BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1971

In the Matter of WACONDA SOLAR, LLC, Complainant, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	MOTION TO HOLD WACONDA SOLAR'S RESPONSE TO PORTLAND GENERAL ELECTRIC'S SECOND MOTION FOR SUMMARY JUDGMENT IN ABEYANCE AND MOTION TO SET SCHEDULE *Expedited Consideration Requested*

I. INTRODUCTION

Pursuant to OAR 860-001-0420, Waconda Solar, LLC ("Waconda Solar" or "Waconda") respectfully files this Motion to Hold Waconda Solar's Response to Portland General Electric's ("PGE") Second Motion for Summary Judgment in Abeyance until after Waconda Solar is given an opportunity to conduct reasonable discovery to enable it to respond. Waconda Solar also asks that the Administrative Law Judge ("ALJ") process PGE's motion for summary judgment along with any motion for partial summary judgment that Waconda may choose to file, after conducting discovery. Alternatively, Waconda Solar respectfully requests that the Administrative Law Judge ("ALJ") issue a ruling setting a reasonable schedule in this proceeding that allows Waconda Solar sufficient time to conduct appropriate discovery prior to being required to respond to PGE's motion.

If the ALJ is not inclined to grant any of the above requests, Waconda Solar requests that, at a minimum, Waconda Solar be granted a two-week extension for responding to PGE's motion (until at least September 18, 2019). Given that the date for Waconda Solar's response that otherwise applies (September 4, 2019) is nearing, Waconda Solar also offers that an appropriate way forward may be for the ALJ to set a pre-hearing conference to resolve this motion and any PGE proposal regarding the schedule, and that Waconda Solar's response not be required to be filed until such time as is determined through that pre-hearing conference.

Waconda Solar is entitled to conduct discovery, and should be allowed to do it prior to responding to PGE's Second Motion for Summary Judgment. PGE's motion sets forth PGE's version of the facts, and relies on those to argue that Waconda is not entitled to relief, but Waconda has not had an opportunity to investigate those facts or put forward the facts that would undermine PGE's claims. Additionally, as PGE has indicated, the parties engaged in settlement discussions between the filing of the case up until recently,[1] and engaged in informal discovery in that process. Waconda Solar should not be denied its right to now conduct formal discovery because doing so would discourage parties from engaging in settlement discussion at all.

Waconda Solar is also entitled to file its own motion for summary judgment, or for partial summary judgment, in this proceeding. Waconda Solar intends to do so, after conducting certain discovery in this case. In the interest of ensuring judicial/regulatory

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[1] *See* PGE's Motion for Summary Judgment (First) at 24 (July 23, 2019).

economy and efficiency, Waconda Solar requests that PGE's motion for summary judgment be considered at the same time as Waconda Solar's motion for summary judgment, or partial summary judgment. The schedule in this proceeding should, therefore, allow for a reasonable time for Waconda Solar to conduct discovery, and then file its motion, which could be processed at the same time as PGE's motion.

II. REQUEST FOR EXPEDITED CONSIDERATION

Waconda Solar requests expedited consideration of this Motion. Counsel for Waconda Solar corresponded on this motion with Counsel for PGE and Counsel for PGE indicated that PGE opposes the motion. Waconda Solar requests that the ALJ issue a ruling by Tuesday, September 3, 2019 because the response is due the following Thursday, September 4, 2019. As described above, an alternative approach could be to set a date for a pre-hearing conference, and hold the due date for a response in abeyance until such time as is determined through the pre-hearing conference.

Waconda notes that it and PGE have been working in good faith, over the last several days, to determine if they could agree on a process for this case. Those discussions turned out to not be fruitful, and thus Waconda is filing this motion as quickly as possible after that determination was made.

III. DISCUSSION

A. The Schedule in this Proceeding Should Be Modified In Light of the Legal Standard for Summary Judgment

Summary judgment may be granted where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a

matter of law.[2] No genuine issue as to a material fact exists if, based on the record and viewed in a manner most favorable to the non-moving party, no objectively reasonable person could return a verdict for the non-moving party on the matter that is the subject matter of the motion for summary judgment.[3]

In its motion for summary judgment, PGE has made numerous assertions of fact, including through the use of declarations, where PGE makes assertions about Waconda's actions and PGE's own actions. For example, PGE claims that:

- "Waconda has never requested from PGE any specific information or specific access for the identified purpose of conducting an independent system impact study,"[4]
- "[A]ny errors in the feasibility studies were immaterial and were corrected in subsequent studies,"[5]
- Waconda "select[ed] an overly aggressive COD,"[6] and
- "[I]t is unclear whether Waconda will miss its COD or suffer any harm if it does."[7]

Each of these claims relates to, and purportedly supports PGE's motion for summary judgment. In other words, PGE asks the Commission to rely on these facts when ascertaining whether Waconda could prevail in its case when the facts are

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2 ORCP 47C.
3 *Id.*
4 PGE's Motion at 3. *See also* Declaration of Jason Zappe in Support of PGE's Second Motion for Summary Judgment at ¶ 8.
5 PGE's Motion at 3.
6 *Id*.
7 *Id*.

construed most favorably toward Waconda.[8] To the extent PGE's statements are in error, then, this bears directly on whether the motion for summary judgment should be granted, or if PGE should be required to sponsor these facts through written testimony under oath that is subject to cross examination.

Yet Waconda has not had an opportunity to investigate PGE's statements through discovery—to find out what documentation or knowledge PGE has on these topics—and has not had an opportunity to develop its own case to rebut these points, although it intends to do so. Waconda should not be required to develop these facts only in the course of responding to PGE's motion for summary judgment. And, even if it were to be so required, it should be allowed more time than 15 days from the time PGE filed its version of the facts, since Waconda will presumably be required to address these facts through filing declarations to respond to PGE's factual assertions, and it should be afforded an opportunity to conduct discovery on PGE's statements.

In light of PGE's factual allegations, and the legal standard for motions for summary judgment, the ALJ should hold Waconda's requirement to respond to PGE's motion in abeyance until discovery can be conducted by Waconda on PGE's assertions.

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8 *See, e.g.* PGE's Motion at 20 (arguing that Waconda's claims regarding an independent System Impact Study have no merit because Waconda never requested information from PGE to allow it do conduct an independent study).

B. The Commission has Previously Held that Discovery Should Proceed a Motion for Summary Judgment Where Factual Issues are in Play

The Commission has made clear that in its proceedings, discovery is a matter of right.[9] Pursuant to OAR 860-001-0540, data requests are permitted subject to the Oregon Rules of Civil Procedure ("ORCP"). Under ORCP 36B, a party "may inquire regarding any matter, not privileged, that is relevant to the claim or defense."

Further, the Commission may direct the parties not to engage in briefing on a motion for summary judgment, but to engage in discovery first.[10] In *PGE v. Alfalfa Solar LLC*, the qualifying facility ("QF") parties filed a motion for summary disposition, but PGE stated that it would subsequently respond to the motion for summary disposition by arguing that there were a number of disputed issues of material fact.[11] In that case, the QF's dispositive motion was denied without detailed explanation, and PGE was permitted to conduct limited discovery. The situation in this case is the same--the only difference being that it is the QF, rather than the utility, that is seeking to conduct limited discovery prior to dispositive motions practice. But, the same logic should apply that presumably supported the decision in that case.

Here, Waconda Solar is entitled to discovery and it will respond to PGE's Second Motion for Summary Judgment by asserting that there are a number of issues of material

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9 *In Re Portland General Elec. Co. for Approval of the Customer Choice Plan*, Docket No. UE 102, Order No. 98-294 at 3 (1998) ("Discovery is a right afforded to parties in a legal proceeding by our rules and by the Oregon Rules of Civil Procedure, which we follow except where our rules differ.").

10 *See PGE v. Alfalfa Solar, LLC et. al.*, Docket No. UM 1931, ALJ Ruling at 1 (Aug. 23, 2018).

11 *Id*. at 2-3.

fact (and potentially filing its own partial motion for summary judgment). Even though formal discovery has not yet occurred because the parties engaged in settlement discussion or attempted and failed to agree on a limited scope for discovery,[12] the Commission should not restrict Waconda Solar's right to now engage in such formal discovery.

C. PGE's Assertions About Settlement Efforts Require Further Consideration, and Waconda Solar Should Be Allowed Additional Time to Respond

Waconda Solar should be allowed to conduct discovery at this point in the case not only to protect its rights under the Commission's processes, but also so that parties are not discouraged from engaging in settlement discussions, and in order to consider how to respond to certain statements by PGE. PGE makes assertions about what statements Waconda Solar made, or rather, statements PGE claims Waconda has not made in this case while the parties were engaged in settlement negotiations. Waconda intends to explore these statements further, and may respond to aspects that Waconda believes may be inaccurate in later pleadings.

Generally, evidence of offers to compromise are not admissible under the Oregon Evidence Code in order to prove liability or invalidity of a claim or its amount and any evidence of conduct, and statements made in compromise negotiations are also not admissible.[13] This rule is intended to "encourage non-litigious resolution of disputes."[14]

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12 Declaration of Jeff Lovinger in Support of PGE's Response Opposing Waconda Solar LLC's Motion for Leave to File First Amended Complaint, at ¶ 10 (July 23, 2019).

13 ORS 40.190.

14 *Holder v. Irish*, 316 Or 402, 418 (1993).

In light of that purpose, assertions about what was "not said" in settlement negotiations should be carefully considered by the ALJ and Commission.[15]

Here, PGE seems to seek to absolve itself of liability based on its assertion that Waconda Solar has not asked for specific information in settlement discussions. Mr. Lovinger notes that, "[i]n late 2018 and early 2019, Waconda and PGE engaged in settlement discussions," and "engaged in a substantial effort to settle."[16] And PGE notes that during that same time period, "in the 12 months since the August 2018 letter, Waconda has not requested any specific information for the identified purpose of conducting an independent system impact study."[17] PGE goes on to say that Waconda "has ***never*** identified any specific information or access that it seeks from PGE for the identified purpose of performing an independent system impact study."[18] Therefore, PGE specifically requests to be absolved of liability based on these assertions.[19]

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15 Waconda is aware that courts have struggled with this topic. *See, e.g., Atronic Int'l GmbH, v. SAI Semispecialists of Amer., Inc.*, 2006 U.S.Dist. LEXIS 66078, 2:03-cv-04892-RRM at 10 (E.D.N.Y. Sep. 15, 2006) ("[T]he blind application of the bright-line rule . . . that the text of Rule 408 should compel a finding that it never bars the admission of settlement statements to show that certain things were *not said*-would plainly contravene the Second Circuit's admonition that the 'another purpose' exception not be mechanically applied to the extent, such that is undermines Rule 408's purpose of promoting the settlement of disputes.") (emphasis added).

16 Declaration of Jeff Lovinger in Support of PGE's Response Opposing Waconda Solar LLC's Motion for Leave to File First Amended Complaint, at ¶¶ 6-7 (July 23, 2019).

17 PGE's Second Motion for Summary Judgment at 29-30 (citing Declaration of Jason Zappe in Support of PGE's Second Motion for Summary Judgment at ¶ 8).

18 *Id.* (emphasis added).

19 PGE's Second Motion for Summary Judgment at 30 ("The Commission should not find PGE in violation of an implied duty to provide information when the interconnection applicant made one unspecific request for PGE's 'system

Waconda will not fully respond to PGE's statements here. However, Waconda Solar should be allowed to respond to PGE's assertions through providing its own evidence on whether it requested certain information from PGE. This may necessitate the filing of declarations or depositions of PGE personnel. Either of these required methods of responding to PGE's assertions warrants additional time for responding to PGE's assertions, and additional time will also allow Waconda Solar to determine what is appropriate to offer with respect to this topic.

D. Waconda Solar has Begun to Engage In Discovery Already, and Needs Continued Discovery to Explore the Factual Assertions PGE Has Made in its Motion

Waconda Solar went ahead with serving its first set of discovery requests. After serving that first set of formal discovery requests, however, Waconda Solar agreed with PGE to hold open the response date to enable PGE to file its Amended Answer. PGE filed its Amended Answer and Second Motion for Summary Judgment on the same day. As the parties have not reached an agreement as to how this case should proceed, PGE's discovery responses will be due 15 days after its filed its Answer, September 4, 2019. This means that absent some modification to the schedule, Waconda Solar would need to file its Response to PGE's motion before having a chance to review and incorporate any discovery it obtains. Additionally, Waconda would not have any chance to test PGE's factual assertions in its motion through discovery.

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configuration' and has not requested any specific information for the identified purpose of conducting an independent system impact study.").

This case requires that the parties engage in discovery and develop a factual record so that Waconda Solar can appropriately respond to PGE's Second Motion for Summary Judgment. Waconda Solar has identified certain of PGE's factual statements, which are in dispute, above. Additionally, there are other instances where discovery is needed in order to respond adequately to PGE's motion. For example: 1) PGE's internal interconnection studies for the Waconda project could indicate whether PGE provided Waconda with the information required to be produced under the Oregon Administrative Rules ("OARs"); 2) PGE's internal processes and procedures for conducting a system impact study can shed light on whether PGE has met its obligation under the OARs with regard to Waconda's request to hire a third party consultant; and 3) PGE's internal communications could be probative of whether or not PGE acted with discriminatory intent towards Waconda, or whether PGE acted in bad faith or unreasonably with respect to Waconda Solar's requests.

PGE's internal interconnection studies for Waconda Solar could be used in response to PGE's claim that it has provided sufficient information in its Feasibility Study. PGE notes that it "identified" possible system impacts as required under the rules and therefore met its obligation.[20] What PGE fails to acknowledge is that it is also obligated to provide a copy of the Feasibility *Study* not simply the *results* of its Feasibility Study.[21] Should PGE's internal studies show something different than what PGE provided to Waconda, then it becomes more probable that PGE did not actually

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[20] PGE's Motion at 12.

[21] OAR 860-082-0060(6)(g).

provide the study, as required by the rules. It seems very possible that PGE performed studies not reflected in the Feasibility Study because the study itself says that it only "provides the study results."[22]

PGE's internal processes and procedures for conducting a system impact study can make it more or less probable that PGE is required to provide some information and access to Waconda Solar in order to obtain an independent system impact study. For example, if PGE utilizes certain system information that is only accessible to PGE and not available to the general public, then it becomes more probable that PGE is required to provide that information to a developer seeking to have an independent system impact study performed, which is expressly contemplated by the Commission's rules.[23]

In fact, in its Answer to Waconda Solar's amended complaint, PGE admits that some of the information required to conduct an independent System Impact Study is not available publicly, and that some of it is required to be received from PGE.[24] Waconda Solar should be allowed to explore PGE's actions on this topic more fully. This is especially true before the Commission decides that the facts (even when construed most favorably to Waconda Solar) do not support a claim that PGE has undermined the Commission's rules by preventing Waconda from being able to conduct an independent system impact study.

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22 First Amended Complaint at Attachment B at 3.
23 OAR 860-082-0060(7)(h).
24 *See* PGE's Answer to First Amended Complaint at ¶¶ 102, 103.

In sum, Waconda Solar does not have enough information in order to fully and appropriately respond to PGE's Second Motion for Summary Judgment because that information is within PGE's control. As such, it would be appropriate to hold Waconda Solar's response time in abeyance until such discovery can be conducted.

E. The Schedule for This Proceeding Should Allow for Appropriate Discovery and Should Provide for Economical and Efficient Use of Commission and Party Resources

As described above, Waconda Solar should be allowed additional time for discovery prior to being required to respond to PGE's motion for summary judgment. Additionally, Waconda Solar intends to file its own motion for summary judgment, or motion for partial summary judgment, on certain questions in this case, after conducting discovery on those points. The efficient use of the Commission's, ALJ's, and parties' time would dictate that the motions for summary judgment be considered at the same time. Additionally, this would ensure that the Commission understand both parties' disparate positions on a topic before making an informed decision on determining that something is clear as a factual or legal matter. In light of this, Waconda Solar requests that the following schedule be set in this case.

Action	**Deadline**
Discovery allowed, sufficient to allow two more rounds	October 9, 2019
Waconda Solar files any motion for summary judgment (or partial summary judgment)	October 23, 2019
Responses to cross-motions for summary judgment (both PGE's and Waconda's) and Replies	Under normal Commission procedural timelines, or as determined by the Administrative Law Judge

If the ALJ elects not to hold in abeyance Waconda's Response to PGE's Second Motion for Summary Judgment pending discovery, and to synchronize cross-motions for summary judgment, then Waconda Solar alternatively requests an extension of time to file its response such that the due date be no earlier than October 10, 2019. This deadline would at least enable Waconda Solar to engage in two additional rounds of discovery with PGE, in the event follow-up questions are required for the first round, and make reference to those facts in its response to PGE's motion.

Finally, if the Administrative Law Judge determines to deny all of the above requests, and to require Waconda Solar to respond to PGE's motion without specifically accommodating additional discovery (other than PGE's required response to the outstanding data requests), Waconda Solar requests a two-week extension due to lead counsel being out of the office since the time PGE filed its motion, and the press of business, such that Waconda's Response would be due on September 18, 2019. Waconda Solar has been working on its response to the motion for summary judgment, but for all of the reasons above (regarding the need for additional discovery and the development of factual responses to PGE's assertions) and because of the press of other business, Waconda respectfully requests additional time under any circumstance.

Waconda notes that PGE and Waconda have been in continued discussions regarding the schedule for this case, which have not been able to result in an agreement. Waconda recognizes that this motion is being filed fairly close in time to the due date that otherwise applies to its Response (September 4, 2019), and recognizes that a holiday exists in that timeframe, and respectfully suggests that if the Administrative Law Judge

determines that additional time should be taken to consider this motion, then Waconda would support the Administrative Law Judge scheduling a pre-hearing conference with the parties to resolve Waconda's proposal and any PGE proposal. Waconda would request that Waconda's Response be held in abeyance until that pre-hearing conference, through which a schedule could be set.

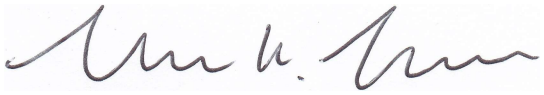
IV. CONCLUSION

For all of the reasons described above, Waconda Solar's response to PGE's Second Motion for Summary Judgment should be held in abeyance until after Waconda Solar is permitted to conduct discovery, and the schedule in this case should be set to accommodate cross-motions for summary judgment.

Dated this 29th day of August 2019.

Respectfully submitted,

Sanger Thompson, PC



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