BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1971

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

I. INTRODUCTION

Pursuant to ORCP 47 and OAR 860-001-0420, Waconda Solar, LLC ("Waconda Solar") moves the Oregon Public Utility Commission (the "Commission" or "OPUC") for an order granting partial summary judgment on two legal issues in this proceeding by ruling that: 1) a utility must review an independent System Impact Study ("iSIS") under OAR 860-082-0060(7)(h) in a reasonable, non-discriminatory manner consistent with Good Utility Practice, the contractual duty of good faith and fair dealing, and the utility's obligation to identify system upgrades necessary to mitigate adverse system impacts caused by the interconnection of the generating facility; and 2) the Commission has the legal authority to modify an executed power purchase agreement ("PPA") entered into between a utility and a qualifying facility ("QF") when the modification remedies harms caused by a utility and the QF consents to the modification. Resolving these issues will

address Waconda Solar's Second and Third Claims for Relief and Prayers for Relief 4, 11, 12, and 13.[1]

First, the Commission should resolve the legal question as to what standards of review apply when a utility reviews an interconnection customer's iSIS. An iSIS is one tool an interconnection customer has to gain effective insight into, or remedy harms in, the interconnection process. An iSIS is a way for the interconnection customer to understand the costs and upgrades the utility is proposing, and it provides the interconnection customer an opportunity to vet those costs and upgrades. The iSIS is a tool to protect the interconnection customer. If a utility can evaluate and address an iSIS without regard to a meaningful standard of review, then the interconnection customer's tool becomes useless and the only way the interconnection customer would be able to gain effective insight into the interconnection process or vet a utility's conclusions would be to file a complaint. The utilities must review an iSIS under a meaningful standard of review or this tool will become useless.

Further, it is vital that interconnection customers know ahead of time the utility will review the iSIS under a meaningful standard of review so that the interconnection customer can make informed business decisions before proceeding with an iSIS. An interconnection customer needs assurances the utility will adequately review the iSIS before it spends thousands of dollars on an iSIS. Thus, the utility must review an iSIS under the appropriate standards of review, which is that a utility must review an iSIS in a

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[1] *See generally* First Amended Complaint (July 31, 2019).

reasonable, non-discriminatory manner consistent with Commission rules and a contractual duty of good faith and fair dealing.[2]

First, the Commission's enabling statutes and rules require the utility's review to be reasonable. The manner in which the utility reviews the iSIS needs to be reasonable, among other things, because the costs assigned to the interconnection customer for the upgrades must also be reasonable. At minimum, to review in a reasonable manner means to review how an ordinary person in the industry would review and review consistent with Good Utility Practice.

Second, a utility must also review the iSIS in a non-discriminatory manner. Specifically, a utility's review of the iSIS cannot unjustly discriminate against an interconnection customer by providing undue or unreasonable preference or advantage to any other person or subjecting an interconnection customer to an undue or unreasonable prejudice or disadvantage in any respect. Thus, the utility must review the iSIS just as it would review its own interconnection studies, and those of other interconnection customers. If a utility reviewed the iSIS at a lower standard than its own studies, then the

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[2] Waconda Solar is seeking the Commission grant summary judgment on whether a utility must review an iSIS in a reasonable, non-discriminatory manner consistent with Good Utility Practice, the contractual duty of good faith and fair dealing, and the utility's obligation to identify system upgrades necessary to mitigate adverse system impacts caused by the interconnection of the generating facility. Resolving this issue would address Waconda Solar's Second Claim for Relief and prayers for relief 4 and 11 (Prayer 4: "Finding PGE in violation of Waconda Solar's right to have an independent System Impact Study performed." Prayer 11: "Requiring that PGE allow Waconda Solar's request to have an independent System Impact Study performed.").

utility would be unjustly discriminating against the interconnection customer in favor of itself.

Third, a utility must also review the iSIS to ensure the interconnection customer is only responsible for system upgrades that are necessary to mitigate against adverse system impacts caused by the interconnection of the generator facility. Therefore, the generator facility must be the cause of the impacts and the impacts must be adverse to the system. Further, the upgrades must be necessary to mitigate those adverse impacts. Thus, a utility must review the iSIS with these requirements and Commission rules in mind.

Finally, a utility must also review the iSIS consistent with its contractual duty of good faith and fair dealing. The utility will enter various agreements with an interconnection customer such as a Feasibility Study Agreement, System Impact Study Agreement, Facilities Study Agreement, and eventually an Interconnection Agreement. Implied in each of these agreements is a contractual duty of good faith and fair dealing, which requires a party to effectuate the reasonable expectations of the other party. A reasonable expectation of an interconnection customer can be the ability to conduct an iSIS that the utility reviews consistent with the meaningful standards of review within the Commission's rules. Thus, a utility must review the iSIS consistent with the contractual duty of good faith and fair dealing.

Therefore, the Commission should rule that a utility must review an iSIS in a reasonable, non-discriminatory manner consistent with Good Utility Practice, the contractual duty of good faith and fair dealing, and the utility's obligation to identify

system upgrades necessary to mitigate adverse system impacts caused by the interconnection of the generating facility.

Second, the Commission can resolve the legal question as to whether the Commission has authority to modify an executed PPA between a utility and QF when the modifications will remedy harms to the QF caused by the utility. The Commission should hold it does have the authority to modify an executed PPA with the consent of the QF.[3] Generally, the Commission does not have authority to modify an executed PPA without the consent of the QF. However, the Commission has the consent of the QF in this proceeding.

That allows the Commission to rely upon its statutory duty to ensure the utilities it regulates do not engage in unjust or unreasonable practices and represent the customers of the utilities. Thus, if a utility unjustly or unreasonably causes harm to a QF, the Commission has a duty to remedy that harm. The Commission has broad authority to take actions necessary to fulfil its statutory duties. As examples, the Commission could order the utility to offer the QF a specific contractual amendment or order the utility to offer to terminate the current PPA and execute a new PPA with new provisions. Thus,

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[3] Waconda Solar is seeking the Commission grant summary judgment on whether the Commission has the legal authority to grant Waconda Solar's claim for relief and prayers for relief 12 and 13 (Prayer 12: "Requiring that PGE grant an extension of Waconda Solar's power purchase agreement commercial operation date and termination date to account for the delayed in-service date PGE caused." Prayer 13: "Granting Waconda Solar an extension of its power purchase agreement commercial operation date to coincide with its actual interconnection in-service date."). Waconda Solar is not seeking summary judgment on the factual question of whether the Commission should grant this relief at this time.

the Commission has authority to order a utility to agree to modify an executed PPA if a utility has unjustly or unreasonably harmed the QF.

Further, the Commission has limited authority to modify an executed PPA under ordinary Oregon contract law. A PPA is a contract between a utility and a QF, and Oregon law generally allows modifications of unconscionable or impractical contract provisions. Further, the Commission has asserted that it has the necessary expertise to review the terms and conditions of standard contracts approved by the Commission. Thus, the Commission does have the authority to modify an executed PPA under Oregon contract law and the Commission's own expertise in standard Commission-approved contracts. Therefore, the Commission should hold it has the authority to modify an executed PPA between a utility and QF when the modifications will remedy harms to the QF caused by a utility.[4]

The Commission should rule that: 1) a utility must review an iSIS in a reasonable, non-discriminatory manner consistent with Good Utility Practice, the contractual duty of good faith and fair dealing, and the utility's obligation to identify system upgrades necessary to mitigate adverse system impacts caused by the interconnection of the generating facility; and 2) the Commission has the legal authority to modify an executed PPA entered into between a utility and a QF when the modification remedies harms caused by a utility and with the consent of the QF.

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[4] Again, the Commission's authority to modify post-execution decisions is limited by the Public Utility Regulatory Policies Act of 1978 ("PURPA"), which prevents the Commission from modifying a contract without the consent of the QF. However, it does not limit any jurisdiction that the Commission may have to order relief with the consent and agreement of the QF.

Resolving these two legal issues will protect an interconnection customer's right to conduct an iSIS, ensure the utility is conducting a meaningful review of the iSIS, and allow the Commission to remedy harms to a QF caused by a utility.

II. LEGAL STANDARD

In contested cases, the Commission follows the Oregon Rules of Civil Procedure ("ORCP") except when inconsistent with its own rules, a Commission order, or an Administrative Law Judge ruling.[5] The Commission should grant a motion for summary judgment if the record shows no genuine issue of any material fact and that the moving party is entitled to prevail as a matter of law.[6] No genuine issue as to a material fact exists if, based on the record and viewed in a manner most favorable to the opposing party, no objectively reasonable person could return a verdict for the opposing party on the matter that is the subject matter of the motion for summary judgment.[7]

III. FACTUAL BACKGROUND

No genuine issue of fact exists as to the two legal issues in this Motion for Partial Summary Judgment. A factual background is provided for context surrounding the legal issues. It is also provided to demonstrate why there is disagreement on the legal issues in this Motion for Partial Summary Judgment.

On September 28, 2018, Waconda Solar brought this complaint against Portland General Electric Company ("PGE"). Waconda Solar's complaint raised several claims and prayers for relief, including a Commission order finding that PGE violated Waconda

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5 OAR 860-001-0000(1).
6 ORCP 47C.
7 *Id.*

Solar's right to have an iSIS performed and requiring PGE to grant an extension of Waconda Solar's PPA scheduled commercial operation date ("COD") and termination date.[8]

Waconda Solar started the interconnection process for a 2.25 megawatt solar project in March 2018 when Waconda Solar sent an interconnection application to PGE.[9] Waconda Solar and PGE entered into a Feasibility Study Agreement in April 2018.[10] Around the same time PGE and Waconda Solar executed a standard renewable PPA with a Scheduled COD of February 1, 2020.[11]

In July 2018, PGE provided the Feasibility Study to Waconda Solar, but Waconda Solar noted several errors and inconsistencies in the study.[12] Waconda Solar asked PGE to provide the actual studies and analysis behind the interconnection requirements in the Feasibility Study and for PGE to clarify some of the errors and inconsistencies in the study.[13] Waconda Solar followed up with PGE three additional times asking PGE to respond to Waconda Solar's questions.[14] Multiple times Waconda Solar requested that PGE allow it to hire a third-party consultant for the remainder of the studies because of the inconsistencies and errors in the Feasibility Study.[15] In August 2018, PGE responded

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8 First Amended Complaint at 30-31.
9 First Amended Complaint at ¶¶ 9, 10.
10 First Amended Complaint at ¶ 16.
11 First Amended Complaint at ¶¶ 19, 20.
12 First Amended Complaint at ¶¶ 22-34.
13 First Amended Complaint at ¶ 36.
14 First Amended Complaint at ¶ 39.
15 First Amended Complaint at ¶¶ 41, 43, 49.

that it was "unwilling to agree" to Waconda Solar's request to have future studies conducted by a third-party consultant.[16]

In August 2018, PGE provided a Revised Feasibility Study that still contained errors and inconsistencies.[17] Again, Waconda Solar responded to PGE asking PGE to provide an accurate and correct study and to clarify some of the errors and inconsistencies in the Revised Feasibility Study.[18] Waconda Solar again asked PGE to allow it to hire a third-party consultant to complete the remainder of the studies, and Waconda Solar also asked that PGE provide a system configuration so that Waconda Solar could conduct an iSIS.[19] PGE responded by denying Waconda Solar's request to hire a third-party consultant to complete the remainder of the studies with no explanation and ignoring Waconda Solar's request for the system configuration to conduct an iSIS.[20] After PGE refused to cooperate with Waconda Solar or provide Waconda Solar a system configuration or access to its system in order for Waconda Solar to conduct an iSIS, Waconda Solar ultimately filed its complaint.[21]

Since Waconda Solar filed the first amended complaint, Waconda Solar and PGE engaged in settlement discussions, and exchanged several letters back and forth.[22] One topic in those letters was Waconda Solar's request to have a third-party consultant

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16 First Amended Complaint at ¶ 51.
17 First Amended Complaint at ¶¶ 52-64.
18 First Amended Complaint at ¶ 65.
19 First Amended Complaint at ¶¶ 87, 88.
20 First Amended Complaint at ¶¶ 89-91.
21 First Amended Complaint at ¶¶ 92-106.
22 *See generally*, PGE's Declaration of Rebecca Dodd in Support of PGE's Modified Second Motion for Summary Judgment (Sept. 15, 2021).

complete the remainder of the studies.[23] PGE has not agreed that a third-party consultant can conduct studies instead of PGE. However, PGE now states it is willing to provide a system configuration and access to its system for Waconda Solar to conduct an iSIS if Waconda Solar identifies what specific information it seeks and signs a non-disclosure agreement ("NDA").[24]

Waconda Solar continued to express its desire to conduct an iSIS but sought reassurances from PGE that PGE would comply with all legal requirements and "review the study results in a reasonable manner consistent with Good Utility Practice consistent with Oregon laws, rule and policies."[25] Waconda Solar sought "sufficient assurances that PGE's evaluation [of the iSIS] will be consistent with the law."[26] PGE has replied that Waconda Solar is requesting that PGE agree to "terms not found in OAR 860-082-0060(7)(h)"[27] and "standards not found in the Commission's small generator interconnection rules."[28] PGE has stated "none of these standards of review [(reasonableness, good faith, or Good Utility Practice)] are stated, or defined, by the Commission's rules as standards applicable to evaluation of an independent system

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23 *See generally*, PGE's Declaration of Rebecca Dodd in Support of PGE's Modified Second Motion for Summary Judgment.

24 PGE's Declaration of Rebecca Dodd in Support of PGE's Modified Second Motion for Summary Judgment, Exhibit 1 at 1-2.

25 PGE's Declaration of Rebecca Dodd in Support of PGE's Modified Second Motion for Summary Judgment, Exhibit 2 at 1.

26 PGE's Declaration of Rebecca Dodd in Support of PGE's Modified Second Motion for Summary Judgment, Exhibit 2 at 3.

27 PGE's Declaration of Rebecca Dodd in Support of PGE's Modified Second Motion for Summary Judgment, Exhibit 3 at 2.

28 PGE's Declaration of Rebecca Dodd in Support of PGE's Modified Second Motion for Summary Judgment, Exhibit 5 at 2.

impact study."[29] Waconda Solar and PGE disagree on what standards of review apply to a utility's review an iSIS under Commission rules.

Since the complaint was initially filed, the proceeding has been postponed 28 times.[30] There have been several motions for extension of time,[31] motions to cancel the prehearing conference,[32] motions to modify the procedural schedule,[33] and motions to hold in abeyance.[34] Litigation has caused Waconda Solar to miss its Scheduled COD in the PPA, thereby necessitating an extension of the COD as well as the PPA termination date.

IV. ARGUMENT

A. A Utility Must Review an iSIS in a Reasonable, Non-Discriminatory Manner Consistent with Good Utility Practice, Contractual Duty of Good Faith and Fair Dealing, and an Identification of System Upgrades Necessary to Mitigate Adverse System Impacts Caused by Interconnection of Generating Facility

An iSIS is one way an interconnection customer can review and engage in the interconnection process especially as it relates to the interconnection studies a utility produces (and refuses to let others produce). The Commission's rules spell out the process through which each of these studies is to be conducted and provide various

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29 PGE's Declaration of Rebecca Dodd in Support of PGE's Modified Second Motion for Summary Judgment, Exhibit 7 at 2-3.

30 This count includes any time the procedural schedule was delayed or modified by either the parties or the Commission.

31 *See, e.g.,* Parties' Joint Motion to Extend Time (June 22, 2021).

32 *See, e.g.,* PGE's Request to Cancel 3/7/19 Prehearing Conference at 1 (Mar. 5, 2019).

33 *See, e.g.*, Joint Motion to Modify Procedural Schedule at 1 (Aug. 4, 2021).

34 *See, e.g.,* Waconda Solar's Motion to Hold Response to PGE's Motion for Summary Judgment in Abeyance at 1 (July 31, 2019).

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.[35]

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 iSIS 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.[36]

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.[37]

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35 *See generally* OAR 860-082.

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

37 *See, e.g., Madras Solar v. PGE*, 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/44-48 (Nov. 5, 2019) (where SIS Re-Study reduced estimated costs from over $300 million to less than $25 million).

1. The Standards of Review for an iSIS Is at Issue in this Proceeding

The standards of review that apply when a utility reviews an iSIS is at issue in this proceeding. There is currently lack of clarity on how a utility must review an interconnection customer's iSIS. Waconda Solar believes the utility must review the iSIS in a reasonable, non-discriminatory manner consistent with Good Utility Practice, the contractual duty of good faith and fair dealing, and the utility's obligation to identify system upgrades necessary to mitigate adverse system impacts caused by the interconnection of the QF. However, PGE has refused to acknowledge these are the standards in which it must review an iSIS. If these are the appropriate standards of review, then PGE is essentially making illegal offers and entering illegal contracts because they violate the law and Commission rules. Thus, the issue of what standards of review apply to a utility's review of an iSIS is at issue in this proceeding.

Waconda Solar is seeking the Commission grant summary judgment on whether a utility must review an iSIS in a reasonable, non-discriminatory manner consistent with Good Utility Practice, the contractual duty of good faith and fair dealing, and the utility's obligation to identify system upgrades necessary to mitigate adverse system impacts caused by the interconnection of the generating facility. Resolving this issue would address Waconda Solar's Second Claim for Relief and prayers for relief 4 and 11.[38]

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[38] Second Claim for Relief: "Waconda Solar is entitled to relief because PGE unreasonably withheld its consent to allow Waconda Solar …to complete an independent System Impact Study." Prayer 4: "Finding PGE in violation of Waconda Solar's right to have an independent System Impact Study performed." Prayer 11: "Requiring that PGE allow Waconda Solar's request to have an independent System Impact Study performed."

Specifically, the Commission should find that PGE has unreasonably withheld its consent to allow Waconda Solar to complete an iSIS and find PGE in violation of Waconda Solar's right to have an iSIS performed, and require PGE to allow Waconda Solar's request to have an iSIS.

i. PGE Has Not Stated It Will Review the iSIS in a Reasonable, Non-Discriminatory Manner Consistent with Good Utility Practice, Contractual Duty of Good Faith and Fair Dealing, and the Utility's Obligation to Identify System Upgrades Necessary to Mitigate Adverse System Impacts Caused by the Interconnection of the QF

PGE has argued the issue of what standard of review applies is not at issue in this proceeding because Waconda Solar has not provided PGE with an iSIS.[39] PGE asserts that "[t]he question of what standard of review would apply to PGE's evaluation of the alternative findings in a Waconda iSIS is speculative and premature."[40] PGE argues the only relevant claim under Waconda Solar's amended complaint is whether PGE has refused to cooperate with Waconda Solar conducting its iSIS.[41] PGE asserts it has not interfered with Waconda Solar's ability to conduct an iSIS because PGE asserts it will provide the system information Waconda Solar needs to conduct the iSIS if Waconda Solar executes an NDA with PGE.[42] PGE asserts Waconda Solar has equivocated regarding whether Waconda Solar intends to conduct the iSIS because Waconda Solar

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39 PGE's Reply in Support of Modified Second Motion for Summary Judgment at 19 (Dec. 15, 2021); PGE's Response to Notice and Request at 3-4 (Jan. 5, 2022).

40 PGE's Response to Notice and Request at 3.

41 PGE's Reply in Support of Modified Second Motion for Summary Judgment at 19; PGE's Response to Notice and Request at 3-4.

42 PGE's Modified Second Motion for Summary Judgment at 36-41; PGE's Reply in Support of Modified Second Motion for Summary Judgment at 17-23.

has not executed the NDA or specified what information it needs, and Waconda Solar has "conditioned its desire to conduct a study on terms not found in the Commission's rules[.]"[43]

Waconda Solar disagrees with these assertions and believes the issue regarding what standard of review applies when a utility evaluates and addresses an iSIS is at issue in this proceeding. By refusing to state that PGE will review the iSIS in a reasonable, non-discriminatory manner consistent with Commission rules, Good Utility Practice, and its contractual duty of good faith and fair dealing, PGE has prevented Waconda Solar from conducting its iSIS. Waconda Solar expressed its desire to conduct an iSIS many times[44] and has requested assurances PGE would evaluate and address the iSIS 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 iSIS: 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 iSIS 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

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43 PGE's Modified Second Motion for Summary Judgment at 37-41.

44 *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).

> 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*.[45]

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."[46] Thus, PGE is essentially stating it retains the right to *not* review the iSIS in a reasonable, nondiscriminatory manner consistent with Commission rules or its contractual duties.

PGE claims it has agreed to allow Waconda Solar to conduct the iSIS.[47] However, PGE has not really agreed to allow Waconda Solar to conduct the iSIS because PGE has conditioned its agreement to Waconda Solar conducting the iSIS upon Waconda Solar dropping its request that PGE review the iSIS in a reasonable, non-discriminatory manner consistent with Commission rules and its contractual duties.[48] PGE has stated it "is not willing to agree to be bound by specific standards of review, or definitions, not stated in the Commission's rules unless such standards are part of a comprehensive settlement[.]"[49] PGE's offer to have Waconda Solar conduct the iSIS without assurances

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

46 PGE's Modified Second Motion for Summary Judgment at 40-41.

47 PGE's Modified Second Motion for Summary Judgment at 42.

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

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

it will review the iSIS in a reasonable, non-discriminatory manner consistent with Commission rules and a contractual duty of good faith and fair dealing is not a real offer as 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 believes a utility's review of an iSIS must be in a reasonable, non-discriminatory manner consistent with its contractual duties. However, Waconda Solar needs clarity regarding its legal rights *before* making a reasoned business decision to expend money on an iSIS.

Waconda Solar is concerned that PGE's review will be unreasonable, inconsistent with Good Utility Practice, unjustly discriminate against Waconda Solar, and PGE's review will not evaluate whether Waconda Solar is only responsible for system upgrades that are necessary to mitigate against adverse system impacts caused by the interconnection of Waconda Solar.[50] Waconda Solar's concern is reasonable. It is well known in the industry that there are significant stakeholder concerns with the PGE's interconnection process, that the inability to verify the upgrades and cost estimates is a barrier in the interconnection process, and third-party consultants can provide objective technical insights into interconnection processes which can save significant amounts in upgrade costs.[51] PGE has been subject to a significant amount of litigation regarding its

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50 *See* Declaration of Troy Snyder.

51 *See, e.g.*, *in re Commission Staff Proposal for a Request for Proposal for Third-Party Interconnection Review Services for the Community Solar Program*, Docket No. UM 1930, Order No. 20-185, Appendix A at 2-6 (June 3, 2020) ("stakeholders in CSP and other proceedings are concerned about the ability to verify the conclusions of the interconnection studies performed by the utility. This

interconnection process for a wide variety of issues.[52] In addition, TLS Capital, the owner of Waconda Solar has experienced and/or is aware of numerous other instances of problems with PGE's interconnection process. Specifically, Waconda Solar is aware that PGE has a history of making errors in its interconnection studies, missing interconnection

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includes verifying the upgrades identified as necessary, the utility's consideration of alternative solutions to the upgrades, and the costs quoted for those upgrades."… "The ability to verify the upgrades and cost estimates in utility interconnection studies is a more acute barrier for CSP project development…" …. "Staff believes that third-party interconnection review services can be provided at an affordable cost, and would provide valuable insights to both the CSP interconnection process and small generator interconnection generally."); Docket No. UM 1930, Order 19-392, Appendix A at 14-15 20-21 (Nov. 8, 2019).

[52] *See, e.g.*, *Pac. Nw. Solar, LLC (Amity Project) v. PGE*, Docket No. UM 1902, Complaint at 1-3 (Oct. 9, 2017); *Butler Solar, LLC v. PGE*, Docket No. UM 1903, Complaint at 1-3 (Oct. 9, 2017); *Pac. Nw. Solar, LLC (Duus Project) v. PGE*, Docket No. UM 1904, Complaint at 1-3 (Oct. 9, 2017); *Pac. Nw. Solar, LLC (Stringtown Project) v. PGE*, Docket No. UM 1907, Complaint at 1-3 (Oct. 9, 2017); *Pac. Nw. Solar, LLC (Starlight Project) v. PGE*, Docket No. UM 1906, Complaint at 1-3 (Oct. 9, 2017); *Dunn Rd. Solar v. PGE*, Docket No. UM 1963, Complaint at 1-3 (July 26, 2018); *Sandy River Solar, LLC v. PGE,* Docket No. UM 1967, Complaint at 1-5 (Aug. 24, 2018); *Madras PV1, LLC v. PGE*, Docket No. UM 2009, Complaint at 1-3 (Apr. 22, 2019) and Madras Solar's Response to PGE's Motion to Strike at 6 (Nov. 26, 2019); *Waconda Solar, LLC v. PGE*, Docket No. UM 1971, First Amended Complaint at 1-4 (July 31, 2019); *St. Louis Solar, LLC v. PGE*, Docket No. UM 2057, Complaint at 1-4 (Feb. 3, 2020); *Zena Solar, LLC v. PGE*, Docket No. UM 2074, Complaint at 1-5 (Mar. 27, 2020); *Zena Solar, LLC v PGE,* Docket No. UM 2164, Complaint at 1-15 (May 24, 2021). There have also been at least two requests by Interconnection Customers for waivers of the interconnection rules in order to avoid or mitigate prohibitively expensive interconnection costs. *In Re Carnes Creek Solar, LLC, Petition for Waiver of OAR 860-082-0025(1)(c),* Docket No. UM 1631, Petition for Waiver for Carnes Creek Solar, LLC at 1-2 (Apr. 23, 2020); *In Re Marquam Creek Solar, LLC, Petition for Waiver of OAR 860-082-0025(1)(c),* Docket No. UM 1631, Marquam Creek Solar, LLC, Petition for Waiver of OAR 860-082-0025(1)(c) at 1-2 (Jan. 25, 2021).

application and study timelines, and providing inadequate studies that do not contain the information required by Commission rules.[53]

Waconda Solar is not willing to pay to conduct a study that ultimately has no value.[54] 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 iSIS and then litigate what its legal rights are after PGE ignores the study results. Specifically, Waconda Solar will not execute an agreement with PGE or spend money on an iSIS because PGE's position is that the Commission is powerless to review whether PGE's review of the iSIS was reasonable, consistent with Good Utility Practice, non-discriminatory, and evaluated whether Waconda Solar was only responsible for system upgrades that are necessary to mitigate against adverse system impacts caused by the interconnection of Waconda Solar.[55] Ultimately, PGE's refusal to agree to review the iSIS under these standards is preventing Waconda Solar from conducting the iSIS.

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53 First Amended Complaint at ¶¶ 67-87 (identifying examples with Mt. Hope Solar, Eola Solar, Brush College Solar, Sandy River Solar, and Mountain Meadow Solar specific projects as of July 8, 2019; *see also* Attachment A.

54 *See* Declaration of Troy Snyder.

55 If the Commission does not provide clarity it is requesting to perform an iSIS, then Waconda Solar will abandon the project. *See* Declaration of Troy Snyder.

ii. PGE's Refusal to State It Will Review the iSIS Consistent with the Law, Commission Rules, and Contractual Duties Constitutes an Illegal Agreement

Further, PGE's terms could constitute an illegal agreement, and courts have refused to enforce agreements that are illegal.[56] 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."[57] Further, courts have held that a contract that contravenes or violates a statute will always be illegal if the statute is intended to protect the public "against those evils which we know from experience society must be guarded against by protective legislation."[58] Administrative rules and regulations have the same effect as if enacted by the legislature.[59] Thus, if a contract violates a rule or regulation, especially if that rule or regulation is intended to protect the public, then the contract is illegal.

In *Huff v. Bretz*, lessors of land brought suit against the lessees claiming breach of the lease and sought ejectment.[60] The lessors asserted breach of the lease because the lessees did not make beneficial use of the water rights and the lessees did not pump water from the East Fork of Williams Creek to preserve the water rights even though that was not the lessors' designated point of diversion.[61] The lessees asserted there was no breach

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56 *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543, 552, 340 P3d 27 (2014) (citing *Uhlmann v. Kin Daw*, 97 Or 681, 688, 193 P 435 (1920)).
57 *Bagley*, 356 Or at 552 (citing *Uhlmann*, 97 Or at 689) (internal quotes omitted).
58 *Hunter v. Cunning*, 176 Or 250, 287, 157 P2d 510 (1945).
59 *Bronson v. Moonen*, 270 Or 469, 476-77, 528 P2d 82 (1974).
60 *Huff v. Bretz*, 285 Or 507, 509, 595 P2d 204 (1979).
61 *Huff*, 285 Or at 515.

because Oregon law prohibited a change in the point of diversion without following statutory procedures, so the lease required an unlawful act.[62] The Court held the statute is question was enacted "for the protection of the public" and if the lease had directed the lessees to pump from the East Fork of Williams Creek, then it would have been voidable and unenforceable.[63]

There are also examples of illegal contracts involving public utilities in Oregon. In *Perla Dev. Co. v. PacifiCorp*, Perla Development Company ("Perla") had a contract with PacifiCorp in which PacifiCorp would provide free or reduced cost electric line extensions to houses in the subdivision.[64] At the time, this contract complied with Commission rules and PacifiCorp's tariff.[65] However, a couple years later the Commission issued a new order requiring all public utilities to reduce their free line extension allowances, and PacifiCorp filed a new tariff to comply with the order.[66] Perla brought suit claiming breach of contract.[67] The court held PacifiCorp was excused from performance of the contract because the Commission order made performance of the contract illegal and PacifiCorp's duty was discharged.[68] However, the court noted that if the language of the contract or other circumstances indicated the parties agreed to

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62 *Huff*, 285 Or at 515.
63 *Huff*, 285 Or at 517-19 (the Court upheld the trial court's conclusion there was no breach for other unrelated reasons).
64 *Perla Dev. Co. v. PacifiCorp*, 82 Or App 50, 52, 727 P2d 149 (Or Ct App 1986).
65 *Perla Dev. Co.*, 82 Or App at 52.
66 *Perla Dev. Co.*, 82 Or App at 52-53.
67 *Perla Dev. Co.*, 82 Or App at 53.
68 *Perla Dev. Co.*, 82 Or App at 54.

perform regardless of supervening illegality, then damages could be awarded "if performance is prevented rather than one to render a performance in violation of law."[69]

Here, the iSIS rule is meant to protect the public and interconnection customers. The iSIS is a tool to ensure the utility is assigning appropriate interconnection upgrades and costs to the interconnection customer. If a utility must review an iSIS consistent with the standards of review in Commission rules and its contractual duties, but the utility will not agree to abide by those standards, then the utility is violating Commission rules and the agreement would be illegal. Thus, it follows that offers to form an agreement also cannot contain provisions that would make the agreement illegal.

Under Oregon contract law, generally there is no relief from illegal contracts that have been fully executed.[70] Put another way, if a fully executed contract is illegal, then the parties are generally barred to seek enforcement of the contract or relief from the contract. However, Oregon courts have created an exception. When one party is less at fault than the other, then that party may rescind the illegal contract and may be entitled to restitution.[71]

Waconda Solar does not want to sign an agreement that could potentially limit its legal rights. Waconda Solar believes the law requires PGE to review the iSIS in a

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69 *Perla Dev. Co.*, 82 Or App at 54 (quoting *Restatement (Second) Contracts*, § 264 Comment a).

70 *Mesaba Service & Supply Co. v. Martin*, 67 Or App 89, 95, 676 P2d 930 (Or Ct App 1984).

71 *Rugemer v. Rhea*, 153 Or App 400, 404, 957 P2d 184 (Or Ct App 1998) (footnote 1 stating "Illegal contracts may be rescinded by the party not at fault. *State v. Pettit*, 73 Or App 510, 513, 698 P2d 1049, *rev den* 299 Or 522, 702 P2d 1112 (1985)"); *Oregon & Western Colonization Co. v. Johnson*, 164 Or 517, 536, 102 P2d 928 (1940).

reasonable, non-discriminatory manner consistent with Good Utility Practice, the contractual duty of good faith and fair dealing, and the utility's obligation to identify system upgrades necessary to mitigate adverse system impacts caused by the interconnection of the generating facility. However, PGE will not agree to follow those standards of review. Any agreement Waconda Solar were to enter with PGE regarding the iSIS could constitute an illegal agreement, which would limit Waconda Solar's future legal rights. Waconda Solar believes it would be the protected party as it is less at fault because Waconda Solar was merely inquiring into whether PGE would comply with the law, Commission rules, and contractual duties.

But, Waconda Solar would not want its legal rights limited to restitution, recission, or an unenforceable contract. Waconda Solar wants reassurances PGE will comply with the law, Commission rules, and its contractual duties by reviewing the iSIS in a reasonable, non-discriminatory manner consistent with Good Utility Practice, the contractual duty of good faith and fair dealing, and the utility's obligation to identify system upgrades necessary to mitigate adverse system impacts caused by the interconnection of the generating facility.

If PGE is not required to abide by the standards of review in Commission rules and its contractual duties, then an interconnection customer's right to conduct the iSIS becomes useless. PGE is preventing Waconda Solar from conducting the iSIS even though PGE claims it has agreed to allow Waconda Solar to conduct the study. Therefore, the issue regarding what standards of review apply when a utility evaluates and addresses an iSIS is at issue in this proceeding.

2. The Commission Should Rule that a Utility Must Review an iSIS in a Reasonable, Non-Discriminatory Manner Consistent with Commission Rules, Good Utility Practice, and a Contractual Duty of Good Faith and Fair Dealing

The right to conduct an iSIS[72] is one tool an interconnection customer has to ensure the utility's proposed upgrades for interconnection are reasonable, not discriminatory, and necessary to mitigate only adverse system impacts caused by interconnection. If the utility can address and evaluate the iSIS without regard to any meaningful standard of review, then this tool becomes useless. The Commission's small generator interconnection rules require a utility to review an iSIS in a reasonable, non-discriminatory manner and determine if the system upgrades are required to mitigate any adverse system impacts caused by interconnection. Further, a utility must review the iSIS consistent with its contractual duty of good faith and fair dealing. Thus, the Commission should rule that a utility must review an iSIS in a reasonable, non-discriminatory manner consistent with Good Utility Practice, the contractual duty of good faith and fair dealing, and the utility's obligation to identify system upgrades necessary to mitigate adverse system impacts caused by the interconnection of the generating facility.

i. The Commission's Rules Require a Utility's Review of an iSIS to be Reasonable

The Commission's small generator interconnection rules require a utility to review an iSIS in a reasonable manner. Although OAR 860-082-0060(7)(h) does not explicitly say "reasonably review," a reasonableness requirement is the only valid interpretation when considering the rules and the Commission's statutory authority over

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[72] OAR 860-082-0060(7)(h).

utilities. Without such a requirement, then the utility would have the legal right to review an iSIS by spending only a few minutes skimming it before throwing it into the trash, and the Commission would be powerless to hold the utility to account for its unreasonable review.

A utility's review of the iSIS must be reasonable as the Commission has a broad mandate to ensure the monopoly utilities it regulates behave in a manner that is reasonable towards their customers. The Commission's general powers state the Commission shall "protect [] customers, and the public generally, from unjust and unreasonable exactions and practices [by the utilities]" and "represent the customers of any public utility . . . in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction."[73] Further, utilities are required to furnish adequate and safe service to customers at reasonable and just charges.[74] Thus, the Commission has a duty to ensure customers are not treated unreasonably by utilities and disallow unreasonable utility practices and charges.

Also, the interconnection customer is only required to pay the reasonable costs of the interconnection facilities and system upgrades.[75] Specifically, the rules state the interconnection customer "must pay the reasonable costs of the interconnection

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73 ORS 756.040.

74 ORS 757.020 ("Every public utility is required to 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.").

75 OAR 860-082-035(2), (4).

facilities"[76] and "must pay the reasonable costs of any system upgrades."[77] Interconnection customers are not responsible for unreasonable costs of interconnection facilities or system upgrades. Thus, when the utility reviews the iSIS, the review must ensure the interconnection customer is only responsible for reasonable costs of interconnection facilities and system upgrades.

Reasonable costs are similar to prudently incurred costs, which uses an objective standard of reasonableness.[78] The Commission has explained this standard by stating:

> […] the reasonableness standard [is] an inquiry into "whether the utility exercised the standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time the decision had to be made." …
>
> … In applying that reasonableness standard, we will examine the decision-making process, will consider if alternatives to a course of action were adequately considered, and whether there is adequate contemporaneous analysis and documentation and a sound justification to support the investment. …
>
> … In evaluating reasonableness, we determine whether the company's actions and decisions, based on what it knew or should have known at the time, were reasonable in light of existing circumstances.[79]

Thus, a utility must review the iSIS to ensure costs are reasonable consistent with these standards.

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76 OAR 860-082-035(2).
77 OAR 860-082-035(4).
78 *In re PacifiCorp Request for a General Rate Revision*, Docket No. UE 374, Order No. 20-473 at 74 (Dec. 18, 2020).
79 Docket No. UE 374, Order No. 20-473 at 74-75, 87.

The utility must review the iSIS in a reasonable manner because, if the utility was allowed to unreasonably review the iSIS, then the iSIS rule and potentially more of the Commission's interconnection rules would be unlawfully inconsistent with governing statutes. In addition, there would be significant practical harm to interconnection customers. The utility would simply reject the iSIS, and then require the interconnection customer to pay for unjust and unreasonable costs identified in its original System Impact Study.

PGE has argued a reasonableness standard is not necessary to determine if a utility is required to allow an interconnection customer to hire a third-party consultant to conduct interconnection studies in lieu of the utility.[80] PGE reasoned that the interconnection studies are designed to protect the utility's system.[81] However, the iSIS is a tool for the interconnection customer to ensure it is paying for reasonable upgrades that are necessary to mitigate adverse system impacts caused by its interconnection. The iSIS is a tool to protect the interconnection customer. Therefore, it follows that the utility must review the iSIS in a reasonable manner to ensure the interconnection customer is protected. Thus, if the utility refuses to conduct a reasonable review, then the Commission should find such refusal unreasonable, and require the utility accept the alternative and reasonable findings in the iSIS.

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80 *See* PGE's Reply in Support of Modified Second Motion for Summary Judgment at 15-17.

81 *See* PGE's Reply in Support of Modified Second Motion for Summary Judgment at 15-16.

To act reasonably, the utility must review the iSIS similar to how a reasonable person of ordinary prudence in the industry would review the iSIS in similar circumstances. Bouvier Law Dictionary defines reasonable as:

> The practical judgment of a person of ordinary awareness and good will. Reasonableness is the understanding that people endowed with ordinary reason and knowledge have of what is appropriate to do in a given situation. A reasonable action is what most rational and fair-minded people could be expected to do in a given situation. …
>
> … As an aspect of reasonableness, that duty is moderated by the practical affairs of each person and the competing duties and interests that would affect any action at a given moment. Reasonableness moderates the purity of right or reason with the practical limits of human behavior. Reasonableness is not the same as logic, morality, duty, prudence, courage, knowledge, skill, or judgment, but neither is reasonableness an excuse for a person to avoid such attributes of human understanding and conduct as a person of good will would ordinarily do.[82]

Thus, when a utility reviews an iSIS, the utility must review it in a reasonable manner or how an ordinary person in the industry would review it.

Additionally, to act reasonably, or how an ordinary person in the industry would act, the utility must, at a minimum, adhere to "Good Utility Practice" when reasonably addressing and evaluating an iSIS. Good Utility Practice is a set of acceptable practices, methods, or acts generally accepted in a region, but it does not mean a utility is limited to those practices, methods, or acts because a utility could go above and beyond. In PGE, PacifiCorp, and Idaho Power's Open Access Transmission Tariffs ("OATT"), Good Utility Practice is defined as

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[82] *Reasonable (Reasonableness)*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2012).

> Any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region, including those practices required by Federal Power Act section 215(a)(4).[83]

All three investor-owned utilities in Oregon follow Good Utility Practice with regard to interconnection processes in their OATTs. Many of the utilities' state-level interconnection study agreements are based on their studies in the OATTs. Thus, the utilities should also follow Good Utility Practice with regards to the state-level interconnection process and state-level interconnection and study agreements. Thus, utilities must also adhere to Good Utility Practice when evaluating and addressing an iSIS.

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[83] PGE, *Pro Forma Open Access Transmission Tariff* at 19-20 (2021) available at: https://www.oasis.oati.com/PGE/PGEdocs/PGE_OATT_12122017.pdf; PacifiCorp, *Open Access Transmission Tariff – FERC Electric Tariff* at 8 (July 6, 2021) available at: https://www.oasis.oati.com/woa/docs/PPW/PPWdocs/20211105_OATTMaster.pdf; Idaho Power Co., *Idaho Power Company Open Access Transmission Tariff – FERC Electric Tariff* at Section 1.1, p. 5 (Aug. 5, 2010) available at: https://www.oasis.oati.com/woa/docs/IPCO/IPCOdocs/IPC_OATT_Issued_2021-05-28.pdf.

ii. The Commission's Rules Require a Utility's Review of an iSIS to be Non-Discriminatory

A utility's review of an iSIS must be in a non-discriminatory manner. Without such a requirement, then the utility could provide undue or unreasonable preference to advantage to another interconnection customer or itself, and the Commission would be powerless to hold the utility to account for its unjust discrimination.

Utilities are not allowed to act unreasonably in giving preference or advantage to any person.[84] Specifically, "[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" and "[a]ny public utility violating this section is guilty of unjust discrimination."[85] For a public utility to be found guilty of discrimination "[a] particular person or locality must be treated differently from other, similarly situated persons or localities" and "the disparate treatment must also, of course, be undue or unreasonable."[86]

The Federal Energy Regulatory Commission ("FERC") has stated undue discrimination can occur when an interconnection utility "is not independent and has an interest in frustrating rival generators" and ruled "any policy that creates opportunities for such discriminatory behavior to be unacceptable."[87] Thus, FERC considers

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84 ORS 757.325.

85 ORS 757.325.

86 *Chase Gardens v. Or. Pub. Util. Comm'n*, 131 Or App 602, 608, 886 P2d 1087 (Or Ct App 1994) (quoting the Commission's order that the court affirmed); Docket Nos. UC 528 & UC 529, Order No. 01-455 at 21-22 (June 1, 2001).

87 FERC Order No. 2003, 104 FERC ¶ 61,103 at 696 (July 24, 2003).

discrimination between a utility and independent power producers as valid discrimination claims.

In *Brewer v. Juniper Utility Co.*, the Commission held Juniper Utility Co. was guilty of unjust discrimination.[88] Mr. Brewer brought the complaints alleging the defendants failed to delivery irrigation water, which was discriminatory.[89] The Commission held Juniper Utility Co. and JL Ward Construction Co. were guilty of giving undue preference because the amount of time it took to restore irrigation water service to the upper elevation area, the two mobile home parks, compared to the lower elevation area, Mountain High homeowners and a golf course, was unreasonable and longer than could be explained by the vagaries of the Juniper Utility Co. system.[90] Thus, giving undue preference to some customers over others is discrimination, which ORS 757.325 prohibits.

Any particular person or locality would include the utility itself. Thus, discrimination can be: 1) discrimination by a utility between different interconnection customers; 2) discrimination by a utility in favor of retail customers against interconnection customers; or 3) discrimination by a utility in favor of itself against interconnection customers. If a utility refuses to substantively address and evaluate an interconnection customer's iSIS but it will substantively address and evaluate its own

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88 *Paul Brewer, dba Quail Ridge Mobile Park, and Paul Brewer, dba The Pines Mobile Home Park v. Juniper Utility Co., Juniper Water Co., JL Ward Construction Co., and Jan L. Ward*, Docket Nos. UC 528 & UC 529, Order No. 01-455 at 21-22 (June 1, 2001).

89 Docket Nos. UC 528 & UC 529, Order No. 01-455 at 1.

90 Docket Nos. UC 528 & UC 529, Order No. 01-455 at 17-18.

engineers' studies, then the utility would be discriminating against that interconnection customer in violation of ORS 757.325. Thus, the utility's review of the iSIS must be in a non-discriminatory manner.

iii. The Commission's Rules Require a Utility to Evaluate an iSIS to Determine if the System Upgrades are Necessary to Mitigate Any Adverse System Impacts Caused by the Interconnection of the Generator's Facility

The utility must also review the iSIS to determine if the system upgrades are necessary to mitigate any adverse system impacts caused by the interconnection of the small generator's facility. Without such a requirement, a utility could decline to review the iSIS to determine whether or not any impacts are caused by the interconnection of the small generator facility, and the Commission would be powerless to hold the utility accountable for its decision to limit its review.

Any review of the iSIS must be consistent with OAR 860-082-0035(4), which states:

> 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*. A public utility must identify *any adverse system impacts* on an affected system *caused by the interconnection of a small generator facility* to the public utility's transmission or distribution system. The public utility must determine what actions or upgrades are *required to mitigate these impacts*. Such mitigation measures are considered system upgrades as defined in these rules. The applicant must pay the reasonable costs of any system upgrades.[91]

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[91] OAR 860-082-0035(4) (emphasis added).

If system upgrades are not required or necessary to mitigate any adverse system impacts caused by interconnection, then the interconnection customer is not responsible for those costs. The interconnection customer should only be responsible for costs if there is an adverse system impact. Adverse system impact is defined as "a negative effect caused by the interconnection of a small generator facility that may compromise the safety or reliability of a transmission or distribution system."[92] Thus, the interconnection customer should only be responsible for the costs to mitigate negative effects caused by interconnection that compromise the safety or reliability of a transmission or distribution system. If upgrades will not mitigate negative effects on the safety or reliability of a transmission or distribution system caused by the generator facility's interconnection, then the interconnection customer should not pay for those upgrades. The utility's review of the iSIS should be consistent with these rules.

The interconnection customer is also only responsible for system upgrades or interconnection facilities that are necessary to interconnect the generator.[93] Necessary

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92 OAR 860-082-0015(1).

93 *See* OAR 860-082-0035(2) ("The interconnection customer only pays for facilities *necessary* to safely interconnection the small generator facility with the public utility's transmission or distribution system.") (emphasis added); *see* 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); *see* OAR 860-082-0060(2) ("The applicant must pay the reasonable costs of any interconnection facilities or system upgrades *necessitated* by the interconnection.") (emphasis added); *see* OAR 860-082-0025(1)(e)(C) ("A public utility may require the interconnection customer to pay for interconnection facilities, system upgrades, or changes to the small generator facility or its associated interconnection equipment that are *necessary* to bring the small generator facility interconnection into compliance with the small generator interconnection rules or IEEE 1547 or 1547.1.") (emphasis added).

means absolutely needed, required, essential, indispensable, mandatory.[94] If an interconnection can be achieved and all adverse system impacts caused by the interconnection customer are mitigated without the upgrade, then the upgrade is not necessary. The upgrade is only necessary if the only way to avoid the adverse system impact is to construct the facilities with the upgrade.

In Docket No. AR 521 where the Commission adopted its current small generator interconnection rules, the Industrial Customers of Northwest Utilities ("ICNU") filed comments regarding concerns that interconnection customers would pay for upgrades that would benefit other users and were not necessary for interconnection.[95] Specifically, ICNU stated "a utility could compel an interconnection customer to sponsor system upgrades beyond those minimum upgrades necessary to connect that individual customer" and expressed concern that utilities might interpret the rules to "requires interconnection customers to pay for system upgrades, even if those upgrades primarily benefit other utility customers, were already planned, or were installed exclusively for the future benefit of the utility."[96] The Commission addressed these concerns by stating:

> The proposed rules, however, include language that is meant to strictly limit a public utility's ability to require one small generator facility to pay for the cost of system upgrades that primarily benefit the utility or other small generator facilities, or that the public utility planned to make regardless of the small generator interconnection. Under the proposed rules, a public utility may only require a small generator facility to pay for system upgrades that are "necessitated by

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94 *Necessary*, Merriam-Webster Dictionary, available at: https://www.merriam-webster.com/dictionary/necessary (last visited Jan. 18, 2022).

95 *In re Rulemaking to Adopt Rules Related to Small Generator Interconnection*, Docket No. AR 521, Comments of ICNU at 5-7 (Aug. 12, 2008).

96 Docket No. AR 521, Comments of ICNU at 6.

> the interconnection of a small generator facility" and "required to mitigate" any adverse system impacts "caused" by the interconnection. We therefore believe the proposed rules adequately protect small generator facilities and that ICNU's fears are unfounded.[97]

Thus, any upgrade an interconnection customer is responsible for, must be necessary and caused by the generator's interconnection to the system. Therefore, a utility must review an iSIS consistent with the necessary requirement.

Thus, the utility must evaluate and address the iSIS with these rules in mind and only have the interconnection customer pay for interconnections costs that will mitigate an adverse system impact. In other words, the point and purpose of the utility's review of the iSIS should be to determine what are the adverse system impacts, whether those impacts are caused by the interconnection of the generator facility, whether the upgrades are necessary to mitigate those impacts, and what are the reasonable costs to mitigate those impacts. Any utility review of an iSIS that fails to do so violates the Commission's small generator interconnection rules.

iv. A Utility Must Evaluate and Address an iSIS Consistent with its Contractual Duty of Good Faith and Fair Dealing

Finally, the utilities also must evaluate and address the iSIS under a contractual duty of good faith and fair dealing. Without such a requirement, a utility could review the iSIS with an intent to deceive, in a dishonest manner, with a fraudulent intent, and inconsistent with or neglect of fair dealing, and the Commission would be powerless to hold the utility accountable for this bad faith and lack of fair dealing.

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[97] Docket No. AR 521, Order No. 09-196 at 5 (June 8, 2009).

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. . .
>
> . . . The common-law implied duty of good faith and fair dealing serves to effectuate the objectively reasonable expectations of the parties.[98]

The duty of good faith is traditionally applied by courts in situations where one party has discretion in how to exercise 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."[99]

With regards to interconnection customers and utilities, the parties sign various interconnection agreements such as a Feasibility Study Agreement, System Impact Study Agreement, Facility Study Agreement, and eventually an Interconnection Agreement. Thus, any of these agreements come with a duty of good faith and fair dealing. A

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

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

"reasonable contractual expectation" of any of these agreements is that each party will comply with the law and Commission rules. It is expected a utility would review an iSIS consistent with Commission rules and the law. Thus, if the utility does not review the iSIS in a reasonable, non-discriminatory manner consistent with Commission rules, then the utility is not upholding its contractual duty of good faith and fair dealing in its agreements such as the System Impact Study Agreement.

Another "reasonable contractual expectation" of the interconnection customer is the ability to effectively conduct an iSIS, but the utility has access to the information the interconnection customer needs to conduct the iSIS with the proper technical assumptions so that the iSIS can legitimately reach accurate and valid conclusions. However, the utility is also the main party that determines the interconnection costs the interconnection customer must pay to interconnect. Thus, because a utility contracts with an interconnection customer, the utility has a duty to facilitate an iSIS if the interconnection customer desires because otherwise that would "have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."[100] Therefore, the utility must evaluate the iSIS under a contractual duty of good faith and fair dealing.

B. The Commission Has Authority to Modify a PPA if Modification Rectifies Harm Caused by a Utility

The Commission should rule it has the authority to modify an executed PPA between a utility and a QF when the modification will rectify harms caused by the utility the Commission is charged with overseeing. Waconda Solar is seeking the Commission

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[100] *Klamath Off-Project Water Users, Inc.*, 237 Or App at 445 (internal citations omitted).

grant summary judgment on whether the Commission has the legal authority to grant Waconda Solar's Second Claim for Relief and Prayers for Relief 12 and 13.[101] Waconda Solar is not seeking summary judgment on the factual question of whether the Commission should grant this relief at this time.

PGE asserts the Commission lacks the authority to order a change in the terms of an executed PPA between a utility and a QF.[102] PGE explains that the Commission has "the authority to interpret the terms of a QF PPA," but the Commission does not have the authority to alter the terms of the PPA once it is executed because it would result in "utility-type regulation" prohibited by Section 210(e) of PURPA.[103] Essentially, PGE is asserting the Commission is powerless to remedy a situation where a utility causes harm to a QF.

Waconda Solar agrees that the Commission does not have the power to modify the terms of an executed PPA without the consent of the QF. However, this does not mean that the Commission lacks the authority to order the utility take any specific action, such as ordering the utility to offer the QF a specific contractual amendment or ordering

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101 Third Claim for Relief: "Waconda Solar is entitled to relief because PGE failed to meet interconnection application deadlines required under the Commission's rules and because PGE's interconnection processing has slowed." Prayer 12: "Requiring that PGE grant an extension of Waconda Solar's power purchase agreement commercial operation date and termination date to account for the delayed in-service date PGE caused." Prayer 13: "Granting Waconda Solar an extension of its power purchase agreement commercial operation date to coincide with its actual interconnection in-service date.

102 PGE's Modified Second Motion for Summary Judgment at 53.

103 PGE's Modified Second Motion for Summary Judgment at 53.

the utility to offer to terminate the current PPA and execute a new one with specified revisions. Either approach is well within the Commission's authority.

The Commission has broad authority to implement PURPA.[104] 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.[105] 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 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 PPA.[106] 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.[107] Further in Phase II of *Blue Marmot*, the Commission was going to consider revising the Scheduled CODs in PPAs the QFs had executed if the Blue Marmot projects could demonstrate the Scheduled CODs were not possible due to litigation.[108] The Commission also has approved standard contracts that utilities must enter into if a QF wishes to sell power to the utility under the standard contract. The utilities have no

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104 *FERC v. Miss.*, 456 U.S. 742, 751 (1982); *North Am. Natural Resources v. Michigan PSC*, 73 F Supp 2d 804, 807 (1999).

105 ORS 756.040(1).

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

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

108 Docket No. UM 1829, Order No. 19-322 at 20. Note the case was settled before the Commission was able to issue an order on this issue.

discretion to disagree or disobey a Commission order directing the utility to enter into specific contract terms with a QF 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 QF 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.[109] Thus, the Commission could, by that same authority, find that a utility is not relieved of its obligation to purchase a QF's power solely by virtue of the fact that the current PPA contains a missed deadline because of the utility's actions or delays caused by litigation. In other words, the Commission has the authority to separately order that a utility purchase power from the QF under terms that the Commission believes are necessary and appropriate under PUPRA and its own enabling statutes to protect QFs' rights.

FERC has recognized a state commission's ability to modify an executed PPA under similar circumstances where delay from litigation makes specific milestones in a PPA impractical.[110] In *West Penn Power Co.*, West Penn Power Co. ("West Penn") filed a Petition for Issuance of a Declaratory Order at FERC asking FERC to hold "a State

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

110 *See, e.g.*, *West Penn Power Co.*, 71 FERC ¶ 61,153 at 61494 (1995) (declining to disturb state Commission findings that certain milestones of a QF's contract could be modified for litigation delay).

regulatory authority may not modify a power purchase agreement privately negotiated between an electric utility and a QF[.]"[111] West Penn and Washington Power had entered into a purchase agreement, the Pennsylvania Commission approved the purchase agreement, but then modified milestones in the purchase agreement and the avoided cost rates.[112] FERC denied the Petition stating the issue had already "been fully litigated in another forum" and "[t]he Pennsylvania Commission's modifications to the Purchase Agreement involve fact-based determinations and PURPA enforcement issues that we consistently have regarded as the province of the States."[113] FERC stated "whether the particular facts applicable to an individual QF necessitate modifications of other terms and conditions of the QF's contract with the purchasing utility is a matter for the States to determine."[114] Thus, FERC has recognized and not overruled a state commission's decision and authority to modify an executed PPA.

In addition, there is no question that the Commission could direct a utility to enter into a contract to purchase a QF's net output based on a specific date. The Commission could simply order a utility to enter into a subsequent PPA 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 …."[115] It would put form over substance for the Commission to conclude that it cannot order a utility to agree to modify a current PPA,

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111 71 FERC ¶ 61,153 at 61485.
112 71 FERC ¶ 61,153 at 61486, 61487, 61494.
113 71 FERC ¶ 61,153 at 61494.
114 71 FERC ¶ 61,153 at 61495.
115 First Amended Complaint at 30.

when it can order a utility to enter into a subsequent PPA 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 example, in *Kootenai Electric Cooperative v. Idaho Power Company*, after the Commission found that Kootenai had established a LEO, the parties executed a PPA with an updated COD.[116] 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 Scheduled COD in the contract. Thus, the Commission would have authority to order a utility to modify terms of a PPA.

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.[117] However, the Commission found that Blue Marmot had established a LEO with PGE and ordered PGE to sign standard

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116 *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).

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

contracts with the Blue Marmot projects that included different provisions than the contracts the Blue Marmot projects had executed and obligated themselves to.[118] In other words, the QFs committed themselves under their LEO to deliver at specific Scheduled Commercial Operation Dates.

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, the Commission effectively concluded that it could extend the COD, but in 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 Blue Marmot dealt with LEOs, an executed PPA with a utility is still a commitment from the QF to sell its power to the utility just like it would in a LEO. Further, if there is ample evidence litigation has caused delays and caused a QF to miss its Scheduled COD, then the Commission would be able to take that into consideration when determining whether to order the utility to modify the PPA. Thus, the Commission has the legal authority to modify an executed PPA between a utility and QF and consider an extension of the COD if the utility has caused harm to the QF.

The Commission would also have jurisdiction to modify an executed PPA and extend the COD because this is a regular contract dispute where the Commission can offer a remedy. A PPA is a contract between the QF and the utility. Oregon law allows

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[118] Docket No. UM 1829, Order No. 19-322 at 20.

modifications of unconscionable or impractical contract provisions.[119] 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 proceedings."[120] Thus, the Commission has authority to modify an executed PPA if a QF was harmed by the utility, and 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.

V. CONCLUSION

For the foregoing reasons, the Commission should grant Waconda Solar's motion for partial summary judgment and issue an order ruling that: 1) a utility must evaluate and an address an iSIS in a reasonable, non-discriminatory manner consistent with Good Utility Practice, a contractual duty of good faith and fair dealing, and an identification of system upgrades necessary to mitigate adverse system impacts cause by the interconnection of the generating facility; and 2) the Commission has authority to modify a PPA if the modification rectifies harm caused by the utility.

Dated this 4th day of February 2022.

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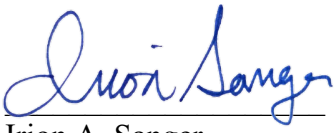
119 *See Livingston v. Metropolitan Pediatrics, LLC*, 234 Or App 137, 151-55, 227 P3d 796, 806-08 (2010); *Carey v. Lincoln Loan Co.*, 203 Or App 399, 420-25, 125 P3d 814, 826-30 (2005).

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

Respectfully submitted,

Sanger Law, PC



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Of Attorneys for Waconda Solar, LLC

Attachment A

Summary of Qualifying Facility Complaints Brought Against PGE Before the Oregon Public Utility Commission and Examples of PGE Interconnection Issues from Waconda Solar's First Amended Complaint

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 a 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. The Commission granted the waiver to enable the QF to reduce its capacity in the IA for its proposed community solar facility without loss of its interconnection queue position after determining that the small reduction in capacity would likely result in substantial cost reduction for the interconnection. However, during the ensuing re-study process, PGE and

the QF have been unable to reach an agreement on the reasonable upgrades and costs to include in the amendment to the IA.

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 and 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 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 estimated 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 third-party contractors themselves in the past.

Earlier in the docket, 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. The time 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 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
Closed: 1/12/2022, Order No. 22-009
Case Status: Settled
Description:
The sole disputed PPA provision was 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.

Examples of PGE Interconnection Issues from Waconda Solar's First Amended Complaint

[…]

67. PGE has a history of making errors in its interconnection studies.

68. TLS Capital experienced PGE's errors and inconsistencies in a number of other studies for other projects.

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

70. 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.

71. 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.

72. 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.

73. 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.

74. 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.

75. In short, TLS Capital, who is the developer working on the Waconda Solar project, has experienced a number of errors and inconsistencies in PGE's interconnection studies.

76. PGE has a history of making errors in its studies.

77. PGE has a history of missing interconnection application timelines and study timelines.

78. PGE has a history of providing inadequate studies that do not contain the information required by the Commission's rules.

79. PGE's errors result in dramatically different cost estimates.

80. PGE's delays in the interconnection process cause financial harm to QFs.

81. PGE's interconnection department is understaffed.

82. Waconda Solar needs to make informed business decisions about its project.

83. Waconda Solar believes that it will get more accurate and more detailed interconnection studies from a third-party consultant.

84. Waconda Solar believes that it will be better able to make informed business decisions with interconnection studies performed by a third-party consultant.

85. PGE itself hired third-party consultants.

86. PGE has hired third-party consultants to complete interconnection studies.

87. PGE's interconnection processing has slowed over time. On August 24, 2018, Waconda Solar again asked PGE to allow it to hire a third-party consultant to complete the remainder of the studies under OAR 860-082-0060(9).

[…]