MARKOWITZ HERBOLD PC

Jeffrey S. Lovinger | Lawyer
JeffreyLovinger@MarkowitzHerbold.com

July 23, 2019

<u>Via Electronic Filing</u>

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

Re: UM 1971 - Waconda Solar, LLC v. Portland General Electronic Company

Attention Filing Center:

Enclosed for filing today in the above-named docket is Portland General Electric Company's Response in Opposition to Complainant's Motion for Leave to File First Amended Complaint.

Thank you for your assistance.

Very truly yours,

Jeffrey S. Lovinger

887414

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1971

WACONDA SOLAR, LLC, Complainant, vs. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	**PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**

I. INTRODUCTION

Over nine months into litigation, Waconda Solar, LLC ("Waconda") seeks to amend its complaint to add five new claims (three contract claims and two statutory claims). The amendments also include new factual allegations regarding the system impact study process – allegations that have been mooted by recent events.

Waconda sat on its claims for nine months while Portland General Electric Company ("PGE") expended significant resources answering the complaint, engaging in settlement negotiations, and preparing a summary judgment motion. In early June 2019, when PGE conferred with Waconda regarding PGE's motion for summary judgment, Waconda requested more time to propose limited discovery and a summary judgment schedule. PGE agreed not to file its motion for summary judgment immediately so that the parties could explore whether they could reach agreement on a procedural schedule. Instead of working with PGE on a procedural schedule, Waconda filed this motion seeking to dramatically alter the complaint. In response, PGE opposes leave to amend and has filed its motion for summary judgment against the original complaint.

The Commission should not reward Waconda's approach by permitting these late filed, meritless amendments. As detailed below, the four factors to be considered when deciding

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

whether to grant leave to amend do not support granting Waconda's motion. As a result, the Commission should deny leave to amend, grant PGE's motion for summary judgment, and dismiss the complaint with prejudice.

II. SUMMARY OF THE ARGUMENT

As the Commission explained in Order 18-348, the Commission and the courts consider four factors when deciding whether to allow amendment of a complaint: (1) the proposed amendment's nature and its relationship to the existing pleadings; (2) the prejudice, if any, to the opposing party; (3) the timing of the proposed amendment; and (4) the colorable merit of the proposed amendment.[1] Each of these factors weighs against allowing Waconda to amend its complaint.

First, the proposed amendments are improper because they would substantially change the cause of action or inject an entirely new element of damage. The amendments allege five new claims for relief, a new prayer for relief, and add factual allegations regarding a new transaction – the system impact study.

Second, allowing Waconda to amend its complaint more than nine months after the complaint was filed would prejudice PGE. PGE has expended substantial effort understanding the original claims, attempting to settle those claims, and preparing a comprehensive motion for summary judgment against those claims. Allowing Waconda to amend at this late date would also needlessly delay the interconnection process, potentially impacting PGE's interconnection queue.

Third, the timing of the proposed amendments mitigates against granting the motion for leave to amend. Waconda's amendments allege five new claims and a new prayer for relief, all of

[1] *See e.g.*, *Bottlenose Solar, LLC v. PGE*, Docket No. UM 1877, Order No. 18-348 at 4 (Sep. 24, 2018) (citing *Alexander v. State*, 283 Or App 582, 590 (2017)) (available at https://apps.puc.state.or.us/orders/2018ords/18-348.pdf).

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

which could have been alleged at the time Waconda filed its original complaint. Waconda has offered no compelling reason for why it delayed more than nine months and until after PGE had prepared a motion for summary judgment against the original complaint, before Waconda advanced these additional claims and additional prayer for relief. Waconda has also alleged new facts regarding the system impact study which could have been alleged in an amendment filed one month after the original complaint. Waconda's new factual allegations have been mooted by recent events.

Fourth, Waconda's new claims are meritless. Waconda originally alleged that PGE violated a number of the Commission's small generator interconnection rules. For the reasons detailed in PGE's motion for summary judgment, PGE has not violated any of the Commission's interconnection rules. Waconda now seeks to amend its complaint to allege five new claims asserting that PGE's handling of the interconnection process somehow violated the general provisions of two enabling statutes or the general duty of good faith and fair dealing under three contracts when PGE's actions did not violate the Commission's specific rules governing the interconnection process. As the Commission has noted in Order 19-218, Waconda faces a high bar to prove that the general duty of good faith and fair dealing or the Commission's general enabling statutes impose any obligations on PGE that are inconsistent with the rights and obligations established by the Commission's detailed and specific small generator interconnection rules.[2] For the reasons detailed below, Waconda's new claims are meritless.

[2] *Sandy River Solar, LLC v. PGE*, Docket No. UM 1967, Order No. 19-218 at 25 (June 24, 2019) (available at https://apps.puc.state.or.us/orders/2019ords/19-218.pdf).

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

Given that each of the four factors to be considered by the Commission militates against granting leave to amend, the Commission should deny Waconda's motion and should turn its attention to resolving PGE's motion for summary judgment and resolving this case.

III. BACKGROUND

Waconda proposes to construct a qualifying facility ("QF") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Prior to filing its complaint, Waconda applied to interconnect its proposed project to PGE's distribution system,[3] PGE and Waconda entered into a power purchase agreement ("PPA"),[4] and PGE was in the process of studying the work required to interconnect Waconda's facility to PGE's system. The parties executed a feasibility study agreement,[5] and in July 2018 PGE timely issued a feasibility study.[6] In response to Waconda's concerns with the contents of that study and Waconda's request for a revised study, in August 2018 PGE issued a revised feasibility study.[7]

Unsatisfied with the content of the revised feasibility study, Waconda filed a complaint against PGE on September 28, 2018.[8] That complaint listed four claims: (1) violation of OAR 860-082-0060(6)(e) due to alleged deficiencies in the original feasibility study and the revised feasibility study;[9] (2)(a) alleged violation of OAR 860-082-0060(9) for refusing to agree that Waconda could hire its own third-party consultant to perform the remaining two interconnection studies (the system impact study and facilities study), and (b) an assertion that PGE violated an

[3] *See* Complaint ¶¶ 8-9 (Sep. 28, 2018); *see also* Answer ¶¶ 8-9 (November 1, 2018).
[4] Compl.¶ 18; Answer ¶ 18. (A copy of the Waconda PPA is available at https://edocs.puc.state.or.us/efdocs/HAQ/re143haq164533.pdf).
[5] Compl.¶¶ 14-15; Answer ¶ 14 and Exhibit A (Feasibility Study Agreement).
[6] Compl. ¶ 19 and Attachment A (July 28, 2018 Feasibility Study); Answer ¶ 19.
[7] Compl. ¶ 49 and Attachment B (August 10, 2018 Feasibility Study); Answer ¶ 49.
[8] Compl. at 23.
[9] *Id*. ¶¶ 88-97.

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

unspecified duty to facilitate the performance of an independent system impact study;[10] (3) violation of the small generator interconnection rules for alleged failure to meet various deadlines in the feasibility study process;[11] and (4) violation of ORS 757.325 for alleged prejudicial conduct.[12]

On October 25, 2018, one month after Waconda filed its complaint, PGE timely issued the system impact study.[13] That same day, PGE provided Waconda an executable facilities study agreement.[14] By regulation, Waconda was required to execute the facilities study agreement within 15 days.[15] Waconda took the position that its pending litigation regarding the feasibility study should toll this deadline for the duration of the complaint proceeding.[16] PGE disagreed, but executed a series of short-term extensions for Waconda to sign the facilities study agreement, the last of which expired on April 30, 2019.[17] The parties engaged in a substantial effort to settle the case in late 2018 and early 2019, but those efforts ultimately failed to resolve the case.[18]

On June 6, 2019, the parties participated in an initial prehearing conference.[19] During consultation between the parties both before the conference and during informal "off the record" discussions during the conference, PGE indicated that it planned to file a motion for summary judgment.[20] At Waconda's urging, PGE agreed to withhold filing that motion to give the parties the opportunity to discuss a procedural schedule and possible cross-motions for summary

---

[10] *Id.* ¶¶ 98-123.
[11] *Id.* ¶¶ 124-34.
[12] *Id.* ¶¶ 135-40.
[13] Answer at 5-6 and Ex. K (System Impact Study).
[14] *Id.;* Declaration of Jeffrey Lovinger in Support of PGE's Opposition to Motion to Amend Complaint ("Lovinger Decl.") ¶ 2 and Ex. 1 (October 25, 2018 email from PGE to Waconda).
[15] OAR 860-082-0060(7)(c).
[16] Lovinger Decl. ¶ 4 and Ex. 2 (November 2, 2018 email from Waconda to PGE).
[17] *Id.* ¶¶ 5, 6 and Ex. 3 (November 13, 2018 letter from PGE to Waconda).
[18] *Id.* ¶ 7.
[19] Lovinger Decl. ¶ 9; *see* Waconda's First Request to Delay Prehearing Conference at 1 ("First Request to Delay Conf.") (June 19, 2019).
[20] Lovinger Decl. ¶ 9.

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

judgment.[21] Based on this proposal by Waconda, the parties asked the Administrative Law Judge ("ALJ") to schedule a follow-up prehearing conference to occur approximately two-weeks later so that the parties could continue discussions about a procedural schedule to govern the case.[22] PGE made it clear to Waconda and the ALJ that it was reserving its right to file a motion for summary judgment if the parties could not agree on a procedural schedule.[23]

The follow-up conference was originally scheduled to occur on June 19, 2019. However, Waconda requested a one-week extension of the conference date to give the parties additional time to "explore whether they can reach an agreement on a procedural schedule in this matter."[24] The ALJ rescheduled the follow-up conference for June 27, 2019.[25]

On June 24, 2019, the Commission issued Order No 19-218 in Docket No. UM 1967.[26] That order granted PGE's motion for partial summary judgment on a claim that PGE violated OAR 860-082-0060(8)(f) by refusing to agree to allow the QF in that case (Sandy River Solar LLC) to hire a third-party consultant to construct the required interconnection facilities.[27] The legal issues raised by this claim are effectively identical to the legal issues raised by Waconda's second claim for relief (alleging PGE impermissibly refused to agree that Waconda could hire a third-party consultant to conduct the remaining interconnection studies). This is the key dispute between the parties. Given that the holding in Order No. 19-218 impacts Waconda's key claim in this case, the parties agreed that an additional two-week extension of the follow-up conference was appropriate to allow Waconda time to determine whether it would continue with its complaint.[28]

---

[21] *Id*. ¶ 10.
[22] *Id*. ¶ 11.
[23] *Id*.
[24] First Request to Delay Conf. at 1.
[25] Notice of Rescheduling of Telephone Prehearing Conference (June 24, 2019).
[26] *See* Docket No. 1967, Order No. 19-218.
[27] *Id*. at 1.
[28] Lovinger Decl. ¶ 13.

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

On June 26, 2019, Waconda requested a two week extension of the date for the follow-up conference and the Commission canceled the June 27, 2019 conference.[29]

On July 8, 2019, before the Commission had re-scheduled the follow-up conference, counsel for Waconda called counsel for PGE, announced that Waconda would be filing a motion for leave to amend its complaint later that day, and asked whether PGE objected to such a motion.[30] Counsel for PGE stated that Waconda's plan of action was inconsistent with the parties' agreement that PGE would withhold filing its motion for summary judgment while the parties attempted to agree on a procedural schedule and Waconda considered whether to proceed with its complaint in light of Order No. 19-218.[31] Counsel for PGE requested that Waconda share a draft of the motion for leave to amend and provide PGE with a day to review the motion so that PGE could make an informed decision as to whether it opposed the motion.[32] Counsel for Waconda indicated that it was unwilling to share a draft of the motion or delay filing the motion because it did not want PGE to have an opportunity to file its motion for summary judgment before Waconda filed its motion for leave to amend the complaint.[33] Waconda then filed its motion for leave to amend later the same day.[34] PGE has now filed its motion for summary judgment.[35]

---

[29] *Id.*; Waconda's Second Request to Delay Prehearing Conference ("Second Request to Delay Conf.") at 1 (June 27, 2019); Notice of Cancellation of Prehearing Conference (June 27, 2019).
[30] Lovinger Decl. ¶ 14.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*; Complainant's Motion for Leave to File First Amended Complaint (July 8, 2019) ("Mot.") at 4.
[35] PGE filed its motion for summary judgment at the same time it filed this response opposing Waconda's motion for leave to amend its complaint. PGE's motion for summary judgment is substantially the same motion that it had prepared in June 2019; however, PGE has revised Section IV(B)(1) in light of the Commission's holding in Docket No. UM 1967, Order No. 19-218. That order granted PGE's motion for partial summary judgment in Docket No. UM 1967. The issue decided by the order is substantially identical to the issue argued in Section IV(B)(1) of PGE's motion for summary judgment in this case and rather than reiterate all of the analysis from PGE's motion for partial summary judgment in Docket No. UM 1967 (which is what PGE's draft motion for summary judgment did before Order No. 19-218 was issued), PGE has simplified Section IV(B)(1) of the motion for summary judgment and noted that the Commission should reach the same conclusions that it reached in Order No. 19-218 because the rule in question is substantially identical to the rule interpreted in Order No. 19-218.

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

In its motion to amend, Waconda seeks to add five new legal theories: (1) breach of the implied covenant of good faith and fair dealing in the power purchase agreement;[36] (2) breach of the implied covenant of good faith and fair dealing in the feasibility study agreement;[37] (3) breach of the implied covenant of good faith and fair dealing in the system impact study agreement;[38] (4) violation of ORS 757.020;[39] and (5) violation of ORS 756.040.[40] Further, Waconda proposes adding allegations about an entirely new transaction: the system impact study process.[41] Finally, Waconda seeks a new form of relief: performance of an independent system impact study by a contractor of Waconda's choosing.[42]

After Waconda filed its motion for leave to amend, PGE provided Waconda with notice that a higher-queued project had withdrawn its interconnection application to the same feeder.[43] As a result, PGE must restudy and issue a new system impact study on Waconda's proposed interconnection.[44] This possibility was anticipated by the original system impact study report, which noted the study was based on the generation facilities currently interconnected and on higher-queued interconnection requests and that the results were subject to modification if any of these higher-queued projects withdrew their application.[45]

---

[36] Proposed First Amended Complaint ("Am. Compl.") ¶¶ 119, 125, 128, 139, 147, 176, 180 (filed as attachment to Mot.).
[37] *Id.*
[38] *Id.*
[39] *Id.* ¶¶ 121, 136, 173, 184.
[40] *Id.* ¶ 8, 122, 137, 175, 186. Only paragraph 8 actually refers to ORS 756.040, the other referenced paragraphs refer to ORS 746.040, but there is no such statute in effect and PGE assumes Waconda intends to reference ORS 756.040.
[41] *Id.* ¶¶ 92-109, 127-31.
[42] *Id.* at 30, 31 (Prayer for Relief ¶¶ 4, 11).
[43] Lovinger Decl. ¶ 15 and Ex. 4 (July 9, 2019 email from PGE to Waconda).
[44] *Id.*
[45] Answer, Ex. K at 8 (System Impact Study at 8 ("If any of these [higher-queued] requests are withdrawn, PGE reserves the right to restudy the request[.]")).

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

IV. LEGAL STANDARD

Under ORCP 23A the Commission may grant leave to amend "when justice so requires."[46] The Commission should look to four factors to determine if justice requires an amendment: (1) the proposed amendment's nature and its relationship to the existing pleadings; (2) the prejudice, if any, to the opposing party; (3) the timing of the proposed amendment; and (4) the colorable merit of the proposed amendment.[47]

Under ORCP 16B, each claim for relief must be "separately stated."[48] A claim is "[t]he assertion of an existing right[.]"[49] Thus, each separate legal basis for relief must be stated in a separate claim, and alternative theories within each claim must be identified by counts.[50]

V. ARGUMENT

A. THE COMMISSION SHOULD REJECT WACONDA'S TARDY, MERITLESS AMENDMENTS TO A COMPLAINT FILED MORE THAN NINE MONTHS AGO.

1. The Commission should deny Waconda leave to amend because its amendments would substantially change the nature of the pleadings.

The scope of the proposed changes weighs against amendment. An amendment is improper if it would "substantially change the cause of action or inject an entire new element of damage."[51] As described above, the proposed amendments add five new claims, a new prayer for relief, and allegations regarding a new transaction (the system impact study).

Waconda does not attempt to justify these wholesale revisions to the complaint. In its cursory, three-page motion Waconda mischaracterizes its amendments as adding "greater

---

[46] ORCP 23A.
[47] *See e.g.*, Docket No. UM 1877, Order No. 18-348 at 4 (internal citation omitted).
[48] ORCP 16B.
[49] *Nixon v. Cascade Health Servs., Inc.*, 205 Or App 232, 240 n.8 (2006) (internal quotation marks and citation omitted).
[50] *Id*.
[51] *Alexander*, 283 Or App at 590 (internal quotation marks and citation omitted); Docket No. UM 1877, Order No. 18-348 at 5 (quoting *Cutsworth v. Kinzua Corp.*, 267 Or 423, 433-34 (1973)).

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

specificity" to existing claims.[52] That is not correct. The amendments add several entirely new claims, allege new facts, and include new prayers for relief. The breadth of the proposed revisions militates against permitting amendment.

2. The Commission should deny Waconda leave to amend because its amendments would prejudice PGE.

The prejudice factor also weighs against amendment. If Waconda is permitted to amend its complaint, PGE will be prejudiced in three distinct ways.

First, PGE has already expended time and expense litigating the case and preparing a comprehensive summary judgment motion. Before Waconda filed its motion for leave to amend, PGE answered the complaint, expended substantial effort attempting to settle the claims in the original complaint, prepare a motion for summary judgment against all claims in the original complaint, and then withheld filing that motion at Waconda's request in order to give the parties time to discuss a possible procedural schedule.[53] PGE only agreed to withhold filing its motion for summary judgment to work with Waconda on a procedural schedule and to give Waconda time to consider whether it would withdraw its complaint in light of Order No. 19-218.[54] Waconda used PGE's good faith efforts to its tactical advantage by filing this motion for leave to amend in a rush so that PGE could not first file the motion for summary judgment it prepared in early June, 2019.[55] Permitting these amendments would prejudice PGE by rendering null its litigation efforts thus far.

Second, prolonged litigation delays the interconnection process. After filing its initial complaint, Waconda took the position that pending litigation should toll its deadline for signing a

---

[52] Mot. at 2, 3.
[53] *See generally* Answer; Lovinger Decl. ¶¶ 7-11.
[54] *Id.* ¶¶ 10-13; *see* First Request to Delay Conf. at 1; *see also* Second Request to Delay Conf. at 1.
[55] Lovinger Decl. ¶ 14.

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

facilities study agreement.[56] PGE disagrees, but in the interest of pursuing settlement discussions agreed to short-term extensions of the deadline to sign the facilities study agreement until April 30, 2019, a deadline that Waconda then missed.[57] Coincidentally, a higher-queued project has since withdrawn its interconnection application, which will require PGE to restudy and issue a new system impact study.[58] But starting litigation on a series of new claims will further prolong the interconnection process given Waconda's position that pending litigation halts the interconnection study process and excuses it from moving forward with a facilities study.

This delay will prejudice PGE because it will tie up a spot in PGE's interconnection queue with no meaningful deadline for the relevant studies and construction. This is particularly egregious because Waconda could have alleged its new contractual and statutory claims at the time it filed its original complaint, and Waconda could have alleged its new factual allegations regarding the system impact study immediately after that study was issued one-month following the filing of the original complaint. Instead, Waconda has waited more than nine months to file its proposed amendments after PGE has answered the original complaint, expended considerable effort to settle the original claims, and expended substantial effort to prepare a comprehensive motion for summary judgment against the original claims.

The Commission should deny the motion to amend, but if it grants the motion, it should also rule that the pending complaint does not toll Waconda's deadlines to proceed with the interconnection process. Any contrary result effectively allows Waconda to stall the interconnection process indefinitely by filing a meritless complaint and then amending that

[56] *Id.* ¶ 4 and Ex. 2 (November 2, 2018 email from Waconda to PGE).
[57] *Id.* ¶ 5 and Ex. 3 (November 13, 2018 letter from PGE to Waconda).
[58] *Id.* ¶ 15 and Ex. 4 (July 9, 2019 email from PGE to Waconda).

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

meritless complaint nine months later notwithstanding that the utility has prepared and filed a comprehensive motion for summary judgment.

Third, in Waconda's amended complaint it demands an extension of its scheduled commercial operation date to accommodate the interconnection delays created by its own refusal to sign a facilities study agreement and its own delay in amending its complaints.[59] Notably, in the original complaint, Waconda only requested an extension of the commercial operation date to "account for the delayed in-service date *PGE caused*."[60] In its amended complaint, Waconda requests an extension of the commercial operation date "to coincide with its actual interconnection in-service date" regardless of who caused the delay.[61] The start date of the 15-year period of fixed prices in Waconda's PPA is tied to the commercial operation date.[62] Thus, Waconda asks that PGE's customers bear the cost of Waconda's self-imposed delay in the form of price divergence in the later years of the PPA. The Commission should not facilitate such an outcome, which will substantially prejudice PGE and its customers.

3. The Commission should deny Waconda leave to amend because Waconda sat on its claims for nine months.

Waconda's delay in bringing its claims also weighs heavily against amendment.[63] Waconda could have asserted its new claims when it filed its complaint over nine months ago and Waconda could have asserted its additional factual allegations related to the system impact study eight months ago after the study was released in October 2018. In its original complaint, Waconda

[59] Am. Compl. at 31 (Prayer for Relief ¶ 13).
[60] Compl. at 23 (Prayer for Relief ¶ 9) (emphasis added). PGE denies that it caused any delays and the original prayer for relief should be denied. *See* PGE's Motion for Summary Judgment at Section IV(C)(1) (July 23, 2019).
[61] Am. Compl. at 31 (Prayer for Relief ¶ 13).
[62] *See* Waconda PPA at 6 and 9 (Section 4.2 notes "For the first 15 years measured from the [commercial operation date] the Contract Price will be the Renewable Fixed Price Option under the Schedule [.]"and Sheet 201-4 ("[Standard fixed price] option is available for a maximum term of 15 years. Prices will be as established at the time the Standard PPA is executed[.]").
[63] *See* Docket No. UM 1877, Order No. 18-348 at 5 (ruling that eight-month delay weighed "heavily" against amendment).

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

asserted entitlement to both a new feasibility study and orders permitting Waconda to hire its own consultant to perform all interconnection studies.[64] Waconda asserts new statutory and contractual claims in support of this relief but does not plausibly explain why it did not bring these claims in its initial complaint.

Waconda states that the reason it is adding these new claims now is to "expand the statutory and other legal references upon which Complainant intends to rely in challenging PGE's actions."[65] And Waconda attempts to justify the timing of its amendments by claiming that the Commission recently held in Order No. 19-218 that it would not consider contract or statutory claims that are not alleged in a complaint.[66] But Order No. 19-218 did not announce a new principle of law; a complainant must always include its legal theories in its complaint.[67] Waconda's failure to do so in its original complaint is not excused by the Commission's recent affirmation of civil procedure in Order No. 19-218. Each of the statutes cited by Waconda in its amendments was enacted long before Waconda filed the original complaint. And the parties executed the PPA, the feasibility study agreement, and the system impact study agreement before Waconda filed the original complaint.[68] There is no reason Waconda could not have advanced its statutory and contractual claims in the original complaint.

---

[64] Compl. at 22-23 (Prayer for Relief ¶¶ 6-7).
[65] Mot. at 3.
[66] *See* Mot. at 2, 3 (requesting to file an amended complaint "in light of … Order No. 19-218 granting a motion for summary judgment based on an interpretation of only the specific rule cited within the claim at issue" and asserting "the timing of the amended complaint is appropriate in light of the fact that the Commission's Order No. 19-218 was issued recently[.]").
[67] ORCP 16B ("Each separate claim or defense shall be separately stated."); *see also Navas v. City of Springfield*, 122 Or App 196, 201 (1993) ("[A] a trial court has no authority to render a decision on an issue not framed by the pleadings.") (internal citation omitted).
[68] *See* Answer, Ex. A at 3 (Feasibility Study Agreement executed April 26, 2018) and Ex. C at 3 (System Impact Study Agreement executed August 10, 2018).

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

To be sure, Waconda also alleges new facts regarding the system impact study process.[69] But PGE issued the system impact study in October 2018.[70] In its motion, Waconda never explains why it waited an additional eight months to bring these claims. Thus, Waconda's delay weighs heavily against amendment.

4. The Commission should deny Waconda leave to amend because its new claims are all meritless.

The "colorable merit" factor also weighs against amendment because Waconda's new claims are meritless. The Commission should not grant Waconda leave to file futile claims.

(a) Waconda's claims related to the system impact study process are moot given recent events.

Waconda's claims related to the system impact study are now moot. Waconda's new factual allegations cover the system impact study initially submitted by PGE on October 25, 2018.[71] But a higher-queued project has since withdrawn, requiring a PGE to restudy and issue a new system impact study.[72] Waconda's system impact study expressly contemplates a new study if a higher-queued project leaves the queue.[73] Thus, any claim related to perceived deficiencies in the existing study are moot; PGE must re-run the study regardless. Given the claim's mootness, there is no reason to permit amendment.

---

[69] Am. Compl. ¶¶ 92-109.
[70] Answer at 5-6 and Ex. K (System Impact Study).
[71] Am. Compl. ¶ 92-109. The proposed amendment also includes a stray allegation that PGE's interconnection processing has "slowed" over time. (*Id.* ¶ 86.) PGE denies the allegation, but for the purposes of this motion, this additional allegation is frivolous because it is not relevant to any of Waconda's stated claims. Even if Waconda could show that some level of wrongdoing in the interconnection study process could ever entitle it to the relief it seeks; no statute or regulation entitles it to relief based on "slowed" processing of *other* QFs' applications.
[72] Lovinger Decl. ¶ 15 and Ex. 4 (July 9, 2019 email from PGE to Waconda).
[73] Answer, Ex. K at 8 (System Impact Study at 8 ("If any of these [higher-queued] requests are withdrawn, PGE reserves the right to restudy the request[.]")).

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

(b) Waconda's claims are governed by a body of regulations that were pleaded in the original complaint, not any general contractual or statutory obligations.

A specific body of Commission regulations governs the interconnection study process.[74] In its original complaint, Waconda cited these rules as entitling it to revised studies, to hire its own contractor to perform the studies, and to perform an independent system impact study.[75] Waconda now seeks to amend its complaint to further allege that PGE's conduct in the interconnection study process violated the general standards of reasonableness and good faith from the Commission's enabling statutes and the parties' contracts.[76] But these new claims are meritless, because the general obligations identified in the amendments do not supplement or alter PGE's duties under the issue-specific rules.

In Order No. 19-218, the Commission interpreted related regulations governing who is entitled to construct the interconnection facilities at the conclusion of the study process.[77] Like the regulations at issue in this dispute, the regulations at issue in that complaint proceeding stated that a utility and interconnection applicant "may" agree that the applicant will hire its own third-party consultant to conduct the necessary interconnection work.[78] The Commission stated that the use of the word "may" should be read as "giving PGE discretion to decide whether to hire a third-party contractor to facilitate the interconnection of a small generator, either on its own or in conjunction with a small generator"[79] and the rule did not require that PGE "reasonably exercise its discretion to agree to . . . hire a third-party consultant."[80]

---

[74] *See* OAR 860-082-0060.
[75] Compl. at 1.
[76] Am. Comp. ¶¶ 119, 121, 122.
[77] *See* Docket No. 1967, Order No. 19-218 at 1.
[78] OAR 860-082-0060(8)(f).
[79] Docket No. UM 1967, Order No. 19-218 at 23.
[80] *Id*. at 25.

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

The Commission also addressed analogous claims to the ones Waconda seeks to assert here: claims based on the Commission's general enabling statutes (ORS 756.040 and ORS 757.020) and the contractual duty of good faith from the parties' PPA and interconnection study agreements.[81] Although the Commission rejected the new claims because the complainant had not pleaded them, the Commission noted 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."[82] As discussed below, Waconda has not met the "high" bar necessary to apply these same "general obligations" to the "specific rules" that directly address the interconnection study process.

(c) Waconda has no contractual right to a study process that differs from what is required by 860-082-0060.

Waconda's invocation of the duty of good faith implied in its PPA and interconnection study agreements is meritless. The duty of good faith and fair dealing protects the parties' "*objectively* reasonable expectation[s]."[83] The objectively reasonable contractual expectations are defined by the express contract terms and pertinent laws.[84] Thus, the "obligation of good faith does not vary the substantive terms of the bargain or of the statute, nor does it provide a remedy for an unpleasantly motivated act that is expressly permitted by contract or statute."[85]

Here, Waconda had no objectively reasonable contractual expectation that it would receive an interconnection study process that differed from what is described in the pertinent regulations. The PPA contemplates the execution of a separate "Generation Interconnection Agreement" that

[81] *Id.* at 17-18, 25.
[82] *Id.* at 25.
[83] *Pac. First Bank v. New Morgan Park Corp.*, 319 Or 342, 354 (1994) (emphasis added).
[84] *Wegroup PC / Architects & Planners v. State*, 131 Or App 346, 353 (1994) ("The obligation of good faith cannot vary the substantive terms of a contract or pertinent statute, or provide relief from an act that is expressly permitted by contract or statute.").
[85] *U.S. Nat. Bank of Oregon v. Boge*, 311 Or 550, 567 (1991).

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

will "provid[e] for the construction, operation, and maintenance of interconnection facilities."[86] The relevant interconnection study agreements all expressly incorporate the pertinent rules. The feasibility study agreement states that the feasibility study will be performed "consistent with OAR 860-082-0060(6)."[87] Similarly, the system impact study agreement states that the feasibility study will be performed "consistent with OAR 860-082-0060(7)."[88] Both study agreements also provide that in the event of any conflict between the agreements and the rules, the rules will prevail.[89]

The implied duty of good faith is not an independent basis for relief because the contract expressly incorporated the rules themselves. Where a contract incorporates a pertinent regulation, the parties have no objectively reasonable expectation for anything other than what is provided in the regulation. In *Wegroup PC / Architects & Planners v. State*, the state contracted with an architectural firm for the design of a prison.[90] The parties' contract provided that the firm would be paid a lump sum for the design work.[91] Midway through the project, the state requested changes to the design.[92] Given the project's "demanding timelines" the firm began work immediately, and then billed the state for this extra work.[93] The state refused to pay, citing a statute and regulations that mandated that amendments to construction contracts with the state be agreed to in writing *before* work begins.[94] The trial court granted summary judgment to the state on the firm's claim for breach of the duty of good faith.[95] The Court of Appeals affirmed, holding that the duty of

---

[86] Waconda PPA at 3 (Section 1.11).
[87] Answer, Ex. A at 1 (Feasibility Study Agreement ¶ 2).
[88] *Id.*, Ex. C at 1 (System Impact Study Agreement ¶ 2).
[89] *Id.*, Ex. A at 1 (Feasibility Study Agreement ¶ 1) and Ex. C at 1 (System Impact Study Agreement ¶ 1).
[90] *Wegroup PC*, 131 Or App at 348 ("The obligation of good faith cannot vary the substantive terms of a contract or pertinent statute, or provide relief from an act that is expressly permitted by contract or statute.").
[91] *Id.*
[92] *Id.* at 348-49.
[93] *Id.* at 351.
[94] *Id.*
[95] *Id.* at 349.

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

good faith did not require the state to pay the contractor for the additional work because "[s]uch a duty would . . . be flatly inconsistent with the applicable public contracting statutes and rules."[96]

The same is true here. In a detailed body of regulations, the Commission articulated the specific contents for the interconnection studies, the specific deadlines for the interconnection process, and the amount of discretion that PGE has in permitting a third-party consultant to perform the interconnection studies.[97] The parties' contracts expressly incorporated this body of regulations. Waconda cannot alter the requirements of these regulations by arguing that "good faith" required PGE to provide more detailed studies, meet some other deadlines, or accept a consultant of Waconda's choosing. PGE either violated OAR 860-082-0060 or it did not. Waconda's amended claims seeking to expand PGE's duties are meritless.

(d) Waconda has no statutory right to a study process that differs from what is provided by OAR 860-082-0060.

The Commission's general enabling statutes also do not provide a basis for relief. ORS 756.040 and ORS 757.020 contain general language that does not supplant the issue-specific regulations of OAR 860-082-0060. ORS 756.040 does not proscribe or prescribe specific utility conduct but gives the Commission regulatory and adjudicative authority to protect utility customers and the public from "unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates."[98] ORS 757.020 similarly provides that a public utility must "furnish adequate and safe service, equipment and facilities, and the charges made by any public utility for any service rendered or to be rendered in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited."[99]

---

[96] *Id.* at 353.
[97] OAR 860-082-0060.
[98] ORS 756.040.
[99] ORS 757.020.

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

Preliminary, ORS 757.020 is inapplicable because it covers reasonable "charges" for "service, equipment and facilities."[100] Waconda does not challenge the reasonableness of any relevant charges.

Further, as described above, the Commission has issued specific rules implementing the abstract obligations from ORS 756.040. When an agency's enabling statute is inexact, the agency has discretion to "effectuate[] the statutory policy . . . either by rule or by decision in a specific case."[101] Where an agency issues a rule effectuating the policy from its enabling statute, that rule is its exercise of discretion and the agency must follow the rule notwithstanding the broader, more general grant of authority.[102] OAR 860-082-0060 lists as its implementing authority ORS 756.040.[103] Thus, OAR 860-082-0060 *is* the Commission's statement of reasonable practice in the interconnection study process. The general obligations in these statutes do not provide a separate, free-standing requirement that utilities comply with an interconnection process that is different from the process established by the Commission's regulations.

Further, PURPA preempts states from exercising "utility-type" regulatory authority over the contractual relationship between QFs and utilities.[104] To the extent Waconda is arguing that the Commission should retroactively alter the parties' obligations under the PPA and

---

[100] *Id.*
[101] *Jeld-Wen, Inc. v. Envtl. Quality Comm'n*, 162 Or App 100, 105 (1999).
[102] *See Wyers v. Dressler*, 42 Or App 799, 807 (1979) (holding that agency was required to hold contested case proceeding notwithstanding discretionary nature of enabling statute given enactment of a mandatory regulation), overruled on other grounds by *Mendieta v. State, By & Through Div. of State Lands*, 148 Or App 586 (1997).
[103] *See e.g.*, OAR 860-082-0060.
[104] *Freehold Cogeneration Assocs., L.P. v. Bd. Of Reg. Comm'rs of State of N.J.*, 44 F3d 1178, 1192-1194 (3d Cir. 1995) (state agency modification of an executed PURPA power purchase agreement violates the PURPA section 210(e) prohibition on "utility-type" regulation of qualifying facilities); *Portland Gen. Elec. Co. v. Pacific Northwest Solar, LLC*, Docket No. UM 1894, Order No. 18-025 at 4 (January 25, 2018) ("We do not have the authority to alter the terms of the [PURPA power purchase] contract, or its established avoided cost prices, once it is executed.") (available at https://apps.puc.state.or.us/orders/2018ords/18-025.pdf).

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

interconnection study agreements to conform to "just and reasonable" practices, such a result is barred by PURPA.

B. ALTERNATIVELY, THE COMMISSION SHOULD DENY WACONDA'S MOTION WITHOUT PREJUDICE TO REFILING ONCE WACONDA CURES THE AMENDED COMPLAINT'S FORMAL DEFICIENCIES.

The proposed amendment does not conform to the requirements of the Oregon Rules of Civil Procedure. ORCP 16C requires that a plaintiff separately state each claim. A claim is "the assertion of an existing right."[105] Each distinct legal right is a separate claim and must be separately stated.[106] "[A]n amalgam of putative 'claims' within a single claim is impermissible."[107]

In an attempt to obscure the scope of its revisions, Waconda shoehorned five new claims into its four existing claims. Even if the Commission rules that amendment is proper, it should deny Waconda's motion without prejudice to it refiling the motion with a pleading that conforms to the requirements of ORCP 16.

This is not a mere technical violation. Waconda brings novel theories based on abstract legal requirements such as the implied covenant of "good faith" and the statutory goal of "reasonable[ness]." Because of Waconda's confusing, amalgamated pleading, it is unclear what Waconda alleges each statute or contract required of PGE and how PGE allegedly fell short of those requirements. For instance, Waconda cites ORS 757.325 in each of its first three "claims," but then has a fourth stand-alone "claim" devoted to just the statutory violations, including ORS 757.325. The references to ORS 757.325 in the first three claims seem redundant given the separate fourth claim also citing ORS 757.325. As another example, the first amended complaint

[105] *Nixon*, 205 Or App at 240 (internal citation omitted).
[106] *See Navas*, 122 Or App at 201 (holding that statutory claim was distinct from related contractual claim).
[107] *Clifford v. City of Clatskanie*, 204 Or App 566, 572 (2006) (citing ORCP 16B).

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
Fax: (503) 323-9105

repeatedly refers to ORS 746.040, which is a repealed part of the Oregon code.[108] Proper pleading will streamline this case by focusing summary judgment and subsequent discovery if any claims survive summary judgment.

VI. CONCLUSION

The Commission should deny Waconda's motion to amend the complaint.

DATED this 23rd day of July, 2019.

Respectfully submitted,

/s/ Donald Light
Donald Light, OSB #025415
Assistant General Counsel
Portland General Electric Company
121 SW Salmon Street, 1WTC1301
Portland, Oregon 97204
Tel: (503) 464-8315
Fax: (503) 464-2200
donald.light@pgn.com

Jeffrey S. Lovinger, OSB #960147
Anit Jindal, OSB #171086
Markowitz Herbold PC
1211 SW Fifth Avenue, Suite 3000
Portland, OR 97204
Tel: (503) 295-3085
Fax: (503) 323-9105
JeffreyLovinger@MarkowitzHerbold.com
AnitJindal@MarkowitzHerbold.com

[108] *See* fn. 40 *supra*.