose in such an instance?

- Does a utility give undue preference to itself, or unlawfully discriminate against its interconnections customers when it refuses to reasonably allow those customers to utilize a third-party to design and construct interconnection facilities, subject to the public utility's oversight and approval, as is allowed by rule?

- Does a utility give undue preference or unlawfully discriminate against its interconnections customers when it allows interconnection customers to hire third parties in some circumstances but not other similar circumstances?

- Is PGE providing undue preference or unlawfully discriminating between interconnection customers if it is allowing some interconnection customers to hire third parties but not others.

- What information should a utility be required to provide to an interconnection customer in its studies?

- When should a utility be required to pay penalties for its unreasonable interconnection actions?

This by no means is a definitive or final articulation of the legal questions that may be appropriate to answer in this case. However, as these questions show, PGE's statement of the legal question posed in its motion for partial summary judgment does not

wholly dispose of any of them.[114] Instead, PGE's asserted legal position would establish, if granted, that Sandy River cannot unilaterally insist on the use of a third-party through reliance on the rule language—but it would not address whether use of a third-party is a reasonable remedy for situations where an interconnection customer has demonstrated that it is aggrieved by an unworkable utility interconnection process. Additionally, nearly all of the questions described above involve the resolution of factual questions regarding PGE's behavior, which calls for the completion of testimony, discovery, and the right to cross-examine witnesses.

E. Proposing a "Generic Docket" to Address a Complaint Is Not Appropriate or Fair to Complainants

In its motion for partial summary judgement, PGE states that "[i]f REC and Sandy River want to advocate for a rule change, the issue should be examined in a new general policy docket focusing on interconnection, and not in this case-specific proceeding."[115] This recommendation is inappropriate, and should be disregarded by the Commission.

First, Sandy River is not arguing for a rule change. Second, as a complainant, with legitimate and immediate business interests with PGE, Sandy River is entitled to rely on the complaint process to litigate disputes it has with the utility and which it cannot otherwise resolve. And, it is entitled to have the Commission determine the reasonableness of PGE's actions, and how it will remedy any harm demonstrated by

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114 PGE's precise arguments in its Motion for Partial Summary Judgment are also, inconsistent or at least unclear. For example, PGE argues that "[t]he rules do not permit the relief that Sandy River seeks, and therefore Sandy River's second claim should be denied as a matter of law." PGE's Motion for Partial Summary Judgment at 1. But, the rules clearly do not *prohibit* the remedy that Sandy River seeks in this case.

115 PGE Motion for Partial Summary Judgment at 23.

Sandy River. Sandy River should not be required to subject its issues to a "generic docket," which would be costly, attenuated, and lengthy, and would do nothing to provide a timely resolution of Sandy River's complaint.

Finally, PGE's argument that a generic docket is necessary to resolve Sandy River's request is contrived in any event. PGE argues that a generic docket would be the more appropriate forum for Sandy River because "[i]nterested parties need to be able to discuss this issue in more depth, and determine whether there is a functional way for successful interconnection customers to offer input into the use of third-party contractors in the interconnection process."[116] Yet, PGE ignores the facts that: 1) other utilities in Oregon *already allow* this process, so it is not a mystery whether it can be done; 2) PGE itself is already *required* to allow third-party contractors in the interconnection process for large generators, and thus should already have processes in place to allow it; and 3) the topic of using third-parties to assist with interconnections was already reviewed by the Commission in AR 521. As PGE is well aware, the current rules were adopted in that proceeding, and placed conditions on the use of third-parties, by making it subject to agreement, which Sandy River asserts needs to be pursued with reasonableness and in good faith.

F. Sandy River Should be Given an Opportunity for a Sur-Reply, Given the Unusual Posture of PGE's Motion

Although non-moving parties are not normally granted an opportunity for the last word in motions practice, there are unique considerations in this instance that justify Sandy River having an opportunity to respond to PGE's Reply to this Response. First,

116 *Id.* at 24.

complainants normally have a right to respond to the defendant's arguments against their claims. By guessing at a Sandy River's legal position, and seeking to dispose of it through summary judgment, however, PGE is essentially shifting the order in which legal arguments are reviewed. It does this by forcing Sandy River to put forward legal argument about what it will *actually* assert in this case, to contradict PGE's *assertions* about what it believes Sandy River will argue. Sandy River should not be given only one chance to put forward its legal arguments, without any chance to respond. Thus, the ALJ or Commission should grant Sandy River an opportunity to address PGE's response, even if it is limited to only addressing PGE's arguments made in response to the arguments that Sandy River has proffered for the first time in its Response.

Second, PGE has made contradictory and shifting assertions of what it is seeking to have decided in its motion for partial summary judgment. This lack of clarity about what PGE is actually seeking justifies Sandy River having a chance to respond to any further clarification that PGE provides in its reply. Specifically, in its motion for summary judgment, PGE states:

> Sandy River's second claim should be denied as a matter of law. Resolving this issue now, before proceeding any further with discovery or the current procedural schedule for testimony and a hearing, will simplify and expedite the resolution of this proceeding.[117]

Thus, PGE asserts that its motion will only partially resolve the case, by disposing of Sandy River's second claim for relief. As described above, in its reply to Sandy River's response to PGE's motion to stay the case, however, PGE asserted a different goal, arguing that this motion for partial summary judgment will dispose of *all* of Sandy

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117 *Id.* at 1.

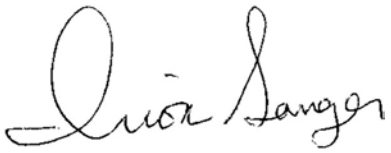
River's claims.[118] Because such an outcome is not apparent from PGE's motion for partial summary judgment, Sandy River should be provided an opportunity to respond to any assertions by PGE in its Reply to this Response, where it may argue for a broader effect of its motion for summary judgment than was actually described by the company in its motion.

V. CONCLUSION

For all of the reasons described above, PGE's motion for partial summary judgment should be denied.

Dated this 26th day of March 2019.

Respectfully submitted,



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[118] PGE Reply in Support of Motion for Stay at 2-3 (emphasis added).

BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

SANDY RIVER SOLAR, LLC **Complainant,**	)	**CASE NO. UM 1967**
vs.	)	**RENEWABLE ENERGY COALITION'S RESPONSE TO PGE'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
PORTLAND GENERAL ELECTRIC COMPANY **Defendant.**	)	

INTRODUCTION AND BACKGROUND

The Renewable Energy Coalition ("REC" or "Coalition") files this Response to Portland General Electric Company's ("PGE's") February 27, 2019 Motion for Partial Summary Judgment. For the reasons described below, REC requests that the Commission deny PGE's motion.

In this proceeding, Sandy River Solar LLC ("Sandy River") is litigating a complaint it filed against PGE in response to difficulties it has faced in the interconnection process associated with its sale of power to PGE as a qualifying facility. Sandy River alleges that PGE has acted unreasonably in missing deadlines, providing inaccurate and untimely information, and that Sandy River is unable to rely on the information provided by PGE. Sandy River seeks relief from the Commission, including an order allowing it to hire a third-party to assist it with its design and construction of the interconnection facilities. This opportunity for a third-party's assistance is presented in the Commission's administrative rules at OAR 860-082-0060(8)(f), which states that "[a] public utility and an applicant [for interconnection] may agree in writing to allow the

applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight and approval." Sandy River seeks to obtain such an outcome as a potential solution to some of the difficulties it has faced and continues to face with PGE. Sandy River also alleges that PGE has unlawfully discriminated against it by its actions, and seeks an order addressing PGE's failures to administer a workable interconnection process for its project.

REC intervened in this proceeding because of its strong interest in utilities' actions regarding the interconnection of qualifying facilities. REC is committed to ensuring that utilities provide a fair and functional process for qualifying facilities to interconnect to their systems. REC has provided evidence in this proceeding on various topics, including the background and intent of the Commission's rules on third-party assistance with interconnections in the form of testimony from John Lowe, who was closely and personally involved in the rulemaking proceedings.

On February 27, 2019, PGE filed a Motion for Partial Summary Judgment, and a Motion to Stay Discovery and Procedural Schedule. Through its motion for partial summary judgment, PGE seeks a Commission order resolving a portion of Sandy River's complaint as a legal matter. PGE asserts that there are no material facts at issue with respect to that portion of Sandy River's complaint, and that summary judgment is therefore appropriate.

On March 19, 2019, over REC's and Sandy River's objection, the Administrative Law Judge issued an order granting PGE's motion for stay, in part. The effect of the Commission's order is that Sandy River's case is essentially halted until PGE's motion for summary judgment is resolved.

The Commission should reject PGE's motion for partial summary judgment. PGE's motion for partial summary judgment will not actually resolve key issues in the case, is founded upon an unreasonable and inaccurately narrow view of the case, and PGE overlooks the numerous factual issues that must be resolved in order to determine the outcome of Sandy River's complaint. PGE's motion for partial summary judgment seeks a legal determination that is completely unsupported in PGE's motion, and PGE's requested Commission determination is fundamentally contrary to the purpose of the rules developed by the Commission, which were intended to give a small generator an opportunity for relief from the type of utility behavior to which Sandy River appears to be subject in PGE's interconnection process.

ARGUMENT

I. This Case Involves Much Broader Issues Than the One Question PGE Seeks to Determine Through Its Motion for Partial Summary Judgment

In PGE's motion for partial summary judgment, it asserts that the "core" issue in the case is whether an interconnection customer has a unilateral right to hire a third-party consultant to construct the needed facilities and upgrades. *PGE's Motion for Partial Summary Judgement* at 1, 9. PGE argues that this question can be resolved without reference to the facts, and is determined solely by a review of OAR 860-082-0060(8)(f) itself. *Id*. at 4.

PGE's assessment of the core issue in the case is misguided, however, because the factual record has not been developed in this case, and because PGE seems to misunderstand Sandy River's complaints. What PGE overlooks specifically is that the issues in this case are much broader than the issue PGE asserts is the core of Sandy

River's case. Rather than solely asserting that it has a right to use a third-party's assistance with its interconnection pursuant to the Commission's rules, Sandy River's case involves complaints that PGE's actions have been unreasonable in many additional respects, which support the need for use of a third party's assistance. PGE's denial of Sandy River's ability to use a third-party's assistance as a remedy to the challenges it has experienced is only one element of PGE's pattern of unreasonable conduct. Thus, rather than being resolved through a reference to OAR 860-082-0060(8)(f) alone, the Commission must review *all of* PGE's actions to determine whether PGE has acted reasonably and lawfully.

REC intervened in this case because it views the "core" issue as being that PGE has a pattern and practice of using the interconnection process to delay, provide inaccurate information, charge customers for work PGE did not actually perform, and impose other unreasonable barriers on qualifying facilities. REC provides some examples of how these problems can harm interconnection customers.

For example, an interconnection customer cannot decide whether to invest their capital in a project or an interconnection if the cost estimates are wildly inaccurate. If cost estimates double from study to study, then a qualifying facility will have spent money developing a project that it believed was economic, but which is suddenly no longer economic. Similarly, if cost estimates drop significantly, then the interconnection customer may be pleased, but they would have preferred to know that information up front. An interconnection customer may not have even elected to move from the early to the later studies if the initial cost estimates are too high.

PGE's failure to abide by its schedules when performing studies and completing work is having a huge impact upon interconnection customers like Sandy River. Qualifying facilities need to meet commercial operation dates in the power purchase agreements or face damages and the loss of financing (investors generally do not want to finance projects that are in default or risk of termination). After years of declining solar costs, there is a risk of cost increases associated with more difficult permitting, the gradual reduction in the investment tax credit, higher cost of lending, higher tariffs, and a tightening labor market. Delays cost real money, and can make the difference between an economic and non-economic project.

REC understands that this is an individual qualifying facility complaint against PGE, and that a broader investigation on interconnection matters is warranted. REC is not seeking to raise all interconnection issues in this case, but believes that PGE's overall interconnection process is directly relevant to the relief that Sandy River is requesting – the Commission's assistance to allow it to timely interconnect in a low-cost manner. The reason why Sandy River is seeking particular relief is relevant to why the Commission should allow Sandy River to mitigate its challenges through the assistance of a third-party, subject to PGE's reasonable oversight.

The Commission should be mindful that it is regulating a monopoly utility provider that has an economic interest in Sandy River not being able to construct its generation facility. REC believes that utilities will always have a strong role in the distribution sector, should always have the ultimate responsibility for the safe interconnection of electric generation, and that there is some work that interconnection customers should not perform. But the Commission should be mindful that PGE would

not have entered into a power purchase agreement with a small 1.85 megawatt solar project owned by a local Portland small business except for the Public Utility Regulatory Policies ("PURPA"). Sandy River is exactly the type of company that Congress and the Oregon legislature sought to encourage. The Commission has a responsibility to protect Sandy River under both PURPA and the Commission's general statutory obligations to protect customers from PGE's unjust and unreasonable exactions and practices and prevent PGE from giving anyone unreasonable preference or advantage. ORS 756.040; ORS 757.325.

Finally, REC notes that Sandy River's Prayer for Relief has eleven requests for relief, including requesting that the Commission require PGE to provide Sandy River with information, timely complete studies, extend its commercial operation date, impose penalties, and grant "any other such relief as the Commission deems necessary." *Sandy River's Complaint* at 26 (Aug. 24, 2018). Sandy River is asking the Commission to provide relief when PGE is not living up to its obligations to Sandy River and other interconnection customers. While the primary request is that Sandy River be allowed to hire a third party, there are other ways in which the Commission can assist Sandy River. PGE should not be permitted to cause irreparable damages to a wide swath of interconnection customers, including Sandy River, without facing any consequences.

Sandy River's complaint, therefore, is not susceptible to PGE's motion for partial summary judgment because the factual record has yet to be developed to establish that PGE has acted unreasonably and prove that the Commission should grant Sandy River relief, including but not limited to:

> 1) provid[ing] complete interconnection studies that would allow Sandy River Solar or a third-party consultant to understand and properly evaluate the need, types and cost of any required interconnection upgrades; and 2) allow[ing] Sandy River Solar, subject to PGE's reasonable oversight, to hire qualified and experienced third-party consultants to properly and safely construct the required interconnection upgrades.

Sandy River's Amended Complaint at 2 (Sept. 2, 2018).

II. The Commission Should Reject PGE's Artificially Narrow View of the Case, and Should Instead Allow Sandy River and REC to Demonstrate the Factual Basis of Their Positions

Sandy River has alleged actions by PGE that are important for this Commission to review, and the types of actions that are especially of concern to REC. Specifically, Sandy River alleges that PGE has acted unreasonably toward it by failing to diligently perform its duties under the Commission's rules for small generator interconnections, and that PGE's actions have made its interconnection process unworkable and unreliable. The Commission should allow for a full review of the facts concerning PGE's behavior with respect to Sandy River, its actions with respect to other projects, the reasons for which the Commission's rules provide an opportunity for using third-parties to assist with interconnections, and the reasons why PGE has denied Sandy River that opportunity in this case.

PGE, on the other hand, invites the Commission to take an exceedingly narrow and inaccurate view of the issues in the case. REC sees this as the manifestation of a pattern, where PGE has sought over and over again to narrow the scope of the case in an apparent effort to keep the Commission from reviewing the reasonableness of its implementation of the interconnection process. PGE previously argued, for example, that REC should not be allowed to even intervene in the proceeding because the dispute relates only to a "specific interconnection dispute between PGE and Sandy River," and

that because REC's members already have interconnection agreements, they have no interest in the proceeding. *PGE's Objection to REC's Intervention* at 9 (Feb. 8, 2019). PGE has also sought to limit parties' access to its other interconnection studies, even though Sandy River has alleged a larger problem with PGE's interconnection department and the company's overall approach to interconnections, claiming that those documents are irrelevant to the narrow dispute in this case. *See Complainants' Motion to Compel* at 8-12 (Feb. 28, 2019). Now, PGE seeks to narrow the case so much that it tries boil it down to a single "core" legal issue of whether OAR 860-082-0060(8)(f) provides a unilateral right of a developer to insist on the use of a third-party to assist with interconnection, over the utility's objection.

PGE thus hopes to prevent the Commission from reviewing PGE's conduct in the interconnection process by characterizing Sandy River's complaint so narrowly as to raise no factual issues whatsoever. PGE's picture of the case is inaccurate, however, and the Commission should reject PGE's motion. The case includes claims much broader than PGE states in its motions, and a factual record is necessary in order to review those claims before they can be decided.

PGE's efforts to narrow the scope of the case appear to be calculated to avoiding a Commission review of PGE's actual actions with respect to small generator interconnections. PGE argues, for example, that the facts are not relevant, because it should be allowed as a legal matter to refuse requests to allow third-party assistance "under any circumstance," and that it has "full authority and discretion to dictate the use of third-party contractors." *PGE's Motion for Summary Judgment* at 11, 17. This effort to avoid a review of PGE's actions, including its refusal to allow third-party assistance to

anyone, is concerning. The Commission should also be alarmed, and recognize that PGE's efforts are in contravention of the Commissioners' stated desire to be able to review whether utilities are abusing the interconnection process to the detriment of qualifying facilities. This was expressed, for example, at the Commission's February 26, 2019 public meeting, where Commissioner Tawney noted, during the Commission's consideration of the scope of Docket No. UM 2001, that many of the parties have expressed the "sense that the utilities are not following the rules" when it comes to interconnection. *See* Archive of Video Stream of OPUC Public Meeting at 1:00:33 (Feb. 26, 2019). The Commissioner asked Staff how they think this could be evaluated, and then expressed:

> In the interconnection transparency work that we do under this interim step, if there are ways that we can bring light to clarify this question of whether they're following the rules or not, I would encourage that.

Commission Chair Decker also weighed in, discussing the idea of "metrics reporting" for interconnections, and asking whether that would be helpful in the Commission's evaluation of how the interconnection process is working. Commissioner Tawney supported the idea, expressing that:

> The more transparency we have, the more we can get to the core [] of the problem, so that we can create an actually productive solution.

Given the Commission's desire to review whether utilities are faithfully carrying out a reasonable implementation of the interconnection process, it would be counterproductive to grant PGE's motion for summary judgement, rather than get to the heart of whether PGE has been abusing the interconnection process for Sandy River. It is through complaint cases like Sandy River's where the Commission can see the real-world

impact and difficulties that are caused by a utility's administering of the interconnection process in a way that discourages and delays qualifying facilities. To be clear, REC does not want to litigate all interconnection related issues in this proceeding, but only those that bear upon the delays relevant to Sandy River. Instead, REC wants to ensure that this one particular interconnection customer is provided timely access to justice so that it can obtain practical and meaningful relief from an abusive monopoly.

III. PGE's Motion Should Be Denied Because Its Proposed Interpretation of the Rule is Contrary to OAR 860-082-0060(8)(f)'s Language and the Rulemaking Record

In its motion for partial summary judgment, PGE argues that it has complete discretion, under any circumstance, to deny an interconnection customer's request to use a third-party's assistance to construct the required interconnection facilities because the language of OAR 860-082-0060(8)(f) says that the "public utility and an applicant may agree in writing to allow the applicant to hire a third-party." *PGE's Motion for Summary Judgment* at 10. PGE reads the term "may" as giving it total discretion to deny such requests without justification.

PGE's interpretation is unwarranted and unfounded. PGE's reading of the rule disregards the entire context of the rule, the rulemaking record, and the Commission's statements when it adopted the rule.

As described in the testimony of REC's witness John Lowe, the purpose of 860-082-0060(8)(f), as reflected in the rulemaking record, was to give small generator interconnection customers, who could be maltreated by the utility in the interconnection process, an opportunity to remedy their situation through hiring a third-party to both

study the interconnection, and also to construct the required facilities. REC/100, Lowe/6-9.

Several parties including Sorenson Engineering, on whose behalf Mr. Lowe appeared, the Energy Trust of Oregon, and Renewable Northwest, had identified the need for third-parties to be able to assist interconnection customers. This was seen as necessary due to the propensity of utilities to delay the process, miss deadlines, or otherwise act unreasonably toward interconnection customers. *See, e.g.,* REC/101 (containing Comments of Energy Trust of Oregon in Docket No. AR 521); REC/102 (containing Comments of Renewable Northwest Project).

PGE also expressed general support for the proposition that third-parties could serve a useful function in the interconnection process, but raised certain concerns about the conditions that should attend such an option. PGE explained that it would need to review the contractors to ensure that they were qualified, and they would need a process by which they could review the work done by the contractor. *See* REC/104 (containing PGE's Comments in AR 521).

At that time, PGE agreed that it would allow third party contractors, but PGE has now changed its position. Resolving what PGE believed at the time is a factual question which should not be resolved through summary judgment.

The Commission then adopted rules which accommodated PGE's requests by requiring that the work be subject to utility oversight, and an agreement where reasonable conditions could be imposed. But the rules it adopted were still intended to give an opportunity for small generator interconnection customers to be able to use a third-party's assistance subject to these conditions, and it was clear that the Commission expected

utilities to approach the issue in a reasonable manner – not to grant the utility the unilateral discretion to arbitrarily refuse to even consider use of a third-party contractor for whatever reason the utility creates or even for no reason at all.

In adopting the rules, the Commission explained that "[d]uring the rulemaking proceedings, the participants agreed that a public utility and an applicant to interconnect a small generator facility could agree to allow the applicant to hire third-party contractors to complete any interconnection facilities and system upgrades required by the interconnection, at the applicant's expense and subject to public utility oversight and approval." *In Re Rulemaking to Adopt Rules Related to Small Generator Interconnection*, Docket No. AR 521, Order No. 09-196 at 4. The Commission also commented on the utilities' oversight provisions, stating that utilities could even redo work of a third-party, if a utility reasonably concluded that this was necessary. *Id.* The Commission thus recognized 1) that the parties had agreed that they could come to terms under which applicants could use third-parties, and 2) that the use of third-parties would be subject to public utility oversight and approval.

PGE now, in its motion, asserts a much more hollow view of the rules, and seeks to characterize them as an authorization for the utility to decline the use of third parties for any reason. PGE's interpretation would stand the entire purpose of the rules on its head, and thus the Commission should reject its over-reliance on the word "may" and its misinterpretation of the context of the rule. PGE's interpretation ignores the much more straight-forward reason for the rule's use of the word "may," which is that no one can forecast if parties will reach agreement on any matter, (thus they *may* agree) but that the

Commission nevertheless intended for parties to at least work in good faith toward reaching such an agreement if possible.

In its motion, PGE seeks to characterize certain statements by REC, in 2012, as an admission that the rule does not require PGE to allow the use of third-parties under any circumstance. PGE argues that in UM 1610, a docket that followed the Commission's adoption of OAR 860-082-0060(8)(f),

> REC stated that it wanted the Commission to consider a "potential solution" to concerns that REC had with respect to the interconnection process. REC's solution was "allowing QFs the ability to use and contract with utility-approved third parties for portions of the interconnection work, from studies to construction." REC stated further that it wanted the Commission to "consider specific and limited revisions to its interconnection rules, practices, and policies" that would broaden that role. In 2012, REC knew that the current rules did not permit QFs to elect any role for third-party contractors in the interconnection process. That is why REC advocated for a rule change.

PGE's Motion for Partial Summary Judgment at 23-24.

These statements, however, show only that REC would indeed prefer it if qualifying facilities had a *stronger* option than the current rule to elect to have a third-party conduct interconnection work, without oversight or the need to negotiate with the utilities. The actual language from which PGE quotes demonstrates that REC was committed to finding ways to address the continuing problem of utilities' abusing the interconnection even more directly, and that such improvements to the use of third-parties would do so.

Additionally, REC's comments also show that despite abuses by the utilities of the interconnection process, REC determined that it could address those issues more effectively by gaining greater access to third-party assistance. REC's comments stated:

> Another interconnection issue inter-related to the PPA contract process is the use of third-party contractors. There is a wide variety of interconnection-related issues in Oregon that allow the utilities to use their leverage in the interconnection process to force concessions in the PPA contract negotiation process or otherwise harm the QFs. These include inaccurate cost and time estimates, additional requirements, amounts for progress payments, timing, and final accounting. In lieu of raising these issues, REC and other parties agreed to focus on a potential solution: allowing QFs the ability to use and contract with utility-approved third parties for portions of the interconnection work, from studies to construction. Typically, such approved contractors are used to perform interconnection work but under the direction of the utility. Having the QF contract directly with the approved third-party contractor can provide the QF with the essential control of the costs, the time for completion, and meeting its power purchase obligations. Direct contracting with third parties can also limit the utilities' exposure to excessive cost claims and failure to meet critical deadlines. * * * New QFs and many long-standing older QFs that need to update their interconnections cannot enter into PPAs without a fair and timely interconnection process, and the Commission should consider specific and limited revisions to its interconnection rules, practices, and policies to ensure that the interconnection and PPA processes work as seamlessly as possible.

Declaration of Molly K. Honore in Support of PGE's Motion for Partial Summary Judgment, Ex. 8 at 8 (containing REC Resp. to Disputed Issues in Docket No. UM 1610).

On the whole, REC's comments merely demonstrate that REC remained committed to addressing interconnection issues and continued to seek improvements to the rule regarding use of third-parties. REC's comments are in no way contradictory to its position in this case, that PGE must approach the topic of requests to use third-parties to assist with interconnections in good faith and reasonably. REC's more recent requests for a better remedy than the current rule only highlights how much more disappointing PGE's current position is, that the rules provide *no* remedy for interconnection customers because of its determination to treat the rules, contrary to their purpose, as an authorization to ignore the issue altogether.

IV. PGE's Motion for Partial Summary Judgment Should be Denied Because It Does Not Meet the Legal Standard of Showing PGE is Entitled to Dispose of Sandy River's Claim as a Matter of Law

Under ORCP 47C, a motion for summary judgment can only be granted if the moving party is found to be entitled to prevail "as a matter of law," and that "no genuine issue as to a material fact exists." That rule also specifies that an issue of material fact exists if, viewing the evidence in the manner most favorable to the adverse party, a reasonable person could find in favor of that party. *Id*. Given that, as described above, PGE's interpretation of the rules is in contravention of the purpose of the rules themselves, and would be contrary to the Commission's stated view of the operation of the rules, its motion for summary judgment cannot be sustained.

Instead of disposing of Sandy River's claims through summary judgment, the Commission should instead allow for a review of PGE's actions, including its refusal of Sandy River's request to use a third-party's assistance, and determine whether PGE's actions have been reasonable and in good faith. REC believes that the facts established to date, and those that will be established through this proceeding, will prove that PGE's actions have been unreasonable or not in good faith. In any event, the existence of disputed issues of material fact regarding PGE's conduct requires the Commission to deny PGE's motion for partial summary judgment.

CONCLUSION

For all of the reasons explained herein, PGE's Motion for Partial Summary Judgment should be denied.

DATED this 26th day of March 2019.

Respectfully submitted,

RICHARDSON ADAMS, PLLC

/s/ *Gregory M. Adams*

_____

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April 4, 2019

Via Electronic Filing

Public Utility Commission of Oregon - Filing Center
PO Box 1088
Salem, OR 97308-1088

Re: UM 1967 - Sandy River Solar, LLC v. Portland General Electric Company

Attention Filing Center:

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

Thank you for your assistance.

Very truly yours,

Jeffrey S. Lovinger

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1967

SANDY RIVER SOLAR, LLC, Complainant, vs. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	**PORTLAND GENERAL ELECTRIC COMPANY'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Pursuant to OAR 860-001-0420(5), Portland General Electric Company ("PGE") files this reply in support of its motion for partial summary judgment against the second claim for relief in the first amended complaint, filed by Sandy River Solar, LLC ("Sandy River") on September 27, 2018.

I. REPLY

A. PGE'S MOTION FOR PARTIAL SUMMARY JUDGMENT SEEKS A RULING ON THE PROPER INTERPRETATION OF OAR 860-082-0060(8)(F).

Sandy River seeks to make PGE's motion for partial summary judgment, and this case as a whole, more complex than necessary. The following facts of the case are undisputed:

PGE completed the interconnection study process required by the rules[1] and determined that the interconnection will require PGE to: (1) construct a service and metering package;[2] (2) construct a transfer trip protective scheme with a fiber optic communication channel;[3] and (3) complete the replacement of relays at the substation under higher-queued application SPQ0070 before the Sandy River interconnection can be placed in-service.[4] PGE has informed Sandy River that the required work on the Sandy River interconnection (construction of a service and metering

[1] The first amended complaint has alleged, and the answer admits, that PGE issued the system impact study report on January 7, 2018, a facilities study report on April 25, 2018, and a revised facilities study report (to address Sandy River's questions about the original facilities study) on July 27, 2018. Am. Compl. ¶¶ 15, 26, 70 (Sept. 27, 2018); Answer ¶¶ 15, 26, 69-70 (Oct. 9, 2018).

[2] Compl., Att. C at 5 (Revised Facility Study and Redline Revised Facility Study: "PGE will design, procure, install and maintain the new service conductor and metering equipment.").

[3] *Id.* (Revised Facility Study and Redline Revised Facility Study: "A transfer trip protection scheme will also be designed, installed and maintained by PGE.).

[4] *Id.* at 6 (Revised Facility Study and Redline Revised Facility Study: "The construction completion date of this Sandy River Solar project is contingent on the construction and completion of a higher queued project."); Answer at 2, ¶ 66 and Ex. J; see also Declaration of Molly Honoré in Support of PGE's Mot. for Partial Summ. J. ("Honoré Decl."), Ex. 1 at 6 (PGE Resp. to Data Request 11: "As PGE has previously explained to Sandy River Solar, most of the time provided for in the estimated construction schedule is to allow time for higher queued interconnection project SPQ0070 to be completed. That project includes the installation of new relays at the substation that are a necessary requirement for the Sandy River interconnection.") and 8 (PGE Resp. to Data Request 14: "… [T]he SEL-487E transformer relay requirements being installed under SPQ0070 must be complete for Sandy River Solar to interconnect. The estimated construction schedule proposed as part of the Revised Facilities Study includes time to allow the completion of such work as part of the interconnection of SPQ0070, which is a necessary requirement for the Sandy River Solar interconnection.").

package and of the transfer trip protective scheme) will take approximately three weeks to complete,[5] and that the higher-queued work at the substation is scheduled to be in-service on February 17, 2020.[6] Although Sandy River has alleged that PGE took too long to produce system impact and facilities study results, and that the studies do not contain information required by the rules (PGE has denied that it violated the rules), Sandy River has not contested PGE's conclusion that the interconnection facilities and system upgrades require a new service and metering package and a transfer trip protective scheme.[7]

Sandy River has not requested that it be allowed to hire a third-party consultant to conduct the interconnection studies. Rather, Sandy River has asked PGE to agree to allow Sandy River to hire a third-party consultant to construct the interconnection facilities and system upgrades required by the facilities study.[8] It is now asking the Public Utility Commission of Oregon ("Commission") to order PGE "to allow Sandy River to hire a third-party consultant to complete its interconnection facilities and system upgrades."[9]

[5] Answer ¶ 66 and Ex. H at 1 (June 6, 2018, email from Jason Zappe to Troy Snyder).
[6] *See* Honoré Decl., Ex. 1 at 4 and 10 (PGE Resp. to Data Request 1 and Attachment 001-G) (indicating that SPQ0070 has a scheduled in-service date of Feb. 17, 2020)).
[7] If Sandy River intended to argue that the requirements for a new service and metering package and a transfer trip protective scheme are inappropriate, then Sandy River would have needed to state such a claim in its first amended complaint, just as Dunn Rd. Solar, LLC ("Dunn Rd.") did in its complaint in Docket No. UM 1963. The Dunn Rd. case involved the same feeder and substation as is involved in this case. In the Dunn Rd. case, the complainant alleged not only that the study process took too long and that the study results were incomplete but also that the required interconnection facilities and system upgrades—a new service and metering package, a transfer trip protective scheme with fiber optic communication channel, and new relays in the substation—were inappropriate and unnecessary. *See Dunn Rd. Solar LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1963, Compl. ¶¶ 96-113 (Jul. 26, 2018). The complainant also sought, and PGE answered, discovery requests regarding the need for the required interconnection facilities and system upgrades. If Sandy River sought to challenge the appropriateness of the interconnection facilities and system upgrades required for its interconnection, it needed to allege that they are inappropriate, just as Dunn Rd. did, and PGE would expect that Sandy River would have also sought discovery on the rationale behind the required facilities and upgrades, just as Dunn Rd. did. But Sandy River has done neither of these things because it does not challenge the appropriateness of the required service and metering package and transfer trip protective scheme; rather, Sandy River seeks an order allowing it to construct those facilities and upgrades.
[8] Answer, Ex. L at 2 and Ex. N at 1 (two letters from Sandy River's counsel to PGE dated July 19, 2018, and August 2, 2018, respectively, both requesting that PGE agree to allow Sandy River to hire a consultant to construct the required interconnection facilities and system upgrade pursuant to OAR 860-082-0060(8)(f)).
[9] Am. Compl. at Prayer for Relief ¶ 7.

Sandy River argues that PGE has unreasonably refused to agree to allow Sandy River to hire a consultant to construct the needed facilities and upgrades.[10] But Sandy River has raised no relevant arguments why it is allegedly unreasonable for PGE to have declined to agree to allow Sandy River to construct the required facilities and upgrades. Sandy River's allegations that PGE has missed interconnection study deadlines in this case, or in other cases, does not make it unreasonable for PGE to take the position that it will construct the required interconnection facilities and system upgrades. Likewise, Sandy River's allegations that PGE's study results are incomplete in this case or any other case, does not make it unreasonable for PGE to take the position that it will construct the required interconnection facilities and system upgrades.

PGE's motion for partial summary judgment is predicated on the position that the rules do not allow an interconnection customer to veto PGE's decision to construct the required interconnection facilities and system upgrades itself. The small generator interconnection rules clearly establish that the utility will construct the required interconnection facilities and system upgrades.[11] The rules also allow the utility to use its own consultants to construct the facilities and upgrades.[12] And the rules allow, but do not require, the utility and the interconnection customer to agree that the customer may hire a consultant to construct the required facilities and upgrades.[13] There is no "reasonableness balancing test" established by the rule that requires PGE to engage in an analysis as to whether it would be "more reasonable," in some unspecific way, for the interconnection customer, rather than the utility, to construct the facilities and upgrades.

[10] Am Compl. at 4, ¶¶ 120-21, 126-31.
[11] OAR 860-082-0035(2) and (4).
[12] OAR 860-082-0060(8)(f) ("The public utility may contract with a third-party consultant to complete the interconnection facilities and system upgrades identified in the facilities study.").
[13] *Id.* ("A public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight and approval.")

Even if there were a "reasonableness balancing test," the complaint does not allege facts sufficient to support a claim to compel PGE to agree to allow the customer to construct. It is undisputed that construction will take approximately three weeks after completion of the higher-queued work. None of Sandy River's allegations of missed deadlines in the study process or of inadequate study results support the conclusion that PGE cannot construct the required, relatively simple, interconnection facilities or system upgrades on PGE's own system within approximately three weeks, or that a customer consultant could somehow do so more quickly or more cost effectively. Rather, as PGE has pointed out to Sandy River in its response to Data Request No. 002, proceeding with construction by a consultant hired by Sandy River would make this interconnection more time consuming, costly, and inefficient.[14] PGE and Sandy River would need to negotiate and enter into one or more additional contracts to govern Sandy River's use of a third-party consultant, to protect PGE and its system, and to allow PGE to exercise sufficient control and oversight over the third-party consultant's work—all tasks much more efficiently conducted if PGE were to construct the facilities and upgrades or hire a third-party consultant itself.

It is PGE's position that the small generator interconnection rules, as adopted by the Commission, do not allow the interconnection customer to compel the utility to allow the customer to construct facilities or upgrades on the utility's system, which is the remedy that Sandy River seeks here. Sandy River states in its response that it does not seek to change the small generator interconnection rules.[15] PGE agrees that this complaint proceeding would be the wrong forum in which to consider a change to the rules. The Commission can and should resolve Sandy River's second claim for relief as a matter of law by holding that OAR 860-082-0060(8)(f) does not require

[14] *See* Sandy River/102 (PGE's Resp. to Data Request 2) (Feb. 7, 2019).
[15] Sandy River's Resp. to PGE's Mot. for Partial Summ. J. ("Sandy River's Resp.") at 6 (Mar. 27, 2019) ("… Sandy River is not seeking to modify the Commission's rules[.]").

PGE to agree to allow Sandy River to hire a consultant to construct the required service and metering package or transfer trip protective scheme. Once this core legal issue is resolved, PGE believes the Parties will be able to resolve any remaining disputes.

B. THE RULE DOES NOT REQUIRE THE UTILITY TO UNDERTAKE ANY REASONABLENESS BALANCING TEST WHEN DECIDING WHETHER TO USE OR ALLOW OTHERS TO USE A THIRD-PARTY CONSULTANT TO CONSTRUCT INTERCONNECTION FACILITIES AND SYSTEM UPGRADES.

PGE's motion for partial summary judgment asks the Commission to interpret OAR 860-082-0060(8)(f) and to determine that the rule does not permit the relief sought by Sandy River in its second claim for relief. The touchstone of statutory interpretation is ascertaining the intent of the legislative or rulemaking body—here, the Commission.[16] The text and context of the rule are primary, because only the words actually chosen by the Commission can be given the effect of law.[17]

The Commission chose specific language in OAR 860-082-0060(8)(f) regarding the use of third-party consultants in the interconnection process. First, the small generator interconnection rules provide in clear and unambiguous language that the utility will construct any required interconnection facilities and system upgrades on its own system.[18] Against this backdrop, OAR 860-082-0060(8)(f) provides that a utility *may* hire its own consultant to construct some or all of the required interconnection facilities or system upgrades. The rule does not require that the utility obtain the interconnection customer's agreement or consent before the utility may hire its own

[16] *State v. Gaines*, 346 Or 160, 171-72 (2009).
[17] *Faverty v. McDonald's Restaurants of Oregon, Inc.*, 133 Or App 514, 533 (1995), *rev dismissed on other grounds, appeal dismissed on other grounds,* 326 Or 530 (1998) ("Inchoate intentions are not law, only those intentions that are manifested in language that is enacted.") (internal citation omitted); *State v. Walker*, 356 Or 4, 13 (2014) ("We begin with the text and context of the statute, which are the best indications of the legislature's intent.")
[18] ORS 860-082-0035(2) ("The public utility constructs, owns, operates, and maintains the interconnection facilities."); ORS 860-082-0035(4) ("A public utility must design, procure, construct, install, and own any system upgrades to the public utility's transmission or distribution system necessitated by the interconnection of a small generator facility.").

consultant to construct the required facilities and upgrades. The rule also provides that the utility and interconnection customer *may* agree to allow the customer to hire a third-party consultant to construct the needed facilities and upgrades, but there is no requirement that the utility agree to allow such an approach under any specific circumstances. It is left to the utility's discretion to allow or not allow the customer to construct facilities and upgrades on the utility's system.

The plain meaning of OAR 860-082-0060(8)(f), and its meaning in the context of the interconnection rules generally, demonstrate that the Commission gave utilities the discretion to determine when to use third-party consultants to construct facilities and upgrades on the utility's system. There are no factors articulated by the rule that a utility must weigh in exercising that discretion. Nothing in the rule requires the parties or the Commission to engage in a fact-intensive investigation into whether the utility's decision was "reasonable."

To the extent it is necessary for the Commission to move past the plain language of the small generator interconnection rules to consider the legislative history underlying the rules, the relevant and admissible history supports the plain meaning of the rule, and PGE's position.[19] The relevant legislative history is the written record of the rulemaking in Docket No. AR 521. In contrast, John Lowe's testimony about what unnamed workshop participants allegedly understood during the rulemaking process is not competent or admissible evidence to defeat a motion for summary judgment. It is not persuasive legislative history. Instead, it is hearsay that lacks any foundation and is not based on the personal knowledge of the declarant.

There is therefore no dispute of fact requiring cross-examination regarding the documents filed in the AR 521 rulemaking docket. The Commission does not need any further testimony or cross-examination to determine what its rule means.

[19] *Gaines*, 346 Or at 171-72 (the court can consider legislative history and determine what weight to give it).

1. The ordinary meaning of the language enacted in the rule does not require the utility to engage in a reasonableness balancing test.

The text of OAR 860-082-0060(8)(f) unambiguously states that the utility "may agree in writing to allow the applicant" to hire a third-party consultant. That delegation of discretion is not modified or restricted in any way. And the Commission did not intend to say "must" when it chose to say "may."

Sandy River and Renewable Energy Coalition ("REC") argue an interpretation of the rule that requires inserting additional words into the rule. They argue that the utility "must agree, so long as the request is reasonable, to allow the applicant" to hire a third-party consultant.[20] In construing a rule, however, the Commission cannot "insert what has been omitted or [ ] omit what has been inserted."[21] In this case, the use of the word "may" was not inadvertent, and could not have meant that the Commission intended to create a right for the QF to demand the use of a third-party consultant.

OAR 860-082-0060(8)(f) appears in a list of provisions governing small generator interconnection studies. Every one of those provisions—except for (8)(f)—uses mandatory language specifying what the utility or applicant "must" do under certain circumstances:

> (8) If a public utility is required to perform a facilities study under subsection (6)(i) or 7(j), or if an applicant and a public utility agree in the scoping meeting to waive the system impact study and proceed directly to the facilities study, then the public utility **must** provide the applicant with an executable facilities study agreement within five business days of completing the system impact study or within five business days from the date of the scoping meeting, whichever is applicable.

[20] *See* PGE's Mot. for Partial Summ. J. at 16-18 (Feb. 27, 2019).
[21] ORS 174.010 ("In the construction of a statute, the office of a judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted or to omit what has been inserted."); *Crooked River Ranch Water Co. v. PUC*, 224 Or App 485, 490 (2008) ("Of course, we cannot supply language that the legislature has omitted.") (citing ORS 174.010).

(a) The facilities study agreement **must** include a detailed scope for the facilities study, a reasonable[22] schedule for completion of the study, and a good-faith, non-binding estimate of the costs to perform the study.

(b) The facilities study agreement **must** follow the standard form agreement developed by the public utility and approved by the Commission.

(c) The applicant **must** execute the interconnection facilities study agreement within 15 business days after receipt of the agreement or the application is deemed withdrawn.

(d) The public utility **must** make reasonable, good-faith efforts to follow the schedule set forth in the facilities study agreement for completion of the study.

(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. Design for any required interconnection facilities or system upgrades **must** be performed under the facilities study agreement. The public utility **must** also identify the electrical switching configuration of the equipment, including transformer, switchgear, meters, and other station equipment.

(f) The public utility *may contract* with a third-party consultant to complete the interconnection facilities and system upgrades identified in the facilities study. A public utility and an applicant *may agree* in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight and approval.

(g) The interconnection facilities study **must** include a detailed estimate of the time required to procure, construct, and install the required interconnection facilities and system upgrades.

(h) If the applicant agrees to pay for the interconnection facilities and system upgrades identified in the facilities study, then the public utility **must** approve the application within 15 business days of the applicant's agreement.[23]

[22] As discussed below, the Commission also expressly included reasonableness or good faith requirements on utilities where it intended those standards to apply.
[23] OAR 860-082-0060(8) (emphasis added).

Because the Commission used "must" for the other provisions of the rule, it did not intend "may" to mean "must" in section (8)(f). The general assumption for purposes of statutory interpretation is that "when the legislature employs different terms within the same statute, it intends different meaning for those terms."[24] There is no evidence within the text or context of the rule demonstrating that the Commission intended that, in some circumstances, the utility "must" use a third-party consultant.

The cases cited by Sandy River do not support a different outcome here. Sandy River primarily relies on the Oregon Supreme Court's decision in *Dilger v. School District 24CJ*.[25] In *Dilger*, the court was construing a statute that provided students "may be excused from [public] school . . . to attend weekday schools giving instruction in religion."[26] The question was how much discretion the school had to determine when to excuse students for religious instruction. Because the question implicated First Amendment constitutional concerns and was being challenged as vague, indefinite, and uncertain, the court construed "may" to mean "shall," subject to certain further restrictions.[27] Unlike *Dilger*, the Commission is not faced with any concern over whether OAR 860-082-0060(8)(f) is unconstitutional, and the language is not vague, indefinite, or uncertain. The language is plain on its face, and the surrounding provisions demonstrate the Commission understood the difference between "must" and "may." There is therefore no reason to deviate from the ordinary meaning of the language the Commission chose.[28] As noted by the court in *Dilger*, "It is axiomatic that the courts cannot in the guise of construction supply an integral

[24] *State v. Meek*, 266 Or App 550, 556 (2014) (internal quotations marks and citation omitted); *see also Baker v. Croslin*, 359 Or 147, 157-58 (2016) (alternative terms do not mean the same thing, unless there is evidence to the contrary).
[25] *Dilger v. School District 24CJ*, 222 Or 108, 111 (1960). The other Oregon case cited by Sandy River, *State v. Guzek*, 342 Or 345, 356 (2007), does not contain an independent analysis of the issue; instead, it just cites to *Dilger*.
[26] *Dilger*, 222 Or at 111 (quoting ORS 336.260).
[27] *Id*. at 117.
[28] Under applicable maxims of construction, courts will not construe a statute so as to infringe on any party's constitutional rights. *See, e.g., State v. Bordeaux*, 220 Or App 165, 175-76 (2008).

part of a statutory scheme omitted by the legislature."[29] Moreover, the court in *Dilger* construed "may" to mean "shall" because it believed the legislative history of the statute in question and its context within other related statutes compelled that unusual result.[30] Here, the context of OAR 860-082-0060(8)(f) as it relates to other regulations—as well as the history behind the making of the rule—both point the other direction. *Dilger* is of no use here.

More on point is *Associated Oregon Veterans v. Department of Veterans Affairs* where the Oregon Court of Appeals distinguished *Dilger* and held that there was no reason to read a mandatory provision as permissive where the legislature used both mandatory and permissive language in the same statute. Here, the Commission used both mandatory and permissive language in the same regulation and there is no reason to conclude that the permissive language "may" should be read as a mandatory "must."[31]

The out-of-state cases cited by Sandy River also do not overcome the context of the provision at issue in this case. To the extent those cases have any persuasive bearing on this decision, they agree that the context of the rule is what matters in determining what the legislature means.[32] The context here—based on the provisions immediately surrounding 860-082-0060(8)(f), as discussed above, the other provisions in the small generator interconnection rules, and those applicable to large generators, as discussed below—demonstrates the Commission clearly understood when to use "must," and when to use "may."

[29] *Dilger*, 222 Or at 112 (internal citation omitted).
[30] *Id.* at 118-19.
[31] *Associated Oregon Veterans v. Department of Veterans Affairs*, 70 Or App 70, 74 (1984).
[32] *Sloban v. Fla. Bd. of Pharmacy*, 982 So2d 26, 33 (Fla Dist Ct App 2008) ("Under the plain meaning rule, 'may' denotes a permissive term; however, if reading 'may' as permissive leads to an unreasonable result or one contrary to legislative intent, courts may look to the context in which 'may' is used and the legislature's intent to determine whether 'may' should be read as a mandatory term.") (internal citation omitted); *Myles v. State*, 602 So2d 1278, 1281 (Fla 1992) ("[T]he word 'may' is not always permissive, but may be a word of mandate in an appropriate context. This especially is true where the statute in question is necessary to preserve a constitutional right, as it was here.") (internal citation omitted); *see, e.g.*, *Bass v. Doughty*, 5 Ga App 458, 63 SE 516, 517 (1909) ("To decide between these meanings [of 'may'] in any given case, the context and whole legislative scheme must be taken into consideration.") (internal citation omitted).

2. The context of the rule shows that PGE's interpretation is correct.

Sandy River seeks to insert requirements into OAR 860-082-0060(8)(f). The Commission did not adopt a rule for small generators that states the utility must agree to allow a customer consultant to construct facilities or upgrades on the utilities system. If the Commission had intended this result for small generators, it would have used mandatory language, as it did for the customer option to build under the Standard Oregon Qualifying Facility Large Generator Interconnection Agreement ("QF-LGIA").[33]

In the same way, Sandy River seeks to imply a requirement that the utility not unreasonably refuse to agree that the customer can hire a consultant to construct the required facilities or upgrades. Again, OAR 860-082-0060(8)(f) does not include any such requirement. The legislature or rulemaking body can—and frequently does—insert language constraining a party's exercise of discretion.[34] On multiple occasions under the small generator interconnection rules, the Commission used this approach to limit the utility's exercise of discretion (emphasis added):

- 860-082-0025(1)(e)(A) states that a "public utility **may not unreasonably refuse** to grant expedited review of an application to renew an existing small generator facility interconnection if there have been no changes to the small generator facility other than minor equipment modifications."

- 860-082-0060(6) states that "**if a public utility reasonably concludes** that an adequate evaluation of an application requires a feasibility study, then **the public utility must provide** the applicant with an executable feasibility study agreement within five business days of the date of the scoping meeting."

- 860-082-0060(6)(d) states the "public utility **must make reasonable, good-faith efforts** to follow the schedule set forth in the feasibility study agreement for completion of the study."

[33] *See* PGE's Mot. for Partial Summ. J. at 20-23.
[34] *See e.g., Bradley v. State, ex. Rel. Dept. of Forestry*, 262 Or App 78, 91 (2014) (under statute requiring that a party seeking a private way of necessity across public lands must obtain the consent of the state, a provision mandating that the state shall not unreasonably withhold its consent was intended to limit the state's otherwise unconstrained right to refuse its consent).

- 860-082-0060(8)(a) states that the facilities study agreement prepared by the public utility "**must include** a detailed scope for the system impact study, **a reasonable schedule** for completion of the study, and a **good-faith, non-binding estimate** of the costs to perform the study."

When the Commission intended to constrain the utility's discretion and to impose a reasonableness or good faith standard as part of a decision, it did so expressly. It did not do so in OAR 860-082-0060(8)(f). If the Commission had intended the result advocated by Sandy River, it would have been a simple matter for the Commission to adopt a version of OAR 860-082-0060(8)(f) that used the same type of language the Commission used in the provisions cited above to constrain the utility's discretion.

For example, the Commission could have added the underlined and italicized language to the end of the key sentence in OAR 860-082-0060(8)(f): "The public utility and applicant may agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight and approval*, and the utility may not unreasonably refuse to agree to such an arrangement.*" The Commission included no such language. Instead, the Commission left it up to the utility whether to construct required facilities and upgrades on its system itself, as provided by OAR 860-082-0035(2) and (4), whether to hire a utility consultant to construct the facilities and upgrades without the need for customer approval of the use of a utility consultant, as provided by the first sentence of OAR 860-082-0060(8)(f), or whether to agree to allow the customer to hire a consultant to construct the facilities and upgrades as allowed by the second sentence of OAR 860-082-0060(8)(f).

The Commission also expressly chose not to include in OAR 860-082-0060(8)(f) a mechanism to allow the customer to challenge the utility's decision. The Commission knew how to create a process to resolve disagreements between the utility and the applicant during the

interconnection process. For example, under OAR 860-082-0010(2), the utility and the interconnection customer "may agree to reasonable extensions to the required timelines" in the rules without requesting a waiver from the Commission. If the parties are unable to agree, then either "may request that the Commission grant a waiver."[35] The rule then gives the Commission direction on what to consider when granting a waiver: "In deciding whether to grant a waiver of a timeline, the Commission will consider the number of pending applications for interconnection review and the type of applications, including review level, facility type, and facility size."[36]

The Commission could have adopted the template used in OAR 860-082-0010(2) and applied it to OAR 860-082-0060(8)(f), *if it had intended* to allow a customer to challenge the utility's refusal to agree to the customer's requests to use a third-party consultant. The fact that the Commission did not use any language restricting or modifying the utility's discretion over whether to permit the use of third-party consultants, when read in context, shows that the Commission intended to leave it up to the utility to decide.

3. The relevant and admissible legislative history is undisputed and supports PGE's interpretation of the rule.

The Commission may determine the meaning of OAR 860-082-0060(8)(f) as a matter of law, and there are no genuine disputed issues of material fact. The only facts that Sandy River and REC have placed at issue that could be relevant to the Commission's interpretation of the rule are facts relating to the rulemaking history. But Sandy River and REC have not produced competent and admissible evidence that contradicts the evidence offered in support of PGE's motion for partial summary judgment. The testimony of John Lowe is not adequate to create an issue of material fact, and the parties otherwise do not dispute the existence of certain statements in the

[35] OAR 860-082-0010(2)(a).
[36] OAR 860-082-0010(2)(b).

rulemaking record for Docket No. AR 521. They only disagree over the statements' significance. The Commission can interpret the reasonable and objective meaning of those statements, and determine what effect, if any, they have on the language of the rule. As discussed in PGE's opening brief and below, the rulemaking history supports the ordinary and plain meaning of the rule, which gives PGE the discretion over when to permit applicants to use third-party consultants.

(i) The admissible testimony offered by Sandy River and REC does not contradict PGE's interpretation of the rule.

For the most part, Sandy River and REC cite to written comments or orders that were filed in Docket No. AR 521. PGE cited the same comments and explained their impact on the interpretation of the rule.[37] The content of the written record in Docket No. AR 521 is not in dispute and it is up for the Commission to determine what weight, if any, to give to that record.[38]

John Lowe's testimony, filed by REC and relied upon by both Sandy River and REC, concerns his personal understanding of the rule, and various unnamed parties' alleged understanding of the rule.[39] Mr. Lowe's testimony on this point should not be relied on by the Commission when deciding PGE's motion for partial summary judgment for at least two reasons: (1) Mr. Lowe's subjective understanding of the meaning of the rule is not relevant; and (2) Mr. Lowe's belief about other, unnamed parties' understanding is not competent evidence that may be considered to create an issue of fact.

In order to create a genuine issue of material fact, Sandy River and REC must offer written testimony based on the declarant's personal knowledge, that would be admissible in evidence, and must show affirmatively that the declarant is competent to testify to the matters stated therein.[40]

[37] *See* PGE's Mot. for Partial Summ. J. at 4-6, 18-20.
[38] *Gaines*, 346 Or at 171-72 ("the extent of the court's consideration of [the legislative history], and the evaluative weight that the court gives it, is for the court to determine").
[39] *See* Sandy River's Resp. at 17 n.36, 20-21.
[40] ORCP 47 D; *In re PacifiCorp*, Docket No. UE 111, Order No. 00-090, 2000 WL 362998 (Feb. 14, 2000) (applying ORCP 47 to resolving issues of fact in summary judgment motions before the Commission); *Elec. Lightwave, Inc.*,

Mr. Lowe's individual opinions about what OAR 860-082-0060(8)(f) meant during the rulemaking process and what it means now cannot take the place of the Commission's clear expression of intent in the rule and cannot replace the Commission's review of the objective record in rulemaking Docket AR 521.[41] His testimony about what he understood the rule to mean during the rulemaking process is therefore not relevant to the Commission's decision.

Further, Mr. Lowe's statements about what other unnamed parties may think is not competent evidence. Mr. Lowe's testimony that "a number of parties raised the issue," and "the understanding was that the utility's consent would not be unreasonably withheld, and I believe that most of the parties would be shocked that a utility would take the position"[42] lacks any foundation and is not based on personal knowledge.[43] To the extent Mr. Lowe refers to parties that filed written comments in Docket No. AR 521, PGE has already cited those comments and discussed why they support the plain meaning of the rule. Otherwise, Mr. Lowe's failure to identify these parties prevents his testimony from having any foundation that would allow PGE or the Commission to test Mr. Lowe's statements. Further, even if those parties were identified, their statements would be inadmissible hearsay.[44] Finally, Mr. Lowe's commentary on what he believed

Docket No. UC 377, Order No. 99-770, 1999 WL 1442612 (Dec. 22, 1999) (parties opposing summary judgment must submit evidence in compliance with 47D).

[41] *Re Pac. Nw. Bell Tel. Co.*, Docket No. UF 3107, Order No. 76-527, 16 PUR. 4th 73 (OR PUC Aug. 4, 1976). *See also Qwest Corp v. City of Portland*, 275 Or App 874, 893-94 (2015) (finding that a statement of a lobbyist was not persuasive evidence of legislative intent); *Tua Ahn Tran v. Bd. of Chiropractic Examiners*, 254 Or App 593, 606, 300 P3d 169 (2013) (views of "a nonlegislator, in seeking a different statutory change six years later provides minimal guidance") (internal citation omitted); *State v. Kuperus*, 241 Or App 605, 611 (2011) (statement by nonlegislator in a subcommittee was "given little weight"); *State v. Stamper*, 197 Or App 413, 424-25 ("[W]e are hesitant to ascribe to the Legislative Assembly as a whole the single remark of a single nonlegislator at a committee hearing.") (internal citation omitted); *Linn-Benton-Lincoln Educ. Ass'n/OEA/NEA. v. Linn-Benton-Lincoln ESD*, 163 Or App 558, 569 (1999) ("[W]e are reluctant to draw decisive inferences concerning legislative intent [because] * * * the statements were made by witnesses and are not direct expressions of legislative intent.") (internal citation omitted).

[42] REC/100, Lowe/6.

[43] ORS 40.315 (Or. R. Evid. 602) ("a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter").

[44] ORS 40.450(3) (Or. R. Evid. 801(3)) ("Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); ORS 40.455 (Or. R. Evid. 802) ("Hearsay is not admissible except as provided in ORS 40.450 to 40.475 or as otherwise provided by law.").

these unnamed parties may now think about PGE's motion for partial summary judgment is not based on Mr. Lowe's personal knowledge, and therefore does not comply with ORCP 47D.

(ii) The Commission's order in Docket No. AR 521 does not insert a reasonableness balancing test into the rule.

The Commission's Order No. 09-196 in Docket No. AR 521 does not change the plain meaning of 860-082-0060(8)(f) to impose a reasonableness balancing test on the utility that can then be challenged in litigation before the Commission. Sandy River's and REC's reliance on certain language in that order is taken out of context.[45] The order reiterates the language of the rule: (1) the utility and the applicant "could agree to allow the applicant to hire third-party contractors;" and (2) that any work is at "the applicant's expense and subject to public utility oversight and approval."[46]

Sandy River relies on the end of that paragraph in the order to imply a reasonableness balancing test into 860-082-0060(8)(f). The sentences at issue state: "If the public utility, in its reasonable opinion, does not believe that a third-party contractor's work is adequate, then the public utility may rebuild the interconnection facilities, or system upgrades, or repeat the applicable study. The applicant must pay for both the third-party consultant's work and the public utility's work."[47]

This statement does not modify the utility's decision to use a third-party consultant—it only explains a restriction on the utility's right to charge the applicant when the utility rebuilds facilities constructed by the applicant's third-party consultant. This reasonableness standard articulated by the Commission in the order corresponds to an express reasonableness standard that

[45] *See* Sandy River's Resp. at 24.
[46] *In Re Rulemaking to Adopt Rules Related to Small Generator Interconnection*, Docket No. AR 521, Order No. 09-196 at 4 (June 8, 2009).
[47] *Id*.

was codified in the rules. OAR 860-082-0060(2) states: "The applicant must pay the reasonable costs of any interconnection facilities or system upgrades necessitated by the interconnection." The Commission makes clear that ***if*** the utility agrees to allow the applicant to use a third-party consultant, and in the exercise of its review and approval of that work the utility reasonably determines the third-party consultant's work is inadequate, the cost of redoing the work will be allocated to the applicant. Because the applicant is only responsible for reasonable costs under 860-082-0060(2), then the utility must act reasonably if it rebuilds the third-party consultant's work, because it will increase costs to the applicant.

(iii) Sandy River and REC never address the fact that this issue was expressly raised in subsequent Docket No. UM 1610, in which revisions to the current rules were considered, but not yet resolved.

The fact that REC has sought to change the rule through general policy dockets after the rule was adopted—and that the Commission so far has decided not to amend the rule language—further demonstrates that the rule currently does not require a utility to agree to allow the customer to construct the interconnection or impose any type of reasonableness balancing test on the utility's decision to retain its basic authority to construct the required facilities and upgrades on its own system as established by OAR 860-082-0035(2) and (4). PGE's opening brief outlines the history of Docket No. UM 1610, *In the Matter of PUC Investigation into Qualifying Facility Contracting and Pricing*.[48] Sandy River and REC do not meaningfully address that docket. REC has already acknowledged, in Docket No. UM 1610, that it wants to *revise* 860-082-0060(8)(f) to allow, at an applicant's request or upon certain conditions, third-party consultants to perform certain functions in the interconnection review process that are currently performed by the utility.[49] The UM 1610

[48] PGE's Mot. for Partial Summ. J. at 7.
[49] *Id.*; Honoré Decl., Ex. 7 at 6 (Docket No. UM 1610, Staff's Proposed Issues List (Oct. 3, 2012)); Honoré Decl., Ex. 8 at 9 (Docket No. UM 1610, REC Resp. to Disputed Issues at 6 (Oct. 10, 2012)).

docket shows that: (1) Staff understands the current rule does not permit applicants to require the utility to permit the use of third-party consultants; and (2) REC understands that the rule would need to be revised to allow the relief that Sandy River and REC currently seek.[50]

C. NEITHER THE PARTIES' CONTRACTUAL DUTIES NOR THE COMMISSION'S GENERAL ENABLING STATUTES ALTER THE RULES OF STATUTORY CONSTRUCTION.

1. Contractual duties of good faith do not alter the statutory construction rules of *State v. Gaines*.

Sandy River argues that PGE has a contractual duty to deal with Sandy River in good faith.[51] Although Sandy River and PGE entered into a Power Purchase Agreement ("PPA") and a Facilities Study Agreement ("FSA"), they have not yet entered into an Interconnection Agreement. PGE agrees that in general, when parties enter into a formal contract, a covenant of good faith and fair dealing is implied in that contract.[52] It is unclear, however, how Sandy River believes such an implied contractual covenant applies in this case. Sandy River has not sued PGE for breach of the PPA or for breach of the FSA. Whatever contractual duties Sandy River and PGE owe each other under those contracts are not at issue here. Instead, Sandy River's claims for relief and its prayers allege violations of the Commission's regulations.

PGE's motion seeks a ruling on the proper interpretation of only one of those regulations, OAR 860-082-0060(8)(f), under the statutory construction rules of *State v. Gaines*. The cases cited by Sandy River regarding good faith contractual obligations do not change that analysis. *Xcel Energy Servsices, Inc. v. Southwest Power Pool, Inc.*[53] arguably contains dicta that if a utility has

[50] *See, e.g.*, PGE's Mot. for Partial Summ. J. at 6-8; Honoré Decl., Ex. 7 (Docket No. UM 1610, Staff's Proposed Issues List (Oct. 3, 2012)); *see also, e.g.,* Honoré Decl., Ex. 8 at 9 (Docket No. UM 1610, REC Resp. to Disputed Issues at 6 (Oct. 10, 2012)).
[51] Sandy River's Resp. at 12-13.
[52] *Klamath Off-Project Water Users, Inc. v. PacifiCorp*, 237 Or App 434, 445 (2010) ("In general, every contract has an obligation of good faith in its performance and enforcement under the common law.")
[53] *Xcel Energy Servs., Inc. v. Sw. Power Pool, Inc*., 118 FERC ¶ 61, 232, 62163–64, 2007 WL 861003 (FERC Mar. 22, 2007).

a contractual obligation to take a specific action, then it should honor that contractual obligation in good faith, even though the governing statutes or regulations do not require the utility to take that specific action. *Xcel* stands for the unremarkable proposition that a contract can impose a duty above and beyond the duties that are imposed by statute or regulation. Sandy River has not identified any contract provision in the PPA or the FSA that would require PGE to allow a third-party consultant to upgrade PGE's interconnection facilities, nor could it.

The PPA is a form contract that Sandy River had the right to compel PGE to enter into under the authority of the Public Utility Regulatory Policies Act of 1978 ("PURPA") and the Commission's orders and regulations implementing PURPA. Sandy River had the right to select a scheduled commercial operation date under the PPA of up to three years after the effective date of the PPA.[54] Sandy River selected December 1, 2019, a date well in advance of the maximum three-year date Sandy River could have selected (i.e., May 25, 2021).[55] PGE had no authority to insist on a different scheduled commercial operation date. Sandy River cannot now rely on the scheduled commercial operation date that it chose, and which is in advance of the date that the Sandy River interconnection is expected to be placed in-service, to argue that PGE must agree to allow Sandy River to hire its own consultant to construct the required interconnection facilities and system upgrades. This would amount to a finding that such a right is triggered whenever the applicant imposes an early scheduled commercial operation date through its unilateral choice of an early date in the PPA.

[54] Docket No. 1610, Order No. 15-130 at 2, Appendix A at 2 (Apr. 16, 2015).
[55] Answer, Ex. D at 17 (Sandy River PPA, which was fully executed and became effective on May 25, 2018). Pursuant to Docket No. UM 1610, Order No. 15-130, a QF is allowed to select a scheduled commercial operation date that is up to three years after the effective date of the PPA. Sandy River therefore had the right to select a scheduled commercial operation date as late as May 25, 2021.

Here, PGE estimates that construction of the required interconnection facilities and system upgrades will require approximately three weeks. But the Sandy River interconnection cannot be completed and placed in-service until higher-queued work under SPQ0070 is completed. The interconnection agreement milestones and construction schedule for SPQ0070—which Sandy River has a copy of and which has been introduced into the record of this case—specifies that the prerequisite construction will not be complete until approximately February 17, 2020.[56] As a result, and regardless of what party constructs the Sandy River interconnection, the interconnection cannot be completed and placed into service before late February 2020. Nothing in the PPA or the FSA changes this result.

Electric Lightwave, Inc. v. US West Communications, Inc.[57] is of no use here either. The issue there was whether the respondent acted unreasonably when it refused to stipulate to certain facts for purposes of the complainant's summary judgment motion. The Commission observed that a party to a lawsuit generally has a duty to deal with the opposing party in good faith.[58] The Commission concluded that the respondent was not legally compelled to stipulate to any facts, and that its refusal was reasonable under the circumstances. *Electric Lightwave* has nothing to do with the proper construction of a regulation, or even with the contractual duty of good faith. Moreover, the Oregon Court of Appeals has held that when construing a statute, a court must determine what the legislature meant when it used certain words, regardless of whether those same words might have a generally accepted, and different, meaning when used in a contract.[59]

[56] Honoré Decl., Ex. 1 at 4 and 10 (PGE Resp. to Data Request 1 and Attachment 001-G) (interconnection agreement milestones indicating that SPQ0070 has a scheduled in-service date of Feb. 17, 2020)).
[57] *Electric Lightwave, Inc. v. US West Communications, Inc.*, Docket No. UC 377, Order No. 99-285 at 3. (1999).
[58] *Id*.
[59] *Bradley*, 262 Or App at 91 (construing phrase "unreasonably withhold consent" in right-of-way statute to mean something different than the same phrase means when it appears in a lease.)

2. General enabling statutes that refer to reasonable conduct by the parties do not require the Commission to insert a reasonableness balancing test into every regulation.[60]

Sandy River also argues that the Commission's authorities are "rife with language" giving it the right and duty to impose upon public utilities an obligation to act in a reasonable manner.[61] For that proposition, it cites ORS 756.040 and ORS 757.325.[62] Sandy River made this same argument in its response to PGE's motion to stay.[63] The persuasiveness of that argument has not improved through repetition. ORS 756.040 confers general powers on the Commission, and it directs the Commission to "protect" customers from "unreasonable exactions and practices" and to obtain for utility customers "adequate service at fair and reasonable rates."[64] ORS 757.325 states that no public utility "shall make or give undue or unreasonable preference or advantage to any particular person."[65]

These general enabling statutes do not impose an undefined reasonableness requirement or balancing test into every regulation enacted by the Commission, nor do they magically amend rules to turn "may" into "must." To the extent these statutes impose a standard of reasonable conduct on a utility, the Commission has already taken that into account in the formal rule making process. When the Commission enacted the regulations in OAR Chapter 860 through the rulemaking process, it determined which regulations would include a reasonableness balancing test. Several of those are discussed above and others are set out below.[66] If the Commission had

[60] Sandy River did not plead in its Complaint that any Oregon Statute imposes a reasonableness requirement into every regulation passed by the Commission, but PGE will address the issue anyway.
[61] Sandy River's Resp. at 11-12.
[62] *Id.*
[63] Sandy River's Resp. to PGE's Mot. to Stay Discovery at 20-21 (Mar. 6, 2019) ("Sandy River views the Commission's authorities as rife with language imposing a duty upon public utilities to act in a reasonable manner, and the Commission's authority to order utilities to do so" *citing* ORS 756.040 and ORS 757.325).
[64] ORS 756.040.
[65] ORS 757.325.
[66] *See, e.g.,* OAR 860-082-0010(2) ("A public utility and an applicant or interconnection customer may agree to **reasonable** extensions to the required timelines in these rules without requesting a waiver from the Commission"); OAR 860-082-0015(20)(b) ("Minor equipment modification" means a change to a small generator facility or its

intended to constrain a utility's discretion to agree or not to a customer building improvements on the utility's system, then the Commission could have easily stated that the utility will not unreasonably refuse to agree to allow the customer to construct the interconnection facilities and system upgrades. But the Commission chose not to include such a requirement. The Commission has thus already decided which regulations should contain a reasonableness balancing test on a regulation-by-regulation basis. And the Commission decided not to include a reasonableness balancing test in OAR 860-082-0060(8)(f).

There is no need for the utility to obtain the applicant's agreement before the utility hires a consultant (and thus the applicant cannot effectively "veto" the utility's decision to hire its own consultant to construct its facilities or upgrades simply by insisting that it is "more reasonable" for the applicant to hire the consultant). The Commission knew how to give the customer a right to compel such a result as exemplified by giving such a right under certain circumstances for large generators (in the QF-LGIA)—but it purposefully did not do so in the small generation interconnection rules.[67] And when it chose to create such a right in the QF-LGIA, it also provided

associated interconnection equipment that…[d]oes not, **in the interconnecting public utility's reasonable opinion**, have a material impact on the safety or reliability of the public utility's transmission or distribution system or an affected system") (emphasis added); OAR 860-082-0025(7)(f) ("The applicant must provide the public utility written notice at least 20 business days before the planned commissioning for the small generator facility*** If the witness test is conducted and is not acceptable to the public utility, then the public utility must provide written notice to the applicant describing the deficiencies within five business days of conducting the witness test….If the applicant fails to resolve the deficiencies **to the reasonable satisfaction of the public utility** within 20 business days, then the application is deemed withdrawn") (emphasis added); OAR 860-082-0030(5) ("An interconnecting public utility must have access to an interconnection customer's or an applicant's premises **for any reasonable purpose** related to an interconnection application or an interconnected small generator facility. The public utility must request access **at reasonable hours and upon reasonable notice**") (emphasis added); OAR 860-082-0060(6)(a) ("If a public utility **reasonably concludes** that an adequate evaluation of an application requires a feasibility study, then the public utility must provide the applicant with an executable feasibility study agreement within five business days of the date of the scoping meeting…The feasibility study agreement must include a detailed scope for the feasibility study, **a reasonable schedule** for completion of the study, **and a good-faith,** non-binding estimate of the costs to perform the study.") (emphasis added); OAR 860-082-0060(6)(d) ("The public utility must make **reasonable, good-faith efforts** to follow the schedule set forth in the feasibility study agreement for completion of the study.") (emphasis added).

[67] PGE's Mot. for Summ. J. at 13-15 (discussion contrasting QF-LGIA and the Commission's small generator interconnection rules); *In the Matter of Public Utility Commission of Oregon, Investigation into Interconnection of PURPA Qualifying Facilities with Nameplate Capacity Larger Than 20 Megawatts to a Public Utility's Transmission*

protections for the utility that do not exist under the small generator interconnection rules.[68] PGE is not arguing that it has no obligation to act reasonably. It is arguing that under OAR 860-082-0060(8)(f), it has no obligation to agree to allow the customer, through its own consultant, to construct improvements on PGE's system.

D. A REASONABLENESS BALANCING TEST WOULD BE DIFFICULT TO ADMINISTER AND WOULD LEAD TO INCREASED LITIGATION.

Sandy River misinterprets PGE's position, and claims that PGE seeks a ruling that PGE's actions with respect to Sandy River's interconnection process have been reasonable.[69] It then incorrectly contends that the evidence shows PGE has been unreasonable, and therefore summary judgment must be denied.[70] Neither of those contentions are correct. As PGE has consistently maintained, OAR 860-82-0060(8)(f) permits PGE to refuse to allow the customer to hire a third-party to construct improvements to PGE's interconnection facilities. Whether the customer believes that refusal is reasonable or not is irrelevant. And as PGE has explained, at least in the small generator context, allowing a third-party consultant to alter PGE's system would sometimes be impracticable and unworkable.[71]

PGE is not saying that it would always be unworkable to allow a third-party consultant to construct interconnection facilities or system upgrades on the utility's system. But imposing a reasonableness balancing test on the utility's decision about whether to allow the customer to construct facilities and upgrades on the utility's system would be unworkable. Statutes and

or Distribution System, Docket No. UM 1401, Order No. 10-132, Appendix A at 40 (Standard Oregon Qualifying Facility Large Generator Interconnection Procedures ("QF-LGIP") at Section 13.4) (Apr. 7, 2010).
[68] PGE's Mot. for Summ. J., at 15; Docket No. UM 1401, Order No. 10-132, Appendix B at 17-19 (QF-LGIP at Section 5.2).
[69] Sandy River's Resp. at 5.
[70] *Id.* at 27-40.
[71] PGE's Mot. for Summ. J. at 21-23.

regulations should always be construed in a way that will avoid impracticable results.[72] If a utility must justify the reasonableness of its decision about whether to let a third-party alter the utility's system in every case—which is Sandy River's position—then that would create the possibility of litigation each time the utility refuses. This case is proof of that. Moreover, a reasonableness requirement would require the parties and the Commission to determine in each interconnection dispute how much weight to give to the utility's interests, versus the interconnection customer's interests. Small QF interconnections are standardized and streamlined to avoid these kinds of complications.[73] The Commission thus enacted OAR 860-82-0060(8)(f) in a way that allowed the utility, and no one else, to decide whether to hire a third-party to alter the utility's system.

E. IF A NEW RULEMAKING IS REQUIRED, A GENERAL POLICY DOCKET IS THE APPROPRIATE WAY TO ACCOMPLISH A RULE CHANGE.

PGE has explained how OAR 860-082-0060(8)(f) came into existence through Docket No. AR 521, and why the rule was designed to prohibit an interconnection customer from vetoing a utility's decision to construct interconnection facilities or system upgrades itself (or to decide to use a utility consultant to construct the improvements).[74] PGE then explained how this same rule was at issue in general investigative Docket No. UM 1610, with the result being that the rule remained unchanged.[75] Later, PGE explained that if Sandy River wants the rule changed, it should seek such changes in a general investigative or policy docket.[76]

Sandy River responds that it isn't asking for a rule change.[77] Given the history of the rule-making in Docket No. AR 521, and the re-visitation of that rule in Docket No. UM 1610, PGE

[72] *Freeman v. DirecTV, Inc.,* 457 F3d 1001, 1004-05 (9th Cir. 2006) (court should not interpret a statute in a way that would lead to impracticable results.)
[73] *See* PGE's Mot. for Summ. J. at 22-23.
[74] *Id.* at 4-6.
[75] *Id.* at 6-8.
[76] *Id.* at 23-24.
[77] Sandy River's Resp. at 42-43.

submits that Sandy River is doing exactly that: Sandy River wants the Commission to alter the language of OAR 860-82-0060(8)(f) in a way that was specifically rejected in Docket No. AR 521 and so far in Docket No. UM 1610. Sandy River's proposed amendment to the rule goes far beyond the circumstances of this case. It would alter the practices of all utilities and interconnection customers in the state. And the fact that PGE is required under certain circumstances to allow an interconnection customer to hire a consultant to construct interconnection facilities for large generators[78] merely reinforces the point that the same does not apply to small generators.[79] If the Commission intends to change OAR 860-82-0060(8)(f) to mirror the rules for large generators, it should do so in a general policy docket, after receiving the input of all interested parties, considering the implications for the efficient and safe modification of the electric system, and providing for express protections for the utility and its system.

F. THIS MOTION FOR PARTIAL SUMMARY JUDGMENT SEEKS A RULING ONLY ON SANDY RIVER'S SECOND CLAIM FOR RELIEF, AND PARAGRAPHS 3 AND 7 OF SANDY RIVER'S PRAYERS.

The scope of this motion is not in dispute. PGE's motion for partial summary judgment requested that the Commission deny Sandy River's second claim for relief and paragraphs 3 and 7 of Sandy River's prayer for relief.[80] That is still true.

In PGE's motion to stay, PGE pointed out that if the Commission grants PGE's motion for partial summary judgment—and thereby agrees with PGE's interpretation of OAR 860-082-0060(8)(f)—that will effectively dispose of all the prayers in Sandy River's complaint.[81] That is also still true. In that same reply brief, PGE then explained how and why the rest of Sandy River's prayers would be obviated by the Commission's correct interpretation of OAR 860-082-

[78] *Id.* at 43.
[79] PGE's Mot. for Summ. J. at 18-23.
[80] *Id.* at 1.
[81] PGE's Reply in Support of Mot. to Stay Discovery at 2 (Mar. 8, 2019).

0060(8)(f).[82] The reasoning expressed there was not intended to expand the scope of PGE's motion for partial summary judgment. PGE included it to explain why a stay was in the best interests of the tribunal and the parties. If the Commission grants PGE's motion for partial summary judgment on Sandy River's second claim for relief and paragraphs 3 and 7 of Sandy River's prayer for relief, then PGE will take appropriate steps to deal with Sandy River's remaining claims and prayers, which may include a subsequent motion for summary judgment and/or settlement of any remaining claims.

G. THE COMMISSION SHOULD DENY SANDY RIVER'S REQUEST TO FILE A SUR-REPLY.

The Commission should deny Sandy River's request for pre-approval to file a sur-reply. A request for leave to file a sur-reply is typically made after the non-moving party has reviewed the moving party's reply brief. And such requests are typically granted only when the moving party has included entirely new arguments or evidence in their reply brief.[83] Even when the moving party does include new evidence or theories in their reply brief, Oregon courts typically permit consideration of that new material without granting the non-moving party leave to file a sur-reply, as long as the non-moving party has the opportunity to address the new material at oral argument.[84] PGE has not included new evidence or legal theories in this reply, so filing a sur-reply would be inappropriate.

Sandy River has had more than enough opportunities to submit briefing on the single legal issue presented by this motion for partial summary judgment. PGE has had effectively four days to reply to 61 pages of combined briefing between Sandy River and REC. And Sandy River

[82] *Id*. at 3-5.
[83] *Provenz v. Miller*, 102 F3d 1478, 1483 (9th Cir. 1996) (recognizing that the non-moving party should be given an opportunity to respond when the moving party submits new evidence and arguments in reply brief).
[84] *Acumed LLC v. Stryker Corp.*, 04-CV-513-BR, 2007 WL 4180682, at *2 (D Or Nov. 20, 2007) *aff'd*, 551 F3d 1323 (Fed. Cir. 2008) (denying motion to strike new evidence in reply brief where "[d]efendants had sufficient opportunity to rebut [opposing party's] submissions at oral argument.").

repeatedly insists that this matter be resolved as soon as possible. Permitting Sandy River to file a sur-reply would only delay resolution of this motion. The Commission currently has before it all the information it needs to correctly construe OAR 860-082-0060(8)(f). However, if the Commission ultimately allows Sandy River to file a sur-reply, it should allow PGE to file an additional reply as well because the moving party typically has the opportunity to file the final brief.

II. CONCLUSION

For all the above reasons, the Commission should grant PGE's motion for partial summary judgment.

DATED this 4th day of April, 2019.

Respectfully submitted,

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1967

SANDY RIVER SOLAR, LLC, Complainant, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	**COMPLAINANT'S SUR-RESPONSE TO PGE'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION AND BACKGROUND

PGE filed its motion for summary partial summary judgment on February 27, 2019. Sandy River and the Renewable Energy Coalition ("REC") filed Responses to PGE's motion on March 26, 2019 ("Sandy River's Response" and "REC's Response"). PGE then filed a reply in support of its motion on April 4, 2019 ("PGE Reply"). In connection with its concurrently-filed request under OAR 860-001-0420(1) for permission to file a sur-response to PGE's reply in support of its motion for summary judgment, Sandy River Solar, LLC ("Sandy River") hereby files this sur-response for the Public Utility Commission of Oregon's ("Commission's") consideration.

PGE is not entitled to summary judgment on the question it presents in its motion for partial summary judgment for all of the reasons described in Sandy River's Response. Additionally, PGE's Reply makes it even more clear that PGE's motion for partial summary judgment relies on disputed facts, and should therefore be denied. PGE's

Reply also raises *new* arguments which should have been raised in its motion for partial summary judgment, and which are addressed herein. These flawed arguments include, among others, an implied assertion that the Commission lacks the authority to remedy Sandy River's complaint through involving a third-party's assistance, and that the specific construction of the Commission's rule regarding third-party assistance overcomes PGE's duty to act in good faith and in a reasonable manner when it exercises its discretion.

PGE's motion should also be denied because, as PGE indicates in its Reply, its proposed process for this case involves multiple and sequential motions for summary judgment. This would result in piecemeal litigation, harm to Sandy River, and a lack of a complete record for the Commission.

In the end, PGE's position is that the Commission cannot order PGE to allow Sandy River to hire a third party consultant, even if PGE: 1) has violated the law by behaving unreasonably and discriminatorily in the interconnection study process; 2) has behaved and is expected to behave unreasonably and discriminatorily in the installation of the actual interconnection upgrades; and 3) PGE's decision not to allow a third party is unjust, unreasonable, discriminatory or provides undue preference or advantage. Regardless of what actions PGE takes, under PGE's view, the only remedy available to Sandy River will be challenge PGE's unreasonable and discriminatory after the interconnection process has been completed, which may be too late.

II. ARGUMENT

A. PGE's Reply Clarifies Further That It Is Requesting That the Commission Rely on Disputed Material Facts

In PGE's Reply, PGE clarifies even further that its motion for partial summary judgment relies on the Commission accepting certain facts as true, even though those facts are either: 1) already disputed on the record; or 2) have not been subjected to discovery, responsive testimony, or cross-examination.[1] This is fatal to PGE's motion for partial summary judgment, and should result in its rejection.

For example, in its Reply, PGE dives straight into the "facts," making an assessment that "Sandy River has raised no relevant arguments why it is allegedly unreasonable for PGE to have declined to agree to allow Sandy River to construct the required facilities and upgrades," and argues that its motion for partial summary judgment should thus be granted.[2] For several reasons, PGE's assertions make no sense in the context of its motion for partial summary judgment. First, PGE's assertion that Sandy River has not raised any reason why PGE's refusal to allow a third-party to construct the interconnection facilities shows a stark shift in PGE's argument to the Commission. Throughout its motions practice, PGE has argued that the facts related to its actions in refusing to grant Sandy River's request for a third-party's assistance are not relevant, because PGE has an absolute authorization to deny the use of third-parties,

[1] Sandy River considered filing a motion to strike PGE's Response on the grounds that it relied upon numerous disputed facts; however, given the need for timely resolution, Sandy River has not elected to file such a motion and relies upon the Commission to give *no* weight to PGE's often inaccurate factual claims made in a legal pleading by its lawyers.

[2] PGE's Reply in Support of Motion for Partial Summary Judgment at 3 (Apr. 4, 2019).

under all circumstances, without regard to a reasonableness test.[3] Now, PGE seems to acknowledge that such a requirement may exist, but asserts in its Reply that Sandy River has somehow failed to make its case that PGE has acted unreasonably.

Second, PGE's assessment that Sandy River has failed to raise any relevant arguments about why PGE's team cannot be relied upon to construct the facilities is absurd, and simply ignores what is in the record in this case. Although PGE may disagree with Sandy River's arguments, Sandy River and the Renewable Energy Coalition ("REC") have both provided substantial evidence regarding PGE's shortcomings in the interconnection process, and explained how they translate into an appropriate remedy being the use of a third-party's assistance in constructing the facilities. This testimony has already been summarized in Sandy River's response to PGE's motion for partial summary judgment, and even categorized into seven broad themes. These themes include:

1. PGE cannot be relied upon to provide accurate or timely information required to complete interconnections.

2. PGE's studies have not provided adequate information to allow Sandy River, or other developers, to assess what PGE is requiring and its reasonableness, and have not met the Commission's requirements.

3. Sandy River's challenges with its interconnection reflect a larger problem at PGE, and PGE may be using the interconnection process to thwart qualifying facility development.

4. PGE has caused significant delays to projects through its administration of the interconnection process.

[3] *See, e.g.*, PGE's Motion for Partial Summary Judgment at 11 (Feb. 27, 2019) (arguing that PGE "is not required to agree, under any circumstances, to permit small generator interconnection customers to use third-party contractors to perform work on the public utility's system)."

5. The Commission's rule allowing for the use of third-party assistance with interconnection projects was intended to provide a remedy for interconnection customers experiencing delays or problems with the utility, and it was understood that a utility's consent to use third-parties would not be unreasonably withheld.

6. Other utilities, including within Oregon, generally allow third-party assistance with interconnections; and

7. PGE has flatly, without justification, denied use of third-party assistance with interconnections, even though doing so would be practical and benefit all parties involved.[4]

If even some of these facts are construed in favor of Sandy River, then the Commission could conclude that would be unreasonable for PGE to refuse to allow a third-party's assistance to construct the facilities because, among other things: 1) PGE cannot be relied upon to complete the work; 2) PGE may be using the interconnection process to try to inappropriately delay or avoid Sandy River's project altogether; 3) other utilities have found ways to efficiently allow a third-party's assistance; and 4) the use of a third-party would benefit both PGE and Sandy River. The facts would also show that PGE flatly, without a good faith consideration, refused Sandy River's request. Such an approach would be almost *per se* unreasonable. Further, if the above assertions are true, then the Commission could rely upon them to conclude that PGE acted unreasonably in refusing to allow a third-party's assistance, and that a third-party's assistance is a reasonable remedy for Sandy River in this case. To rule in PGE's favor in summary judgment, the Commission would need to conclude that regardless of all those facts, PGE

[4] The assertions, and the testimony supporting them, are detailed in Complainant's Response to PGE's Motion for Partial Summary Judgment at 31-40 (Mar. 26, 2019).

still has the unilateral right to refuse to allow Sandy River to hire a third-party consultant, and that the Commission lacks authority to order such a remedy.

PGE goes on to argue in its Reply that, even if it were true that PGE has missed interconnection study deadlines, or issued incomplete studies for Sandy River or other projects, this "does not make it unreasonable for PGE to take the position that it will construct the required interconnection facilities and system upgrades."[5] First, PGE's legal position is that it should be allowed to deny a request to hire a third party, regardless of whether its refusal is reasonable. Thus, any of PGE's claims regarding the reasonableness of its actions are not appropriate for consideration in support of its motion for summary judgment. Second, PGE's legal pleadings are essentially testifying to its view as to what facts demonstrate reasonableness, without any evidence in the record to supports its conclusions or opportunity to refutation. If PGE has a view as to under what factual circumstances a reasonable professional engineer or utility manager should agree to allow an interconnection customer to hire a third party, then PGE should put on testimony by a competent witness testifying to this position.

Next, as shown by the assertions described above, there is a connection between PGE's consistent failures on the studies, and Sandy River's ability to rely on PGE to deliver the construction of the facilities. The unrefuted evidence in the record is that the information provided by PGE cannot be trusted, PGE is using the interconnection process to thwart its project, and that PGE has failed to take any measures to remedy Sandy River's concerns to date. In light of this, Sandy River believes it would be irrational, and

[5] PGE's Reply at 3.

maybe even foolish, to assume that its experience with PGE during the construction phase will be any different than it has been to date. Also, Sandy River has specifically already explained that PGE's failure to provide sufficient clarity in its studies has left it without the ability to have a third-party verify PGE's assertions of what is needed to safely interconnect.[6] Having a third-party assist with the construction would provide Sandy River with an ability to ensure that it can understand what is being constructed, why it is being constructed, and that the costs it is required to bear are in fact reasonable—all of which it cannot do if PGE is allowed to insist that it complete the construction.

Finally, to the extent that PGE is asserting (in its motion for summary judgment) that its interconnection construction team can perform well, despite the shortcomings and unreliability shown by PGE so far, then that is a fact that PGE has not yet supported on the record. This is an assertion that Sandy River should be able to test through discovery, cross-examination, and to which Sandy River should be entitled to respond.

In its Reply, PGE also makes other numerous assertions of fact, and asks the Commission to rely on them, but fails to recognize that those assertions are disputed. For example, PGE argues that "proceeding with construction by a consultant hired by Sandy River would make this interconnection more time consuming, costly, and inefficient."[7] Curiously, PGE tries to support this fact by pointing to a data response that it submitted in the case.[8] A data response does not constitute "undisputed facts," and Sandy River

6 Complainant's Response at 34-35.
7 PGE's Reply at 4.
8 *Id.* at 4, n. 14.

and REC have both already submitted testimony and alleged that a third-party could more efficiently, and in a more cost-effective manner, construct the facilities.[9]

PGE's reply also states that before PGE could allow a third-party to construct facilities, it would need to:

> [N]egotiate and enter into one or more additional contracts to govern Sandy River's use of a third-party consultant, to protect PGE and its system, and to allow PGE to exercise sufficient control and oversight over the third-party consultant's work—all tasks much more efficiently conducted if PGE were to construct the facilities and upgrades or hire a third-party consultant itself.[10]

PGE's assertions that it would be more efficient for PGE to do all of the construction itself is disputed specifically in the record.[11] It is worth noting, also, that this is an exasperating view by PGE. As explained in Sandy River's Response, it was PGE that argued in Docket No. AR 521 that any third-party's work should be governed by an agreement and significant oversight by the utility,[12] and now it argues that the arrangement PGE itself recommended now makes the use of a third-party unworkable.

PGE also asserts that Sandy River's project cannot be placed online until "the replacement of relays at the substation under higher-queued application SPQ0070"[13] and that this means that Sandy River's project cannot come online before February 17,

9 *See, e.g.*, REC/100, Lowe/4-5 (testifying that part of the reason for using a third-party to construct is that such parties are likely to allow for a more cost-effective solution, and ease the strain on utility resources); First Amended Complaint at ¶¶ 125-132 (Sept. 27, 2018) (alleging that a third-party could more cost-effectively complete the construction).

10 PGE's Reply at 4.

11 *See* REC/100, Lowe/4-5.

12 Complainant's Response at 22-23.

13 PGE's Reply at 1.

2020.[14] Sandy River disputes this fact, because it can, under an option even acknowledged by PGE, assume responsibility for those upgrades in order to expedite its online date.[15]

PGE asserts that it is undisputed that "PGE completed the interconnection study process required by the rules."[16] With this statement, PGE seems to imply that Sandy River is satisfied with its studies. Yet, Sandy River has already testified that the studies were untimely, incomplete, inconsistent with the Commission's rules, and so ambiguous that it cannot even have them evaluated by an independent engineer.[17]

Finally, PGE asserts in its Reply that if Sandy River were allowed to use a third-party as a remedy to PGE's shortcomings, then this "would alter the practices of all utilities and interconnection customers in the state."[18] However, as witnesses in this case have already testified, other utilities in Oregon already routinely allow the use of third-parties to construct interconnections for small generators,[19] and thus PGE's assertion again is, at best, a disputed fact.

14 *Id.* at 1-2.

15 *See* Initial Complaint, Attachment C Revised Facility Study at 6 (Aug. 24, 2018) ("There may also be an opportunity to move up the completion date for this project if [Sandy River] agree[s] to assume responsibility for the cost and accommodate the design and construction schedule for the fiber optic communication facilities required of the higher queued project.").

16 PGE's Reply at 1.

17 *See* Complainant's Response at 34 (highlighting full allegations and testimony).

18 PGE's Reply at 25. Although PGE couches this statement as an outcome that would occur if the Commission were to change its rules, PGE also seeks to equate that outcome to what Sandy River's request is in this case. Thus, it seems that PGE is relying on this assertion as a reason why the Commission should, through summary judgment, dispose of Sandy River's request, even though PGE relies on disputed facts to make that assertion.

19 REC/100, Lowe/6.

PGE's Reply, perhaps even more so than its original motion, makes it clear that PGE's motion relies on the Commission accepting its view of disputed facts. This is expressly contrary to the legal standard for motions for summary judgment, and thus the Commission should reject PGE's motion.[20]

B. PGE's Reply Raises New Arguments That Sandy River Has Not Had An Opportunity to Respond To

In its Reply, PGE puts forth various arguments for the first time. Sandy River expected that PGE may do this, given that it had incorrectly asserted in its motion for partial summary judgment that Sandy River's core legal argument was that it had a unilateral right under the Commission's rules to demand the use of a third-party. After reviewing Sandy River's Response, PGE now argues against what Sandy River has clarified it is more likely to argue in this case.

Sandy River responds briefly to each of PGE's arguments below, but notes at the outset that it should not be required, at this stage of the proceeding, or through a motion for partial summary judgment, to respond to the arguments that it is entitled to make after the development of the factual record or that PGE failed to make in its motion. Sandy River notes that it is also unclear how some of PGE's arguments (which are factual in nature) relate to its motion for partial summary judgment, which was based strictly on its interpretation of the rules.

[20] The Commission may grant a motion for summary judgment only if the record shows that 1) there is no genuine issue as to any material fact and 2) the moving party is entitled to prevail on its argument as a matter of law. ORCP 47C.

1. PGE Argues That Language Used in Other Commission Rules Clarifies That PGE's Discretion Regarding Third-Party Assistance of Interconnection Customers Is Not Constrained By Any Reasonableness or Good Faith Standard

PGE finally, in its Reply, recognizes that Sandy River's position is that PGE has a duty to act in good faith and in a reasonable manner when exercising its discretion over whether a third-party should be allowed to help construct interconnection facilities, and that the duty to act reasonably and in good faith does not arise solely from the language of the rule itself. PGE responds to Sandy River's position in its Reply, by making several new arguments about how the language of other rules shows the Commission's intent to exempt OAR 860-082-0060(f) from any reasonableness standard that may otherwise apply.

For example, PGE argues that because the Commission's rules provide elsewhere that the utility itself "may" use a contractor to construct facilities, this right of the utility trumps any right an interconnection would have to insist on using its own third-party, despite any reasonableness test.[21] PGE's position, however, is not logical. PGE's argument is that the Commission's rule somehow prioritizes one action PGE "may" take (hiring its own contractor) over another action that it "may" take (allowing an interconnection customer to hire a contractor), without any explanation of why that would be the case. The more reasonable reading of the rule is that there are various approaches that may make sense in any given circumstance (*i.e.* PGE could do the work itself, it could hire a contractor, or it could allow the interconnection customer to hire a contractor), and that PGE's decisions with regard to how to proceed should be reasonable

[21] PGE's Reply at 3.

under the circumstances. It may be that PGE's insistence on using a contractor to complete its own work would be unreasonable—for example, if the contractor were expensive, unreliable, or unqualified. And, it would be strange for PGE to expect that just because the rules say it "may" hire its own contractor, that this means its decision to do so cannot be questioned for reasonableness by the Commission. Likewise, it may make sense for PGE under some circumstances to allow an interconnection customer to utilize a contractor. Sandy River asserts that its interconnection is such an instance.

PGE also makes another separate argument about how the Commission's other rules show that its discretion under OAR 860-082-0060(f) is exempted from a reasonableness requirement. PGE asserts that because the rules regarding small generator interconnections use the word "must" in other instances, the Commission clearly intended that the word "may" is wholly permissive with respect to allowing interconnection customers to hire third-parties.[22] Sandy River's position is *not* that PGE "must" allow interconnection customers to always use third-parties to construct their facilities. Sandy River's position is that PGE "may" do so, and that its exercise of discretion must be reasonable. PGE's argument on this point, then, does not undermine Sandy River's interpretation because "may" is the correct word to use when the use of third-parties is reasonable in some, but not all circumstances.

PGE also notes that in other places in the Commission's rules, the Commission expressly found that a utility's judgment is to be constrained by reasonableness, or good faith.[23] PGE argues that because no such specific language was included in OAR 860-

22 *Id.* at 7-9.
23 *Id.* at 11-12.

082-0060(f), then the Commission must have intended for PGE's discretion to be free from any reasonableness standard.[24] In making this argument, PGE expressly recognizes that the Commission, by statute, has the power and duty to impose a reasonableness standard on utilities, but asserts that "[t]o the extent these statutes impose a standard of reasonable conduct on a utility, the Commission has already taken that into account in the formal rule making process."[25] In other words, PGE argues that the Commission has already embedded, in every specific rule, whether or not the utility's discretion under the rule is subject to a requirement to exercise that discretion in good faith, or reasonably under the circumstances.

The Commission should not find, on summary judgment in this case, that a utility's duty to act in good faith and reasonably exists only in those instances where the Commission's rules expressly state such a requirement. Such a finding could have far-reaching consequences for the Commission's regulation of utilities.

As pointed out in Sandy River's Response, Courts have recognized that such a reading of the word "may" is not allowed when the context of a statute (or presumably a rule) makes it clear that there is some benefit that was expected to be provided under the rule.[26] PGE seeks to distinguish those cases by arguing that there is no "constitutional right" at issue here, and that the context of the Commission's rules make it clear that PGE has an absolute right to refuse any interconnection customer's request. As described above, and in Sandy River's Response, the context of the rule is that it provides for a

24 *Id.*
25 *Id.* at 21.
26 *See* Complainant's Response at 19 (citing *Dilger v. School District 24 CJ*, 222 Or 108, 117 (1960)).

meaningful remedy that may be appropriate in circumstances like Sandy River's, and the rulemaking history shows that there was an expectation that the remedy would be made available in circumstances where doing so was reasonable.[27]

2. PGE Argues that A Duty of Good Faith and Reasonableness Under Its Contracts With Sandy River Does Not Apply In the Case

PGE recognizes that under its contracts with Sandy River (its Power Purchase Agreement, and its Facilities Study Agreement), PGE has a duty to act in good faith to implement the contracts.[28] But, it argues that this obligation is not implicated in this case because "Sandy River has not identified any contract provision in the PPA or the FSA that would require PGE to allow a third-party consultant to upgrade PGE's interconnection facilities, nor could it."[29] There does not need to be such a provision and the point is that: where an action is not expressly addressed in the contract, and one party is exercising its discretion, then the duty of good faith enters and applies to govern that action.[30]

On this topic of whether PGE has a duty of good faith that applies to its discretion under OAR 860-082-0060(f), PGE does not effectively distinguish the cases cited by

27 *Id.* at 20-27.
28 PGE's Reply at 18.
29 *Id.* at 19.
30 *See* Complainant's Response at 12 ("The duty of good faith is traditionally applied by courts in situations where one party has the discretion to execute a substantial term of the agreement, and requires that 'when one party has the authority to exercise discretion to determine an essential term of the contract, . . . the covenant of good faith and fair dealing requires the discretion to be reasonable.'") (citing *Orff v. U.S.*, No. CV-F-93-5327 OWW SMS, 1999 WL 33945647, at *2 (E.D. Cal., Sept. 27, 1999)).

Sandy River. PGE argues that *Xcel Energy Servs., Inc. v. Sw. Power Pool, Inc*.[31] stands only for the "unremarkable proposition that a contract can impose a duty above and beyond the duties that are imposed by statute or regulation."[32] But, this characterization of the case is wrong. In that case, the utility had not agreed by contract to take the specific actions FERC found that it should take. Instead, FERC found that a utility must take actions that are reasonable under the circumstances to implement a contract, specifically its obligations under PURPA, even though the actions were not required by statute or regulation, or the contract itself, if requested by the counterparty. That is exactly the circumstance presented here.

PGE also tries to distinguish *Electric Lightwave, Inc. v. US West Communications, Inc.*, where the Commission found that a utility "does have a general duty to act in good faith" and to not act in a manner that is unreasonable when requested to negotiate a list of established facts for purposes of litigating a case.[33] PGE argues that the case only means that "a party to a lawsuit generally has a duty to deal with the opposing party in good faith,"[34] as if the duty arises only from some duty that applies to counsel. However, the Commission's statements about the duty were applied, in fact, to the utility. And PGE also offers no explanation for why a duty of reasonableness applies in a Commission proceeding, but would not apply in interactions between parties pursuant to implementing Commission-approved contracts and its obligations under PURPA and state law.

31 *Xcel Energy Servs., Inc. v. Sw. Power Pool, Inc*.,118 FERC ¶ 61, 232 (2007).
32 PGE's Reply at 19.
33 Docket No. UC 377, Order No. 99-285 at 8 (1999).
34 PGE's Reply at 20.

3. PGE Argues that Sandy River Chose Its Commercial Operation Date ("COD"), and that the COD Does Not Justify Hiring a Third-Party

PGE observes in its Reply that Sandy River had the right to select a scheduled commercial operation date under its PPA, and that Sandy River selected December 1, 2019.[35] PGE then asserts that:

> Sandy River cannot now rely on the scheduled commercial operation date that it chose, and which is in advance of the date that the Sandy River interconnection is expected to be placed in-service, to argue that PGE must agree to allow Sandy River to hire its own consultant to construct the required interconnection facilities and system upgrades.[36]

PGE's point here is not entirely clear. Sandy River has argued that it is economically harmed from the delay to the case caused by PGE's motion for summary judgment being processed through a stay of the underlying case, but has not asserted that its commercial operation date is what triggers a third-party's assistance being an appropriate remedy. Rather, that remedy is appropriate because of PGE's unreasonable actions in the interconnection process.

PGE may be asserting that to the extent a third-party would expedite the interconnection, such an outcome should not be provided for because Sandy River chose its own commercial operation date. If so, Sandy River points out that Sandy River's selection of a commercial operation date of December 1, 2020 was based on information that Sandy River received *from PGE* about when it believed the interconnection could be completed. That date has slipped based on requirements determined by PGE subsequent

35 *Id.* at 19.
36 *Id*.

to when the commercial operation date was chosen. In fact, Sandy River has testified that PGE either knowingly or recklessly provided information that showed a December 1, 2019 in-service option when it should have already known, based on information that it had, that a higher-queued project's work would need to be completed, and that it was not scheduled until February of 2020.[37] The Commission should, therefore, disregard PGE's statements on this topic.

4. PGE Argues that Certain Evidence is Hearsay and Not Admissible

In its Reply, PGE addresses testimony offered by John Lowe, on behalf of REC, about what the intended purpose of the rules was, based on his personal experience in AR 521. PGE argues that this is not competent or admissible testimony, and that it is inadmissible hearsay.[38]

PGE's argument overlooks that hearsay is not inadmissible in administrative agency proceedings. Instead, it is often admissible, and is given appropriate weight.[39] In this case, John Lowe participated directly in the proceeding where OAR 860-082-0060(f) was adopted, and was representing parties with an interest in ensuring that remedies were available for small generators that are aggrieved by the utility's actions in the interconnection process. Mr. Lowe's testimony, therefore, should be given its due weight. Although PGE may disagree with his views, his testimony is relevant to the

37 This is explained, with testimony citations in Complainant's Response at 32-33.
38 PGE's Reply at 6.
39 *See, e.g.*, *Reguero v. Teacher Standards & Practices Comm'n*, 101 Or App 27, 34 (1990) (finding that hearsay is admissible in contested cases, and can constitute substantial evidence).

questions in this case, to the extent the Commission views it important to determine what the intent was behind the language that it adopted. Mr. Lowe's testimony would, in fact, seem very relevant and important in this case, given that the Commission, in adopting the rule, stated that "*[w]e agree with the small generators* that it is appropriate to allow a public utility and an interconnection applicant to agree to allow the applicant to hire third-party contractors to complete any required studies during a Tier 4 review and have amended OAR 860-082-0060 to reflect this conclusion." [40]

5. PGE Argues that a General Policy Docket Is the Appropriate Way to Accomplish a Rule Change

PGE again asserts that Sandy River's claims may best be resolved through a generic policy docket. It acknowledges that Sandy River has stated it is not seeking a rule change, but then re-asserts that "Sandy River is doing exactly that"[41] and that a generic docket is thus appropriate. Sandy River notes again that a generic policy docket would do nothing to resolve Sandy River's case because the Commission could not grant it relief through such a docket. Such a docket will not help other projects currently struggling with PGE's interconnection process either, whether they be other QFs or community solar projects. The Commission should thus allow parties, as always, to utilize the Commission's complaint process where necessary to resolve their particular issues, and not use generic policy dockets to do so.

[40] *In Re Rulemaking to Adopt Rules Related to Small Generator Interconnection*, Docket No. AR 521, Order No. 09-196 at 4 (June 8, 2009) (emphasis added).

[41] PGE's Reply at 24-25.

C. The Commission Has The Power to Remedy Sandy River's Harms, Despite PGE's Implications That the Commission Does Not

PGE's Reply continues to evaluate the specific language of OAR 860-082-0060(f), and assert that the rule does not contain any requirement for it to exercise its discretion reasonably, or in good faith. By so arguing, PGE implicitly argues that the Commission is without power to otherwise allow Sandy River to utilize a third-party's assistance in constructing its interconnection facilities.

The Commission should reject such a narrow reading of its powers. The Commission is provided broad statutory authority to protect customers from unjust and unreasonable exactions and practices,[42] and is "vested with power and jurisdiction to supervise and regulate every public utility and telecommunications utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction."[43] This power arguably, then, gives the Commission the authority to require PGE to allow a third-party assist with the construction of Sandy River's interconnection facilities, even without reliance on OAR 860-082-0060(f), if it finds that such a remedy is reasonable and would address Sandy River's harms. The Commission has, in the past, ordered utilities to allow third-parties to review their systems, and make recommendations to the Commission,[44] and it should do so again.

42 ORS 756.040.

43 ORS 756.040(2).

44 *See, e.g.*, *In Re NW Natural Investigation of Interstate Storage and Optimization Sharing*, Docket No. UM 1654, Order No. 15-066 (Mar. 5, 2015) (requiring utility and other parties to hire a third-party to review utility's system and operations, and requiring formation of committee to make such hire and supervise the process).

D. Contrary to PGE's Assertion, Sandy River Did Address PGE's Argument About the UM 1610 Rulemaking Record

In its Reply, PGE argues that "Sandy River and REC never address the fact that [the issue of third-party assistance for small generator interconnections] was expressly raised in subsequent Docket No. UM 1610, in which revisions to the current rules were considered, but not yet resolved."[45] PGE argues that the fact that REC proposed changes to the rule, but those changes were not taken up in UM 1610, shows that the rule does not operate as Sandy River contends it should.

Sandy River does not reargue this point, but instead points out that PGE is mistaken. In its Response, REC expressly addressed PGE's argument. REC provided two pages of analysis of this argument, and summarized:

> On the whole, REC's comments [in UM 1610] merely demonstrate that REC remained committed to addressing interconnection issues and continued to seek improvements to the rule regarding use of third-parties. REC's comments are in no way contradictory to its position in this case, that PGE must approach the topic of requests to use third-parties to assist with interconnections in good faith and reasonably. REC's more recent requests for a better remedy than the current rule only highlights how much more disappointing PGE's current position is, that the rules provide no remedy for interconnection customers because of its determination to treat the rules, contrary to their purpose, as an authorization to ignore the issue altogether.[46]

E. PGE's Reply Makes Clear That It Is Seeking to Piecemeal Its Litigation with Sandy River, to Sandy River's Economic Detriment

As noted in Sandy River's Response, PGE has made contradictory and shifting assertions of what it is seeking to have decided in its motion for partial summary

[45] PGE's Reply at 17.

[46] *See generally* Renewable Energy Coalition's Response to PGE's Motion for Partial Summary Judgment at 13-14 (Mar. 26, 2019) (emphasis omitted).

judgment. Specifically, in its motion for summary judgment, PGE stated that it was seeking to dispose, summarily, of Sandy River's second claim. Subsequent to that, in its reply to Sandy River's response to PGE's motion to stay, PGE asserted that if it prevailed on its motion for partial summary judgment, it would dispose of *all* of Sandy River's claims.[47]

PGE now, in its Reply, changes again, and states that it is still seeking to resolve just Sandy River's second claim for relief. But, it says that it is "also still true" that "if the Commission grants PGE's motion for partial summary judgment—and thereby agrees with PGE's interpretation of OAR 860-082-0060(8)(f)—that will effectively dispose of all the prayers in Sandy River's complaint."[48] PGE tries to reconcile this by stating:

> If the Commission grants PGE's motion for partial summary judgment on Sandy River's second claim for relief and paragraphs 3 and 7 of Sandy River's prayer for relief, then PGE will take appropriate steps to deal with Sandy River's remaining claims and prayers, which may include a subsequent motion for summary judgment and/or settlement of any remaining claims.[49]

It is still unclear exactly what PGE intends on this topic of how its motion would affect Sandy River's claims, but one thing is now clear—PGE expressly envisions handling this case through piecemeal, and serial motions for summary judgment. This is exactly the type of poor outcome that Sandy River predicted, and why it so forcefully opposes the stay that has been granted in this case. As Sandy River argued:

> PGE's requested stay would, in fact, *lead to* a piecemeal approach to the case, where one argument would be decided before the rest of the arguments would then proceed. As stated above, such an

47 PGE's Reply in Support of Motion for Stay at 2-3 (Mar. 8, 2019) (emphasis added).
48 PGE's Reply at 25.
49 PGE's Reply at 26.

> approach would be especially non-sensical given that the legal issue presented in PGE's motion for partial summary judgement is not the actual legal issues that will be presented in this case. Thus, PGE's proposal would have the Commission litigate a hypothetical legal issue, freeze the proceeding until that was concluded, and then turn its attention to the actual legal issues in the case. Such a piecemeal approach is inefficient, prejudicial to Sandy River's interests in a timely resolution of this case, and would not promote any judicial economy.[50]

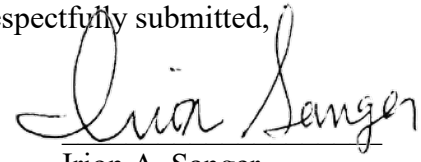
In light of PGE's admission that it is engaging in a piecemeal approach to Sandy River's case, the Commission should deny its motion for summary judgment, and take the more economical and just approach of allowing Sandy River's claims to proceed under a normal litigation schedule, where all factual and legal arguments can be decided at the same time, and with a full record before the Commission when it decides the case.

III. CONCLUSION

For all of the reasons described above, PGE's motion for partial summary judgment should be denied.

Dated this 8th day of April 2019.

Respectfully submitted,



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[50] Complainant's Response to PGE's Motion for Stay at 26 (Mar. 6, 2019).

Attachment B

Summary of Qualifying Facility Complaints Brought Against PGE Before the Oregon Public Utility Commission

OPUC QF Complaint Summaries

PGE QF Complaints

Carnes Creek Solar
Docket: UM 1631
Filed: 1/19/2018
Closed: 8/3/2020 Order No. 20-245
Case Status: Settled
Description:
The QF was pre-certified to participate in the Community Solar Program. During the interconnection process, a larger, higher queued project pulled out of the queue, and left the QF with a larger upgrade cost. With the QF's original nameplate capacity it would have pushed the interconnection point over its daytime minimum load, which would necessitate substantial upgrades to the system. The QF, in response, wanted to reduce their nameplate capacity in order to avoid some of these additional interconnection costs.

The initial estimate for the interconnection was $101,000, which then jumped to over $768,000 with the withdrawal of the higher-queued project. Of the new total, $739,000 was for protection and fiber optic communication requirements to prevent generation from the QF from backfeeding into the substation transformer and onto PGE's transmission system, where such backfeeding could create adverse system impacts. The QF filed a waiver so that they could request that PGE accept its nameplate capacity reduction, without having to pay for a new interconnection study, up to the amount of the amount allowed under the CSP. PGE was not agreeable to requesting a waiver.

Marquam Creek Solar
Docket: UM 1631
Filed: 1/25/2021
Case Status: Ongoing Litigation
Description:
The QF had already secured a fully executed IA with PGE for its community solar facility that contained an interconnection cost estimate of $268,350, which would allow the facility to be brought into service. PGE subsequently proposed to re-study the QF's interconnection after a higher queued project withdrew from the queue. As a result of the restudies, PGE asserted that the QF's generation will cause backfeeding onto PGE's system that requires extensive and costly 3V0 sensing upgrades, with total estimated interconnection costs in PGE's latest SIS to be $1,100,053. In response, the QF wanted to reduce their nameplate capacity by 88kW to place their output under the threshold indicated in the SIS and thus avoid the extra interconnection costs. The QF filed waiver so that they could request that PGE accept its nameplate capacity reduction, without having to pay for a new interconnection study. PGE was not agreeable to requesting a waiver.

Pacific Northwest Solar (Amity Project)

Docket: UM 1902
Filed: 10/9/2017
Closed: 7/4/2019, Order No. 19-199
Case Status: Settled
Description:
PGE failed to meet several deadlines during the interconnection process, resulting in delays of 5 to 6 months. PGE also failed to include schedules that were reasonable in its Feasibility Study Agreement, System Impact Study Agreement and Facilities Study Agreement. PGE acknowledged some delays were possible and claimed that their interconnection personnel and engineers made reasonable, good faith efforts to accurately estimate the time required to complete the Feasibility, System Impact, and Facilities Studies and to adhere to those estimates in completing the Studies, in light of the rapidly increasing number of interconnection requests. The Feasibility Study had a 106 calendar day turn around and the total delay, at the time of filing, was 205 calendar days from the originally agreed upon schedule, and the total study time was 311 days at the time the complaint was filed.

Butler Solar
Docket: UM 1903
Filed: 10/9/2017
Closed: 7/4/2019, Order No. 19-199
Case Status: Settled
Description:
PGE failed to meet several deadlines during the interconnection process, resulting in delays of 6 to 7 months. PGE also failed to include schedules that were reasonable in its Feasibility Study Agreement, System Impact Study Agreement and Facilities Study Agreement. PGE acknowledged some delays were possible and claimed that their interconnection personnel and engineers made reasonable, good faith efforts to accurately estimate the time required to complete the Feasibility, System Impact, and Facilities Studies and to adhere to those estimates in completing the Studies, in light of the rapidly increasing number of interconnection requests. The Feasibility Study had a 99 calendar day turn around and the total delay, at the time of filing, was 230 calendar days from the originally agreed upon schedule and the total study time was 329 days at the time the complaint was filed.

Pacific Northwest Solar (Duus Project)
Docket: UM 1904
Filed: 10/9/2017
Closed: 7/4/2019, Order No. 19-199
Case Status: Settled
Description:
PGE failed to meet several deadlines during the interconnection process, resulting in delays of 10 to 11 months. PGE also failed to include schedules that were reasonable in its Feasibility Study Agreement, System Impact Study Agreement and Facilities Study Agreement. PGE acknowledged some delays were possible and claimed that their interconnection personnel and engineers made reasonable, good faith efforts to accurately estimate the time required to

complete the Feasibility, System Impact, and Facilities Studies and to adhere to those estimates in completing the Studies, in light of the rapidly increasing number of interconnection requests. The Feasibility Study had a 93 calendar day turn around, the total delay, at the time of filing, was 330 calendar days from the originally agreed upon schedule, and the total study time was 423 days at the time the complaint was filed.

Pacific Northwest Solar (Firwood Project)
Docket: UM 1905
Filed: 10/9/2017
Closed: 7/4/2019, Order No. 19-199
Case Status: Settled
Description:
PGE failed to meet several deadlines during the interconnection process, resulting in delays of 10 to 11 months. PGE also failed to include schedules that were reasonable in its Feasibility Study Agreement, System Impact Study Agreement and Facilities Study Agreement. PGE acknowledged some delays were possible and claimed that their interconnection personnel and engineers made reasonable, good faith efforts to accurately estimate the time required to complete the Feasibility, System Impact, and Facilities Studies and to adhere to those estimates in completing the Studies, in light of the rapidly increasing number of interconnection requests. The Feasibility Study had a 165 calendar day turn around and the total delay, at the time of filing, was 340 calendar days from the originally agreed upon schedule, and the total study time was 505 days at the time the complaint was filed.

Pacific Northwest Solar (Starlight Project)
Docket: UM 1906
Filed: 10/9/2017
Closed: 7/4/2019, Order No. 19-199
Case Status: Settled
Description:
PGE failed to meet several deadlines during the interconnection process, resulting in delays of 6 to 7 months. PGE also failed to include schedules that were reasonable in its Feasibility Study Agreement, System Impact Study Agreement and Facilities Study Agreement. PGE acknowledged some delays were possible and claimed that their interconnection personnel and engineers made reasonable, good faith efforts to accurately estimate the time required to complete the Feasibility, System Impact, and Facilities Studies and to adhere to those estimates in completing the Studies, in light of the rapidly increasing number of interconnection requests. The Feasibility Study had a 106 calendar day turn around and the total delay, at the time of filing, was 230 calendar days from the originally agreed upon schedule, and the total study time was 336 days at the time the complaint was filed.

Pacific Northwest Solar (Stringtown Project)
Docket: UM 1907
Filed: 10/9/2017
Closed: 7/4/2019, Order No. 19-199
Case Status: Settled
Description:
PGE failed to meet several deadlines during the interconnection process, resulting in delays of approximately 4 months. PGE also failed to include schedules that were reasonable in its Feasibility Study Agreement, System Impact Study Agreement and Facilities Study Agreement. PGE acknowledged some delays were possible and claimed that their interconnection personnel and engineers made reasonable, good faith efforts to accurately estimate the time required to complete the Feasibility, System Impact, and Facilities Studies and to adhere to those estimates in completing the Studies, in light of the rapidly increasing number of interconnection requests. The Facilities Study had a yet to be received by the QF at the time of filing and the total delay, at the time of filing, was 115 calendar days from the originally agreed upon schedule.

Dunn Rd. Solar
Docket: UM 1963
Filed: 7/26/2018
Closed: 11/9/2018, Order No. 18-434
Case Status: Voluntarily Withdrawn
Description:
The Facilities Study (and subsequent revised Facilities Study) provided by PGE only contained a brief overview of the facilities required and a generic listing of the costs. It contained no information about the existing facilities or the design for the new facilities. PGE did not provide, and refused to provide any additional, information. PGE proposed some facilities and system upgrades that were not necessary to the QF's interconnection under the IEEE standards, and PGE cited to no other industry standard or prudent electrical practice which justified its proposal other than its own internal standard as the grounds for justifying its upgrades.

PGE stated that the transfer trip scheme and new substation relays required by the Revised Facilities Study were necessary to ensure that the QF would cease to energize the Feeder within 2 seconds of the formation of an unintentional island as required by IEEE 1547 Section 4.4.1, and to ensure that the Project would not backfeed PGE's system if there was a ground fault or other contingency on the high-side of the 57 kV Substation transformer. PGE further stated that additional upgrades to the system were necessary because higher-queued projects withdrew from the queue, thereby forcing the QF to pay for upgrades because the aggregate solar generation on the Feeder would then exceed the daytime minimum load. The initial SIS estimated the interconnection costs to be $200,000. The Facilities Study estimated the cost to be $302,000 because of a higher-queued project pulling out, however PGE did not specify in that study exactly what changes would need to be made to safely interconnect the QF.

Sandy River Solar
Docket: UM 1967
Filed: 8/24/2018
Closed: 8/29/2019, Order No. 19-285
Case Status: Voluntarily Withdrawn
Description:
The QF was concerned about PGE's interconnection practices because the studies they received only contained generalized categories on the study's overview, scope, assumptions, affected systems, interconnection requirements, costs, and a schedule. The studies also did not contain any analysis or results and did not detail the impact to PGE's system. As a result, the QF asked to be able to hire a third-party consultant to do the study and interconnection construction. PGE did not agree to allow a third-party consultant on this, or indeed any other QF interconnection projects, at the time of the filing.

PGE indicated that both the facilities study and the revised facilities study required the installation of a new service and metering package and a transfer trip protection scheme with a fiber optic communication channel. PGE further indicated that both the original and revised facilities study estimate the cost of the required interconnection facilities and system upgrades to be $122,954 and would require 18 months of construction time from the execution of an interconnection agreement.

The QF wanted to hire a third-party consultant to construct the required interconnection facilities and system upgrades pursuant to OAR 860-082-0060(8)(f). PGE disputed the claim, stating that a third-party contractor had to be approved by both parties, which they did not approve of despite admitting to being understaffed and behind schedule for their interconnection queue, and having hired their-party contractors themselves in the past.

Earlier in the docket, an Order No. 19-218 was issued in response to PGE's Motion for Summary Judgment. PGE argued that OAR 860-082-0060(8)(f) allowed them sole discretion over the allowance of third-party contractors to perform interconnection studies and construction. The QF stated that the rule was intended to provide a remedy for interconnection customers experiencing delays or problems with the utility, and it was understood that a utility's consent to use third parties would not be unreasonably withheld. In the order, the Commission stated that the rule as written does not include a reasonableness standard, and therefore PGE could unreasonably decide not to allow the QF to hire a third party to construct the interconnection facilities.

Waconda Solar
Docket: UM 1971
Filed: 9/28/2018
Case Status: Ongoing Litigation
Description:

Following PGE's admitting errors on the initial Feasibility Study, the QF wanted to be allowed to hire a third-party contractor to execute various interconnection studies, and conduct an independent system impact study. PGE previously agreed that PGE and an applicant could agree to allow the applicant to hire third-party consultants to complete any interconnection facilities and system upgrades. The QF also noted that PGE itself sometimes uses third-party contractors to do the studies. PGE delayed and made inconsistent statements in the interconnection study process and, according to the complaint, unreasonably refused to allow the QF to hire a third-party to complete the interconnection studies. PGE did not give any specific reasons for refusing to allow a third-party contractor to complete the studies. The QF noted that there can be significant delays and costs for interconnection customers when studies are delayed, inaccurate, or incomplete.

Madras PV1, LLC
Docket: UM 2009
Filed: 4/22/2019
Closed: 4/26/2021 Order No. 21-126
Case Status: Settled
Description:
The QF sought to enter into a PPA with PGE. During that process, PGE caused delay and insisted on unreasonable terms and conditions being included in the PPA. Foremost of these was the requirement that the QF enter into an interconnection agreement, or certain related agreements, prior to receiving a draft PPA. PGE also initially refused to provide indicative pricing for four months from the QF's initial request, and then delayed a draft PPA for another six months because it believed that the point of interconnection for the project could not be accommodated and therefore refused to consider it. PGE also failed to respond in reasonable timeframes to the QF's requests to negotiate the PPA or to move the negotiations forward through exchanges of information. Ultimately, PGE agreed upon the POI and that the interconnection studies did not need to be completed prior to contract execution. However, the initial estimate for the interconnection was roughly $392 million for an NRIS interconnection (which included completely rebuilding 99 miles of transmission lines) and $51 million for ERIS. Improvements of such magnitude would surely be considered Network Upgrades, and thus fall under the jurisdiction of the utility. After a restudy and an admittance of PGE's mistake in the initial study, the interconnection cost was reduced to $27 million for NRIS and $3 million for ERIS interconnection. Furthermore, because of the delays, the date for PGE's new, reduced, avoided-cost pricing was drawing near, which the QF believed to be a possible cause for the multitude of delays. From the initial date the QF requested indicative pricing to the filing of the complaint was a total of 552 calendar days, during which no PPA had been executed.

St. Louis Solar
Docket: UM 2057
Filed: 2/3/20

Closed: 7/13/2021, Order No. 21-221
Case Status: Jointly Dismissed
Description:
The QF and PGE already had a completed PPA and interconnection agreement signed. Due to multiple delays in the interconnection process, the PPA was amended twice to extend the COD. Due to the repeated delays, the QF would be unable to receive the benefits of the fixed-price payments in the PPA. The PPA provided 15 years of fixed price payments starting from the date of execution. PGE sued the QF for damages and refused to further extend the COD, which would result in the potential termination of the PPA. The initial PPA was signed in June 2016, in which the interconnection was said to take approximately 12 months to complete. The facility completed construction in December 2018 and as of the time of filing no agreement had been reached. February 10, 2019, passed, and St. Louis Solar missed its COD. On February 11, 2019, PGE provided a notice of default under the PPA. In March 2019, the QF inquired about interconnection, and PGE asserted that the QF had no claim to interconnection sooner than the last date in the interconnection agreement (October 31, 2019). In April 2019, PGE began sending monthly bills to the QF for alleged damages from the failure to achieve COD pursuant to the PPA. At the time of filing, the QF had paid over $600,000 for interconnection service, paid over $20,000 for PGE's alleged damages, and had lost substantial revenues under the PPA.

Zena Solar
Docket: UM 2074
Filed: 3/27/2020
Closed: 8/12/2020, Order No. 20-264
Case Status: Settled
Description:
PGE completed a SIS for the QF, and the QF and PGE entered into a Facility Study Agreement for PGE to conduct the Facility Study. Less than two weeks after the Facility Study Agreement was executed, a higher queued project withdrew. PGE did not notify the QF of the change in queue. Instead, PGE made the decision to not conduct a new SIS and instead relied on an older SIS for a different project to produce a Facility Study for the QF. PGE then hid the fact that it relied upon an older SIS for a different project and admitted that it used a SIS for a different project only after the QF repeatedly questioned the accuracy of the Facility Study. The QF identified multiple discrepancies and errors with both the resulting Facility Study as well as the old SIS for the withdrawn, higher-queued project. PGE dismissed all concerns by the QF and then demanded that the QF execute an interconnection agreement, at the QF's expense, or forfeit its position in the interconnection queue. The QF asked to be allowed to have an independent third-party contractor conduct the SIS, but PGE refused.
In the Facility Study, PGE estimated that the QF would need to pay a total of $804,926 to interconnect the project, including $459,600 for protection requirements and $195,326 for communication requirements. In the second SIS, PGE estimated that the QF would need to pay a total of $324,312, including $58,500 for protection requirements and $74,812 for communication requirements. PGE's total cost estimate in the Facility Study is greater than the combined total cost estimate in the second SIS and the cost estimate for the QF's pre-requisite requirements in the SIS for the previously highest-queued project.

Zena Solar
Docket: UM 2164
Filed: 5/24/2021
Case Status: Ongoing Litigation
Description:
PGE's position is that the QF should be responsible for the costs of the installation of a 3V0 protection scheme at PGE's substation. The QF's position is that PGE's substation, as it is already designed and currently operated, is already exposed to conditions requiring 3V0 protection. Therefore, the QF should not be responsible for any costs associated with additional protection for the substation because the QF has not caused any adverse system impacts necessitating 3V0 protection. The QF also asked the Commission to determine whether PGE's specific upgrades and proposed costs are reasonable and whether they are consistent with Good Utility Practice. The QF disputed the upgrades required by PGE as being too costly and unnecessary. The QF proposed two different alternative methods that would be lower cost and equally reliable to mitigate and protect against 3V0 according to IEEE standards. The QF had an iSIS study completed, after which PGE agreed to one change, but stated that the rest were still necessary to protect the system. The iSIS indicated that the substation the QF proposed to connect to was already exposed to 3V0 issues and that the upgrades would have been required regardless of the QF's interconnection.

Dalreed Solar II
Docket: UM 2182
Filed: 6/25/2021
Case Status: Ongoing Litigation
Description:
The sole disputed PPA provision is when the QF must pay pre-COD security. PGE proposed that the QF pay the security within 30 days of PPA execution, while the QF proposed to pay within 30 days of receiving its SIS from PGE. The Feasibility Study was completed 205 calendar days after the FERC-mandated 45 day window, and the QF does not expect to receive a SIS until late October 2021. The SIS had also been delayed. Negotiations for the PPA began June 1, 2020 and had not yet been executed at the time of the filing. The QF also alleged that the security amount is much higher and due earlier than is necessary or standard in most QF PPAs. The developer of the QF had been involved in over a dozen other QF PPAs with other utilities and all had required a smaller pre-COD payment, due at a later date, thus making PGEs demands inconsistent with other utilities' practices.

PacifiCorp QF Complaints

Surprise Valley Electrification
Docket: UM 1742

Filed: 6/22/2015
Closed: 8/22/2016 Order No. 16-317
Case Status: Settled
Description:
PAC refused to enter into a PPA with the QF because of its off-grid status and delayed the negotiations until after new avoided cost schedules went into effect. The QF requested the Commission to rule that it had entered into an LEO with PAC prior to that date in order to protect their rates. PAC stated that the QF would not be a QF if Surprise Valley used the net output to offset power purchased from BPA and that was transmitted to Surprise Valley by PacifiCorp. PAC did not identify any provision of Oregon or FERC law, rules, policies, or Schedule 37 to support its statement.

PAC previously described the QF as first an off system QF, then as on system, and then through most of the negotiations as an on/off system QF. After the QF filed the complaint, PAC adopted the position that the project was an off system QF and must provide "transmission arrangements" to deliver the net output across Surprise Valley's transmission system to be eligible to sell the entire net output During the negotiations, PAC filed revised Schedule 37 contracts and rates, which were a reduction from their previous rates. These arrangements meant that a new transmission system would have to be constructed to route the power around the Surprise Valley load area, where it was intended for use, to the transmission input on the opposite side of the load area. From the date the QF initially requested a PPA from PAC to the date of the filing, during which no PPA was executed, was 686 calendar days.

Sunthurst Energy
Docket: UM 2118
Filed: 9/29/2020
Case Status: Ongoing Litigation
Description:
Developer had two pre-certified Community Solar Program QFs seeking to interconnect with PAC. The developer contended that the unreasonable costs and unnecessary metering requirements threatened to make the projects economically infeasible, as they would no longer be eligible for a higher federal Tax Income Credit, which was set to expire at the end of the year. Even though neither project required network upgrades, nor would they produce excess generation in the load pocket, PAC was still estimating a total interconnection cost of over $1M ($202/MW). PAC made some corrections after direct testimony which reduced the cost by a total of $141,728. The QF also disputed the need for branch regulators, which totaled about $180,000, because the system had operated safely without them after a regulator control unit failed and was not replaced for 13 days. PAC conceded these were only included to prevent line loss, ignoring the economic feasibility of having a third-party foot the bill. PAC initially required three meters for the two projects, even though the initial study, and a study done by the developer's own engineer, only required two. After negotiations, PAC agreed to cover the cost of the additional meter, another $39,000 off of the original estimate.

Dalreed Solar
Docket: UM 2125
Filed: 11/3/2020
Case Status: Ongoing Litigation
Description:
The QF requested a draft PPA from PAC but was denied because an interconnection study had not been completed. The QF had requested, and received from PAC, indicative pricing, effectively beginning the PPA negotiation process. PAC then refused to provide the QF with a draft PPA until the interconnection study had been completed, a practice they say was in compliance with all laws and regulations. Without a fully executed PPA the QF would not be alt to obtain financing. The QF asserted that, because they were already in the new cluster study queue, according to PURPA, PAC was required to continue PPA negotiations and that by denying the QF a draft PPA PAC was in violation of federal law. PAC maintained its position. The QF would also only have 30 days after the transition cluster study results to elect to participate in a Facilities Study. Therefore, if the QF was not permitted to proceed with the PPA negotiation process, then it would be required to choose to participate in the Facilities Study without reviewing and knowing what terms, conditions, or prices may be part of its eventual PPA.

PAC, right before oral arguments in front of the Commission, provided the QF with a draft PPA. The Commission left the docket open in order to monitor PAC's behavior. According to the Commission there was concern about PAC's continued willingness to provide draft PPAs to QFs before they have received cluster study results and to expeditiously negotiate PPAs during the cluster study process and after the cluster study report is available.

Sunthurst Energy
Docket: UM 2177
Filed: 6/3/2021
Case Status: Ongoing Litigation
Description:
PAC sent the QF notice of intent to remove the project from the interconnection queue unless they complete the Facilities Study agreements. The QF requested an extension of deadlines PAC had imposed upon it, until PAC had meaningfully addressed the QF's concerns with the interconnection studies. The QF further requested PAC explain why 3 of 3 of the developer's interconnection requests have been reconfigured by PAC during the study process, and state whether PAC will assist the QF in mitigating resulting cost impacts. For two of the SIS, PAC was using different IEEE standards than had been approved by the Commission for the CSP, which, after questioning by the QF, they agreed to remove. PAC had not shown the need for re-conductoring, yet continued to require re-conductoring, at a cost of more than $400,000 (the initial cost for the project to interconnect was roughly $1M). The QF questioned why PAC was applying a standard that is more stringent than IEEE 1547-2018, where even IEEE 1547-2018 would not call for re-conductoring in the interconnection in question. PAC further refused to split the interconnection costs with the QF.