

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 MOTION FOR
SUMMARY JUDGMENT IN
ABEYANCE

I. INTRODUCTION

Pursuant to OAR 860-001-0420, Waconda Solar, LLC ("Waconda Solar") respectfully files this Motion to Hold Waconda Solar's Response to Portland General Electric's ("PGE") Motion for Summary Judgment in Abeyance until after PGE files an amended Answer and/or amended Motion for Summary Judgment. PGE's Motion for Summary Judgment is premature. Waconda Solar and the Oregon Public Utility Commission ("Commission") should not be required to expend additional resources briefing PGE's motion for summary judgment until after PGE has filed an Answer to the Amended Complaint and there is clarity regarding whether PGE's motion has been mooted and to which claims it still applies, and whether Waconda will be permitted to conduct discovery prior to motions practice.

Since Waconda Solar's Motion for Leave to Amend has been granted, the next step should be for PGE to first file an Answer, after which discovery should be conducted

and either motions practice and/or a full contested case proceeding. Waconda Solar is entitled to and should be allowed to conduct discovery prior to responding to PGE's Motion for Summary Judgment. If motions for summary judgments or other dispositive motions are addressed prior to even knowing the impact of the Amended Complaint, then the parties and the Commission may waste significant amounts of time unnecessarily addressing motions that may be mooted, or need to be revised to account for the changes in the Amended Complaint. At a minimum, PGE will need to clarify whether its motion should be considered only a partial motion for summary judgment.

Waconda specifically requests that the Administrative Law Judge ("ALJ") issue an order that Waconda should not be required to respond to the Motion for Summary Judgment until PGE files an Answer and there is clarity on whether PGE will file a new Motion for Summary Judgment, and whether Waconda will be permitted to conduct discovery prior to motions practice.

If the ALJ elects not to hold in abeyance Waconda's Response to PGE's Motion for Summary Judgment pending the filing of PGE's amended Answer and discovery, then Waconda Solar alternatively requests an extension of time to file its response such that the due date be no earlier than two weeks after the ALJ's decision requiring such a filing.

II. REQUEST FOR EXPEDITED CONSIDERATION

Waconda Solar requests expedited consideration of this motion for abeyance. Counsel for Waconda Solar corresponded on this motion with Counsel for PGE on July 30, 2019 and Counsel for PGE indicated that PGE opposed the motion. Counsel for Waconda reached out to Counsel for PGE again on July 31, 2019 following the ALJ's

ruling on the Motion for Leave to File First Amended Complaint to see if PGE's position has changed but has not heard back. Waconda Solar requests that the Administrative Law Judge ("ALJ") issue a ruling before Friday, August 2, 2019 because the response is due the following Wednesday, August 7, 2019.

III. DISCUSSION

A. 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.¹ 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.² In response to a motion for summary judgment, a non-moving party can raise issues that go beyond the pleadings and may seek to amend the pleadings.³

B. The Commission Should First Require PGE to Answer the Amended Complaint, then Proceed with any Motions for Summary Judgment

Waconda Solar's Motion for Leave to File First Amended Complaint was filed shortly after this Commission issued its order on PGE's motion for partial summary judgment in the similar case of Sandy River Solar, LLC v. PGE (UM 1967) and the changes to the Amended Complaint are narrowly tailored to address the potential

¹ ORCP 47C.

² *Id.*

³ *U.S. Nat'l Bank v. Miller*, 74 Or App 405, 409 (1985).

deficiencies the Commission identified in the Sandy River complaint. PGE's Motion for Summary Judgment only addresses the facts and claims in Waconda Solar's original complaint. PGE does not address any of the new issues raised in the Amended Complaint. Therefore, because Waconda Solar's Motion for Leave to Amend was granted, PGE's Motion for Summary Judgment may be mooted in whole or in part, PGE may decide that it needs to change its motion to account for the additional issues in the Amended Complaint, or at the very least, if PGE makes no changes to its motion, then it will need to clarify that PGE is only filing a Partial Motion for Summary Judgment.

In light of the above uncertainty regarding how the Amended Complaint affects PGE's Motion for Summary Judgment, it is appropriate to hold Waconda Solar's response to the Motion for Summary Judgment in abeyance until there is certainty regarding which claims PGE's motion should be evaluated against.

C. Briefing PGE's Motion for Summary Judgment at this Time is a Waste of Resources

Resolving how the Amended Complaint affects this case before continuing briefing on PGE's Motion for Summary Judgment serves the interests of judicial economy and administrative efficiency. It would be a waste of resources for the parties to continue briefing on a motion for summary judgement that could be mooted by additional issues pled in the Amended Complaint.

While there are new legal citations and support, the additional issues in the Amended Complaint are so intertwined with the claims in the original complaint that they should all be addressed together. The briefing on PGE's Motion for Summary Judgment

should not be permitted to proceed effectively severing the claims from the first complaint from the claims in the Amended Complaint.

For example, on Waconda's first claim for relief PGE asks for summary judgment on the ground that it has met its obligation under the Feasibility Study Agreement,⁴ but the Amended Complaint asserts that PGE violated its duty of good faith and fair dealing in the performance of that same agreement.⁵ Further, PGE defends its lack of detail in the Feasibility Study by asserting that such a level of detail is required only in the System Impact Study,⁶ yet when the Amended Complaint asserts that PGE also has not met its obligations with respect to the System Impact Study,⁷ PGE argues that it would "substantially change the nature of the pleadings."⁸ PGE discussed extensively the requirements under the System Impact Study in its Answer filed months ago, attached the study to its Answer, and noted that the System Impact Study corrected errors.⁹

PGE cannot have it both ways. PGE should not be permitted to have its Motion for Summary Judgment heard on its defense, while at the same time preventing any contrary evidence or claims on that same topic. Therefore, the issues raised in the Amended Complaint related to first claim for relief are so interrelated to PGE's arguments in its Motion for Summary Judgment, that the Commission should not allow

⁴ PGE's Motion for Summary Judgment at 10.

⁵ First Amended Complaint at ¶ 125.

⁶ PGE's Motion for Summary Judgment at 11.

⁷ First Amended Complaint at ¶¶ 127-130.

⁸ PGE's Response to Waconda Solar's Motion for Leave to File First Amended Complaint at 9.

⁹ PGE's Answer at 1-7, ¶¶ 21, 22, 25, 30, 50, 54.

PGE's motion to move forward until after there is certainty on how the Amended Complaint changes PGE's Answer.

On Waconda's second claim for relief, PGE asserts that it cannot be required to consent to the use of a third-party consultant and that it has not failed in any obligation with respect to Waconda Solar's unconditional right to an independent system impact study.¹⁰ However, the Commission expressly recognized that it has the authority to require the utility to correct its unreasonable actions,¹¹ and the Amended Complaint specifically pleads the Commission's statutory authority to protect utility customers from unreasonable utility actions.¹² Additionally, the Amended Complaint pleads additional specificity regarding PGE's duty to facilitate an independent system impact study.¹³ Therefore, the changes to the second claim for relief are counter-arguments and additional factual evidence in response to PGE's Motion for Summary Judgement, and therefore should be considered at the same time as PGE's motion.

PGE next argues that the third claim for relief cannot stand because PGE has not missed any deadlines,¹⁴ yet the Amended Complaint clarifies that not only has PGE missed deadlines, but the interconnection process as a whole has slowed down.¹⁵ PGE further asserts that Waconda Solar created its own timing dilemma by selecting an overly

¹⁰ PGE's Motion for Summary Judgment at 15.

¹¹ *Re Sandy River Solar, LLC vs. Portland General Electric Company*, Docket No. UM 1967, Order No. 19-218 at 25 (June 24, 2019).

¹² First Amended Complaint at ¶ 136-138.

¹³ *Id.* at ¶ 145.

¹⁴ PGE's Motion for Summary Judgment at 26.

¹⁵ First Amended Complaint at ¶¶ 180-181.

aggressive commercial operation date,¹⁶ yet the Amended Complaint asserts a contrary fact that “[a]t the time the commercial operation date was selected, it allowed for a reasonable amount of time to complete the interconnection.”¹⁷ Therefore, in order for the Commission to fully evaluate whether PGE is entitled to summary judgement on the issue of delay, it will also need to consider the competing facts pled in the Amended Complaint. These issues simply cannot be considered sequentially and so briefing on the Motion for Summary Judgment should occur after PGE responds to the Amended Complaint.

Finally, on the fourth claim for relief, PGE asserts that it has not discriminated against Waconda Solar.¹⁸ While PGE’s obligation to not act with discrimination is imposed by statute, it is also imbedded in PGE’s obligation to furnish adequate interconnection service at a reasonable charge, and its general obligations to refrain from engaging in unjust and unreasonable practices; the Amended Complaint adds those additional statutory references.¹⁹ As such, in the interests of judicial and administrative efficiency, PGE’s Motion for Summary Judgment should not be briefed and considered until PGE Answers the Amended Complaint.

¹⁶ PGE’s Motion for Summary Judgment at 36.

¹⁷ First Amended Complaint at ¶ 21.

¹⁸ PGE’s Motion for Summary Judgment at 38.

¹⁹ First Amended Complaint at ¶¶ 184-186.

D. Waconda Solar is Entitled to Conduct Discovery and Should be Allowed to Conduct Discovery Now So That it can Respond to the Motion for Summary Judgment

In a proceeding before the Commission, discovery is a matter of right.²⁰ 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.²¹ In *Alfalfa*, the 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.²² Under very similar circumstances, the QFs dispositive motion was denied without detailed explanation, and PGE was permitted to conduct limited discovery. The main difference here is that it is the QF and not the utility that is seeking to conduct limited discovery prior to dispositive motions practice.

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

²⁰ *In Re Portland General Elec. Co.*, Docket No. UE 102, Order No. 98-294 at 3 (1998) (“[d]iscovery 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”).

²¹ *See PGE v. Alfalfa Solar, LLC et. al.*, Docket No. UM 1931, ALJ Ruling at 1 (Aug. 23, 2018).

²² *Id.* at 2-3.

discussion or attempted and failed to agree on a limited scope for discovery,²³ the Commission should not now restrict Waconda Solar's right to now engage in such formal discovery. Waconda Solar went ahead with serving its first set of discovery requests.

This case requires that the parties engage in discovery and develop a factual record so that Waconda Solar can appropriately respond to PGE's Motion for Summary Judgment. 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.

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. 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.²⁴ Should PGE's internal studies show something different than what PGE provided to Waconda, then it becomes more probable that PGE did not actually

²³ 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).

²⁴ OAR 860-082-0060(6)(g).

provide “the Study.” It is likely that PGE performed studies not reflected in the Feasibility Study because the study itself says that it only “provides the study results”²⁵

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. PGE claims that it is not required by any rule to provide Waconda Solar with access to or information regarding its system.²⁶ PGE fails to acknowledge that Waconda Solar has a right to have an independent system impact study performed and that if performed PGE is required to relate those results to its own study.²⁷ If Waconda Solar is unable to perform such a study without PGE’s cooperation, then PGE’s view of the law would render that rule a nullity. Therefore, Waconda should be permitted to discovery on what information and access PGE, itself, requires in order to perform its system impact studies.

Finally, PGE’s internal communications will help the Commission determine whether discrimination occurred. For example, if internal PGE staff made a statement that they want to prevent QFs or certain specific QFs owned by particular individuals from interconnecting to PGE’s system, that could make it more likely that PGE acted in a

²⁵ Complaint at Attachment A at 3.

²⁶ PGE’s Motion for Summary Judgment at 22.

²⁷ OAR 860-082-0060(7)(h).

discriminatory manner towards Waconda Solar. The discovery detailed herein is within the exclusive control of PGE and Waconda should be entitled to discovery before responding to PGE's Motion for Summary Judgment.

In sum, Waconda Solar does not have enough information in order to fully and appropriately respond to PGE's 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.

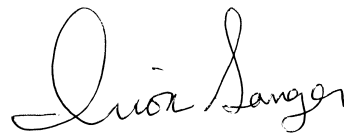
IV. CONCLUSION

Therefore, Waconda Solar's response to PGE's motion for summary judgment should be held in abeyance pending PGE's Answer to the Amended Complaint and after Waconda Solar is permitted to conduct discovery.

Dated this 31st day of July 2019.

Respectfully submitted,

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