

February 22, 2022

**Via Electronic Filing**

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


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

Dear Filing Center:

Enclosed for filing today in the above-named docket is Portland General Electric Company's Motion for Leave to File Reply and Portland General Electric Company's Reply.

Thank you for your assistance.

Very truly yours,

  
Jeffrey S. Lovinger

Enclosure  
1250161

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON  
UM 1971**

WACONDA SOLAR, LLC,

Complainant,

vs.

PORTLAND GENERAL ELECTRIC  
COMPANY,

Defendant.

**PORTLAND GENERAL  
ELECTRIC COMPANY'S  
MOTION FOR LEAVE TO FILE  
REPLY AND PORTLAND  
GENERAL ELECTRIC  
COMPANY'S REPLY**

Pursuant to OAR 860-001-0420, Portland General Electric Company ("PGE") moves for leave to file a reply and PGE submits its Reply in Support of Motion to Clarify Procedural Schedule and to Modify Motion Response Date ("Reply").

**I. CONFERRAL**

PGE conferred with Waconda Solar LLC (Waconda") on February 18, 2022, through an exchange of email. Waconda's view is that PGE's Motion to Clarify Procedural Schedule and to Modify Motion Response Date ("Motion") is substantive and that PGE does not need to seek leave to file a reply. Waconda has stated that if PGE's Motion is procedural, then Waconda does not oppose PGE's request for leave to file a reply.

**II. MOTION FOR LEAVE TO FILE REPLY**

PGE filed its Motion on February 10, 2022. Waconda filed its Response to PGE's Motion ("Response") on February 17, 2022. PGE's Motion is procedural. PGE's Motion requests the Administrative Law Judge ("ALJ") clarify, consistent with the existing procedural schedule adopted in the ALJ's Ruling of August 4, 2021 ("August 4 Ruling"), that any further briefing or decision on Waconda's February 4, 2022, Motion for Partial Summary Judgment should occur, if at all, *after* the Commission has ruled on PGE's fully briefed September 15,

2021, Modified Second Motion for Summary Judgment and *after* the ALJ has held the prehearing conference to schedule further process (if any) as provided for in the August 4 Ruling. In the alternative, PGE's Motion requests that the ALJ modify the procedural schedule to provide for this outcome. PGE's Motion is procedural because it seeks to confirm or modify the schedule. OAR 860-001-0390(2)(b) defines a procedural motion as a motion that "address[es] the means by which the Commission regulates its proceedings; for example, a motion to modify a schedule." The party filing a procedural motion needs the permission of the ALJ to file a reply.<sup>1</sup>

PGE moves for permission to file a reply in support of PGE's Motion. The ALJ should grant leave for PGE to file a reply for three reasons: (1) a reply is necessary to allow PGE to respond to mischaracterizations of PGE's position contained in Waconda's Response; (2) a reply will allow PGE to provide the ALJ with additional information that will aid the ALJ in evaluating Waconda's Response and resolving PGE's Motion;<sup>2</sup> and (3) PGE's request for leave is unopposed.

### **III. REPLY IN SUPPORT OF PGE'S MOTION**

Waconda states that it is inappropriate for PGE to argue that the August 4 Ruling should be clarified to read that Waconda could not file a motion for summary judgment during

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<sup>1</sup> OAR 860-001-0420(5).

<sup>2</sup> As a matter of discretion, the Commission has allowed additional briefing not otherwise authorized by the procedural rules if the additional briefing may aid in understanding the issues in a docket, better explain a party's position, or will otherwise benefit the Commission's review of an issue. See, e.g., *In the Matter of Sandy River LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1967, Ruling at 2 (Apr. 26, 2019) (granting leave to file sur-response and explaining supplemental briefing "may aid the understanding of issues in this docket[.]"), available at <https://edocs.puc.state.or.us/efdocs/HDA/um1967hda142343.pdf>; *In Re Pacific Power & Light, Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, Docket No. UE 177, Order No. 08-002 at 4 (Jan. 3, 2008) (granting motion to file a reply to a procedural motion in order to "provide additional information"); *In Re Portland Gen. Elec. Co. Application for Deferred Accounting of Excess Power Costs Due to Plant Outage*, Docket No. UM 1234, Order No. 07-227 at 4 (Jun. 8, 2007) (explaining that the Commission would accept a reply because it "better explains [the party's] original position").

resolution of PGE’s modified MSJ.<sup>3</sup> This mischaracterizes PGE’s Motion. PGE does not argue that the parties’ joint motion to modify the procedural schedule, or the August 4 Ruling, prohibit Waconda from filing a motion for summary judgment. PGE’s Motion expressly “acknowledges that Waconda is allowed to file motions at any time as authorized by the Commission’s rules[.]”<sup>4</sup> In the joint motion to modify the procedural schedule, “[b]oth parties reserve[d] their right to file additional motions” and this included Waconda’s right to file a motion for summary judgment.<sup>5</sup> PGE does not argue that Waconda is prohibited from filing its February 4, 2022 Motion for Partial Summary Judgment (“MPSJ”). PGE’s Motion argues that the ALJ should clarify that it is consistent with the April 4 Ruling to hold that the Commission will decide PGE’s modified MSJ, and the ALJ will hold the prehearing conference called for in the August 4 Ruling, *before* setting a schedule for briefing and decision on Waconda’s MPSJ.<sup>6</sup>

Waconda argues that cross motions for summary judgment are common.<sup>7</sup> In support, Waconda cites three cases where the parties filed *simultaneous* cross motions for summary judgment.<sup>8</sup> Waconda is effectively arguing that the Commission should treat PGE’s modified MSJ and Waconda’s MPSJ as if they were simultaneously filed cross motions for summary judgment. Waconda is asking the Commission to wait until all briefing is complete on both

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<sup>3</sup> Waconda Solar’s Response to Portland General Electric Company’s Motion to Clarify Procedural Schedule and to Modify Motion Response Date (“Waconda’s Response”) at 21 (Feb. 17, 2022); *see also id.* at 2 (“PGE’s motion to clarify is inappropriate because the joint motion to modify the procedural schedule did not preclude Waconda Solar from filing its own motion for summary judgment while PGE’s [Modified Second Motion for Summary Judgment] was pending as PGE claims.”)

<sup>4</sup> Portland General Electric Company’s Motion to Clarify Procedural Schedule and to Modify Motion Response Date (“PGE’s Motion”) at 4 (Feb. 10, 2022).

<sup>5</sup> Joint Motion to Modify Procedural Schedule (“Joint Motion”) at 2 (Aug. 4, 2021).

<sup>6</sup> PGE’s Motion at 1; *see also id.* at 6-14.

<sup>7</sup> Waconda’s Response at 2 & 11.

<sup>8</sup> *Id.* at 11-12, nn. 35, 39 & 41 (citing *PGE v. Alfalfa Solar I LLC et al.*, Docket No. UM 1931, *Fossil Lake Solar LLC v. PGE*, Docket No. UM 2051, and *PGE v. Pacific Northwest Solar LLC*, Docket No. UM 1894). All three cases involved simultaneously filed cross motions for summary judgment.

motions before issuing a ruling on either motion.<sup>9</sup> However, PGE's modified MSJ and Waconda's MPSJ are not simultaneously filed cross motions for summary judgment.

PGE's motion was filed over five months ago (on September 15, 2021). It has been fully briefed for over two months (since December 15, 2021). Both parties have indicated they will defer to the Commission's decision on whether to hold oral argument on PGE's motion.<sup>10</sup> That means the Commission could resolve PGE's modified MSJ with no additional briefing and with no additional process, and that the Commission could issue a decision on PGE's modified MSJ within days or weeks of this Reply. If PGE's motion is granted in full, it will resolve this case and moot Waconda's MPSJ. Even if PGE's modified MSJ is granted in part, it could render Waconda's MPSJ partially or completely moot.<sup>11</sup>

In contrast, Waconda's new motion still requires two rounds of briefing, and could require the parties to draft, and the Commission to evaluate, hundreds of additional pages of briefing. If PGE is required to respond to Waconda's MPSJ before PGE's modified MSJ is resolved, then PGE will likely need to move to strike Attachment A to the Waconda MPSJ.<sup>12</sup> This will further increase the briefing burden. In addition, even if Waconda's new MPSJ were granted in full, it would not resolve any claims in this case.

Waconda asks the Commission to rule on a complex legal question regarding the Commission's authority to modify a fully executed Qualifying Facility ("QF") power purchase

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<sup>9</sup> Waconda's Response at 2-3.

<sup>10</sup> Waconda's Notice of Intent to File Motion for Summary Judgment and Request for Postponement of Oral Argument at 2 ("Waconda's Notice of Intent") (Dec. 30, 2021); PGE's Response to Notice and Request at 5 ("PGE's Response to Waconda's Notice of Intent") (Jan. 5, 2022).

<sup>11</sup> PGE's modified MSJ seeks denial of all four claims for relief in Waconda's amended complaint. Waconda's MPSJ purports to seek rulings addressing Waconda's second and third claims for relief. If the Commission grants PGE's modified MSJ in part and denies Waconda's second claim or third claim or both, that will moot some or all of Waconda's MPSJ.

<sup>12</sup> Attachment A to Waconda's MPSJ characterizes 16 disputes between PGE and small solar generators. Attachment A is not supported or authenticated by any declaration.

agreement (“PPA”) in light of language in Section 210(e) of the Public Utility Regulatory Policies Act that limits the authority of state commissions to modify executed QF PPAs.<sup>13</sup> But Waconda’s MPSJ makes it clear that Waconda is not asking the Commission to rule on the facts.<sup>14</sup> Waconda is not asking the Commission to rule on whether PGE has actually delayed the interconnection process in some way that would justify the Commission modifying Waconda’s PPA to mitigate for a delay caused by PGE.<sup>15</sup> In other words, Waconda’s MPSJ is asking the Commission to resolve the abstract legal question of “can the Commission modify the PPA?” but is not asking the Commission to resolve the critical, case-specific question of “is there any reason why the Commission should modify the PPA?” Waconda is asking the Commission to issue a declaratory or advisory opinion regarding a complex question of law that will not resolve any claim in the case. Further, the Commission does not need to decide the question unless the Commission first decides that PGE has caused material delays in the interconnection process that must be mitigated through modification of Waconda’s PPA. Waconda’s MPSJ asks the Commission to “put the cart before the horse.”

Waconda’s MPSJ also asks the Commission to rule on what standard of review applies when a utility evaluates an independent system impact study (“iSIS”) under OAR 860-082-0060(7)(h).<sup>16</sup> But this case does not involve any allegation that Waconda has provided PGE with an iSIS, or that PGE’s evaluation of an iSIS (which has not been provided) somehow violated the standard of review applicable under OAR 860-082-0060(7)(h).<sup>17</sup> As a result, a ruling on the

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<sup>13</sup> Waconda’s Motion for Partial Summary Judgment at 1, 5 & 37-44 (“Waconda’s MPSJ”).

<sup>14</sup> *Id.* at fn 3 (stating that Waconda is not seeking summary judgment on the factual question of whether the Commission should grant the relief of modifying Waconda’s PPA).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1-2 (“First, the Commission should resolve the legal question as to what standards of review apply when a utility reviews an interconnection customer’s iSIS.”).

<sup>17</sup> See PGE’s Response to Notice and Request at 3-4 (Jan. 5, 2022) and PGE’s Response to Motion to Stay at 10 (Oct. 12, 2021) for discussion of how Waconda’s amended complaint does not allege that PGE failed to evaluate an iSIS consistent with whatever standard of review applies under OAR 860-082-0060(7)(h) and the Commission does

standard of review is not required to resolve any claim in this case. Waconda's request for such a ruling is, again, simply a request for a declaratory or advisory opinion.

Waconda wrongly argues that PGE has effectively prevented Waconda from filing a simultaneous cross motion for summary judgment.<sup>18</sup> PGE has done no such thing; PGE does not have the power to prevent Waconda from filing a simultaneous cross motion for summary judgment. Instead, Waconda has never sought to file a cross motion for summary judgment at the same time as PGE has filed a motion for summary judgment.

PGE has now filed its motion for summary judgment three times in this case.<sup>19</sup> Each time, PGE has sought summary judgment on all claims without any discovery. In contrast, Waconda wanted to engage in general discovery and then, possibly, file a cross motion for summary judgment.<sup>20</sup> As a result, rather than seeking to file a simultaneous motion for summary judgment, Waconda sought to prevent PGE from moving forward with its motion for summary judgment while Waconda pursued general discovery and then, possibly filed a motion for summary judgment.<sup>21</sup> ALJ Moser rejected this approach in September 2019.<sup>22</sup>

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not need to determine the standard of review for a utility evaluation of an iSIS in order to resolve Waconda's complaint.

<sup>18</sup> Waconda's Response at 20 ("In effect, PGE prevented Waconda Solar from filing a simultaneous cross motion for summary judgment.").

<sup>19</sup> PGE's Motion for Summary Judgment (Jul. 23, 2019); PGE's Second Motion for Summary Judgment (Aug. 20, 2019); PGE's Modified Second Motion for Summary Judgment ("PGE's Modified MSJ") (Sep. 15, 2021).

<sup>20</sup> See Waconda Solar's Motion to Hold Response to PGE's Motion for Summary Judgment in Abeyance at 2 (Jul. 31, 2019) ("Waconda Solar is entitled to and should be allowed to conduct discovery prior to responding to PGE's Motion for Summary Judgment."); Waconda Solar's Motion to Hold Response to PGE's Second Motion for Summary Judgment in Abeyance and Motion to Set Schedule at 1 (Aug. 29, 2019) (moving to defer action on PGE's second MSJ and allow Waconda to conduct general discovery and to then process PGE's second MSJ, and "any motion for partial summary judgment that Waconda may choose to file, after conducting discovery.").

<sup>21</sup> *Id.*

<sup>22</sup> Ruling (Sep. 3, 2019) (granting in part and denying in part Waconda's motion by granting a two-week extension of Waconda's deadline to respond to PGE's second MSJ, but denying the indefinite deferral sought by Waconda, and by limiting discovery to only the issue of PGE's declarations in support of its second MSJ, rather than allowing Waconda to conduct general discovery as it sought).

PGE has not been willing to defer its motion for summary judgment until Waconda completes discovery because of the experience PGE had in the closely related case of *Sandy River Solar LLC v. PGE* in Docket No. UM 1967.<sup>23</sup> That case resulted in overbroad and irrelevant discovery requests from Sandy River Solar LLC (“Sandy River”) and the need for extensive motion practice regarding discovery disputes.<sup>24</sup> Ultimately, Sandy River’s second motion to compel discovery was denied,<sup>25</sup> PGE’s motion to stay new discovery was granted,<sup>26</sup> PGE’s motion for partial summary judgment was granted,<sup>27</sup> and Sandy River withdrew its complaint.<sup>28</sup> PGE’s position is that the Waconda case also can be resolved through summary judgment, and that PGE should be allowed to test the claims in this case through summary judgment without engaging in unnecessary discovery and related disputes, as occurred in the Sandy River case.

If Waconda wanted to file a simultaneous cross motion for summary judgment in this case, it could have done so shortly after PGE filed its second motion for summary judgment on August 20, 2019, rather than moving to hold PGE’s motion in abeyance while Waconda conducts general discovery. Likewise, if Waconda wanted to file a simultaneous cross motion for summary judgment in this case, it could have done so on September 15, 2021, when PGE

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<sup>23</sup> Waconda and Sandy River are projects being developed by the same entity. Waconda and Sandy River filed interconnection complaints against PGE on the same day. The complaints contain substantially similar claims. Compare Waconda’s Complaint (Sep. 28, 2018) in Docket No. UM 1971 and Sandy River’s Complaint in Docket No. UM 1967 (both asserting substantially the same four claims for relief, with the exception that Waconda’s second claim for relief includes a claim that PGE violated obligations with regard to an iSIS under OAR 860-082-0060(7)(h), a claim not made in the Sandy River Complaint).

<sup>24</sup> See PGE’s Response to Motion to Hold Waconda Solar’s Response to PGE’s Second Motion for Summary Judgment in Abeyance and Motion to Set Schedule at 2-3 (Aug. 30, 2019) (explaining discovery disputes in the Sandy River case and providing citations to relevant documents in the Sandy River case).

<sup>25</sup> Docket No. UM 1967, Ruling at 4-5 (Jul. 18, 2019), available at <https://edocs.puc.state.or.us/efdocs/HDA/um1967hda112333.pdf>.

<sup>26</sup> Docket No. UM 1967, Ruling at 4 (Mar. 19, 2019) (granting in part and denying in part PGE’s motion to stay discovery; the ruling granted a stay with regard to new discovery requests), available at <https://edocs.puc.state.or.us/efdocs/HDA/um1967hda153156.pdf>.

<sup>27</sup> Docket No. UM 1967, Order No. 19-218 (Jun. 24, 2019).

<sup>28</sup> Docket No. UM 1967, Order No. 19-285 (Aug. 29, 2019).



filed its modified MSJ (or shortly thereafter). As Waconda points out in its Response, it has reserved the authority to file a motion for summary judgment at any time.<sup>29</sup> But instead of seeking to file a truly simultaneous cross motion for summary judgment, Waconda instead moved to stay this case and PGE's modified MSJ, in favor of a declaratory ruling proceeding (Docket No. DR 57) filed by other parties and which would not have addressed any of the claims in this case.<sup>30</sup> Waconda waited more than four months after PGE filed its modified MSJ before Waconda file its MPSJ; Waconda has not filed a simultaneous cross motion for summary judgment.

Waconda has argued that it would be more efficient to defer decision on PGE's fully briefed motion for summary judgment and to require the parties to fully brief Waconda's new motion before deciding either motion.<sup>31</sup> PGE disagrees. The Commission can decide PGE's motion now, without any further briefing or process, and that decision may resolve this case entirely, or in part, and may moot Waconda's motion. The Commission could issue such decision within days or weeks of this Reply. This will lead to the quickest result with the least additional cost to the parties and the most efficient use of Commission resources.

In contrast, if a decision on PGE's modified MSJ is deferred, and the parties are required to brief Waconda's MPSJ before either motion is resolved, then the parties will need to invest considerable additional effort in briefing Waconda's motion, and the Commission will need to review what will likely be well in excess of one hundred more pages of briefing. Indeed, if briefing on Waconda's new motion occurs before a decision on PGE's motion, then PGE will likely move to strike Attachment A to Waconda's motion for partial summary judgment which

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<sup>29</sup> Waconda's Response at 5.

<sup>30</sup> Waconda's Motion to Stay (Oct. 5, 2021); *see also* PGE's Response to Waconda's Motion to Stay at 10 (Oct. 12, 2021).

<sup>31</sup> Waconda's Response at 19.

contains unsupported statements about sixteen cases. As a result, it may be necessary to resolve that motion to strike as well.

This would mean that no decisions on summary judgment will issue in this case for months, and as discussed above, even if Waconda's new MPSJ were granted, it would not resolve any of the claims in the complaint. It would therefore be less efficient (not more efficient as claimed by Waconda) to defer a decision on PGE's fully briefed modified MSJ in favor of briefing Waconda's new motion, resolving any motion to strike, and then deciding both PGE's and Waconda's motion at the same time.

Finally, deciding PGE's fully briefed motion first, then holding a prehearing conference and requiring PGE to respond to Waconda's new motion only if it remains relevant after PGE's modified MSJ is resolved, is the approach that is most consistent with the current procedural schedule in this case. The ALJ's August 4 Ruling adopted the following schedule:

<b>Event</b>	<b>Date</b>
PGE to file a modified Second Motion for Summary Judgment and modified supporting affidavits (collectively "PGE's modified MSJ")	September 15, 2021
Waconda Solar notifies PGE of intent to conduct depositions of Jason Zappe and Bruce Barney (if applicable)	September 21, 2021
Depositions of Jason Zappe and Bruce Barney (depending on witness availability)	October 12, 2021
Waconda Solar response to PGE's modified MSJ	October 19, 2021
PGE reply regarding PGE's modified MSJ	November 8, 2021
Oral Argument on PGE's modified MSJ	TBD
Prehearing conference to address procedural schedule for any claims remaining unresolved after a decision on PGE's modified MSJ	TBD

The parties have completed the first five steps in the procedural schedule. The only remaining steps are – (1) oral Argument on PGE's modified MSJ, and (2) a prehearing conference to address the procedural schedule for any claims remaining unresolved after a

decision on PGE's modified MSJ. Both parties have indicated they defer to the Commission regarding whether any oral argument is needed.<sup>32</sup> As a result, the Commission can rule on PGE's modified MSJ without any further process or delay. The ALJ can then hold the prehearing conference contemplated by the August 4 Ruling. If the ALJ determines that the second or third claims for relief remain unresolved after a decision on PGE's modified MSJ, and that Waconda's MPSJ remains relevant, then the ALJ can adopt a schedule for the briefing and resolution of Waconda's MPSJ.

#### IV. CONCLUSION

For the reasons discussed in PGE's Motion and this Reply, the ALJ should clarify that under the schedule adopted on August 4, 2021, the Commission will decide PGE's modified MSJ and the ALJ will conduct the prehearing conference provided for in the August 4 Ruling *before* briefing will be completed on Waconda's new MPSJ (if the MPSJ remains relevant after PGE's modified MSJ is decided). In the alternative, the ALJ should modify the procedural schedule to provide for the above stated order of events.

DATED this 22<sup>nd</sup> day of February, 2022.

Respectfully submitted,

/s/Donald Light

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<sup>32</sup> Waconda's Notice of Intent at 2; PGE's Response to Waconda's Notice of Intent at 5.