MARKOWITZ HERBOLD PC

Jeffrey S. Lovinger | Lawyer
JeffreyLovinger@MarkowitzHerbold.com

July 23, 2019

Via Electronic Filing

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

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

Attention Filing Center:

Enclosed for filing today in the above-named docket is Portland General Electric Company's Motion for Summary Judgment.

Thank you for your assistance.

Very truly yours,

Jeffrey S. Lovinger

892119

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1971

WACONDA SOLAR, LLC, Complainant, vs. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	**PORTLAND GENERAL ELECTRIC COMPANY'S MOTION FOR SUMMARY JUDGMENT** ***Oral Argument Requested***

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

TABLE OF CONTENTS

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

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

Portland General Electric Company ("PGE") moves the Public Utility Commission of Oregon ("Commission") for an order granting summary judgment on all claims asserted in the complaint filed by Waconda Solar, LLC ("Waconda") on September 28, 2018. PGE requests oral argument on this motion.

I. INTRODUCTION

This case involves an interconnection dispute. Waconda has applied to interconnect a 2.25-megawatt qualifying facility ("QF") to PGE's distribution system. Waconda has alleged four claims for relief. Each claim, and the reason it fails as a matter of law, is summarized below:

1. **First Claim:** PGE's original and revised feasibility studies are incomplete and contain errors; PGE should be required to issue a complete and accurate feasibility study.

   PGE's Response: The Commission should deny the first claim because PGE's feasibility studies contain the information required by the rules, the errors identified by Waconda were immaterial, and PGE corrected the errors in subsequent studies.

2. **Second Claim:** PGE unreasonably refused to allow Waconda to hire a third-party to conduct the remaining interconnection studies. It was unreasonable for PGE to insist it would conduct the remaining studies when PGE has missed interconnection deadlines and issued incomplete and inaccurate feasibility studies. The Commission should order PGE to agree that Waconda can hire a third-party to complete the remaining studies. In addition, PGE should have provided Waconda with PGE's "system configuration" when Waconda requested it in August 2018 so that Waconda could perform an independent system impact study.

   PGE's Response: The Commission should deny the second claim because the rules do not require PGE to conduct a "reasonableness balancing test" when deciding whether to consent to the applicant hiring a third-party to conduct studies. In addition, even if the rules or some other source imposed a "reasonableness balancing test," it was reasonable for PGE to retain control over the studies because: (i) PGE has not missed any interconnection deadlines; (ii) PGE's feasibility studies provide the information required by the rules; and (iii) any errors in the feasibility studies were immaterial and were corrected in subsequent studies. Further, Waconda's claim that PGE has violated the rules regarding an independent system impact study should be denied because: (1) the complaint does not allege that PGE failed to satisfy any specific obligation under the Commission's rules or otherwise; (2) Waconda has never requested from PGE any specific information or access related to an independent system impact study; and (3) Waconda's generic request for PGE's "system configuration" was made too late in the interconnection process.

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

3. **Waconda's Third Claim:** PGE missed interconnection deadlines; the Commission should order PGE to extend Waconda's scheduled commercial operation date ("COD") and termination date under Waconda's power purchase agreement ("PPA") to account for the resulting delay.

   PGE's Response: The Commission should deny the third claim because: (i) PGE did not miss any interconnection deadlines; (ii) the alleged harm is purely speculative (it is unclear whether Waconda will miss its COD or suffer any harm if it does); (iii) Waconda created its own timing dilemma by selecting an overly aggressive COD; and (iv) the Commission lacks the authority to modify a fully-executed QF PPA.

4. **Waconda's Fourth Claim:** Waconda claims PGE discriminated against Waconda in violation of ORS 757.325 by: (i) missing interconnection deadlines; (ii) refusing to agree that Waconda can hire a third-party to conduct the remaining interconnection studies; and (iii) allowing third parties to conduct studies for other interconnection applications.

   PGE's Response: The Commission should deny the fourth claim because PGE has not missed any interconnection deadlines, the rules allow PGE to refuse to agree that Waconda will hire a third-party to conduct the interconnection studies, and the rules allow PGE to agree to a third-party conducting the studies in other interconnection processes.

II. FACTUAL BACKGROUND

Waconda applied to interconnect its proposed project to PGE's distribution system on March 20, 2018.[1] On March 27, 2018, PGE timely notified Waconda that its application appeared to be complete.[2] The parties held a scoping meeting on April 11, 2018.[3] Waconda executed a feasibility study agreement on April 17, 2018,[4] and PGE received the study deposit on April 19, 2018.[5] Based on those dates, PGE's feasibility study was due on July 16, 2018.[6]

[1] Complaint ¶ 9 (Sep. 28, 2018); Answer ¶ 9 (Nov. 1, 2018); Declaration of Jason Zappe in Support of PGE's Motion for Summary Judgment ("Zappe Decl.") ¶ 3.
[2] Answer ¶ 11; Zappe Decl. ¶ 3 and Ex. 1 at 1 (March 27, 2018 email from PGE to Waconda providing notice that PGE had received Waconda's interconnection application and that it appeared to be complete).
[3] Compl. ¶ 12; Answer ¶ 12; Zappe Decl. ¶ 4 and Ex. 2 (April 5, 2018 emails between PGE and Waconda).
[4] Compl. ¶ 15; Answer ¶ 15 and Ex. A (Feasibility Study Agreement); Zappe Decl. ¶ 5.
[5] *Id*.
[6] *See* Answer, Ex. A at 2 and 5 (Under Attachment B to the feasibility study agreement, the feasibility study was due 60 business days after Waconda signed the study agreement and PGE received the study deposit.) PGE received the signed study and the deposit on April 19, 2018; 60 business days later is July 16, 2018.

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

While PGE was working on the feasibility study, Waconda executed a standard renewable PPA for the project on May 21, 2018.[7] Waconda could have waited to execute a PPA until later in the interconnection process when Waconda's interconnection date could have been estimated with greater accuracy. Instead, Waconda executed the PPA *before* PGE provided the first interconnection study. By executing the PPA on May 21, 2018, Waconda was able to "lock in" PGE's standard avoided cost rates before those rates decreased on May 23, 2018.[8] PGE counter-signed the PPA and it became effective on June 4, 2018.[9] In the PPA, Waconda selected a COD of February 1, 2020, which is 20 months after the PPA effective date.[10] Waconda had the right to select a COD as much as 36 months after the PPA effective date (*i.e.*, as late as June 4, 2021).[11]

On July 10, 2018, PGE timely provided Waconda with a feasibility study.[12] The study identified three adverse impacts of the interconnection on PGE's system and no adverse impacts on any other affected systems.[13] Specifically, the study concluded the interconnection would cause: (1) thermal exceedance requiring the re-conductor of approximately 2.5 miles of overhead distribution line;[14] (2) overload of two protective devices requiring their replacement;[15] and (3) a potentially damaging backflow condition on the transmission system requiring installation of a

[7] Compl. ¶ 18; Answer ¶ 18; *PGE Informational Filing of QF Agreements*, Docket No. RE 143, Waconda PPA at 17 (July 2, 2018) (available at https://edocs.puc.state.or.us/efdocs/HAQ/re143haq164533.pdf).
[8] *See In the Matter of PGE's Annual Application to Update Schedule 201 Qualifying Facility Information*, Docket No. UM 1728, Order No. 18-189 at 1 (May 23, 2018) (Commission order approving new, higher standard avoided cost rates effective May 23, 2018) (available at https://apps.puc.state.or.us/orders/2018ords/18-189.pdf).
[9] Compl. ¶ 18; Answer ¶ 18; Docket No. RE 143, Waconda PPA at 17.
[10] Waconda PPA at 6 (Section 2.2.2 states, "By February 1, 2020 Seller … shall have established the Commercial Operation Date.").
[11] *See In the Matter of Commission Investigation into QF Contract and Pricing*, Docket No. UM 1610, Order No. 15-130 at 2 (Apr. 16, 2015) ("The stipulating parties agree that QFs can select a scheduled COD anytime within three years of contract execution and that a QF can elect a scheduled COD that is more than three years from contract execution if the QF can establish that a period in excess of three years is reasonable and necessary and the utility agrees to the scheduled COD.") (available at https://apps.puc.state.or.us/orders/2015ords/15-130.pdf).
[12] Compl. ¶ 19 and Attachment A (Feasibility Study); Answer ¶ 19.
[13] *See* Compl., Attachment A at 3-6 (Feasibility Study at 3-6).
[14] *Id.* at 5.
[15] *Id.*

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

transfer trip protective scheme and related equipment.[16] The feasibility study estimated this work would cost approximately $950,000 and would require approximately 18 months to complete after PGE and Waconda entered into an interconnection agreement.[17]

On July 12, 2018, two days after receiving PGE's feasibility study report, Waconda asked PGE to respond to eight questions about the study results and to provide additional information.[18] PGE was not subject to any deadline to respond to Waconda's questions and requests for additional information. Regardless, only fifteen business days later, on July 27, 2018, PGE provided a response.[19] That same day, July 27, 2018, Waconda: (1) sent PGE an executed system impact study agreement;[20] (2) asked PGE to issue a revised feasibility study agreement reflecting the clarifications and corrections PGE had communicated to Waconda earlier in the day;[21] and (3) requested that PGE agree to allow Waconda to hire a third-party consultant to conduct the remaining interconnection studies.[22]

PGE began working on Waconda's requests. On August 9, 2018, PGE informed Waconda that PGE did not agree to allow Waconda to hire a third party to conduct the remaining studies.[23] On August 16, 2018, PGE provided Waconda with a revised feasibility study.[24] This revised study identified the same three adverse system impacts that were identified in the original study and responded to Waconda's July 12, 2018 questions by correcting certain immaterial errors in the original study.[25]

---

[16] *Id* at 5-6.
[17] *Id.* at 6.
[18] Compl. ¶ 33; Answer ¶ 33 and Ex. D (July 12, 2018 email from Waconda to PGE) (containing list of eight numbered items with eight questions, items 1 and 4 each contain two questions, and two requests for additional information).
[19] Compl. ¶¶ 39 and 41; Answer ¶¶ 39, 41, and Ex. F (July 27, 2018 email from PGE to Waconda).
[20] Compl. ¶ 37; Answer ¶ 37 and Ex. E (July 27, 2018 email from Waconda to PGE).
[21] Compl. ¶ 45; Answer ¶ 45 and Ex. G (July 27, 2018 9:43 pm email from PGE to Waconda).
[22] Compl. ¶¶ 38 and 40; Answer ¶¶ 38, 40, and Ex. E (July 27, 2018 email from Waconda to PGE).
[23] Compl. ¶ 48; Answer ¶ 48.
[24] Compl. ¶ 49 and Attachment B (Revised Feasibility Study); Answer ¶ 49.
[25] Compl., Attachment B at 3-6 (Revised Feasibility Study at 3-6).

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

On August 24, 2018, Waconda sent a letter to PGE again demanding that PGE agree to allow Waconda to hire a third-party consultant to conduct the remaining interconnection studies.[26] The letter also stated that Waconda intended "to seek an independent System Impact Study under OAR 860-082-0060(7)(h)" and asked PGE to "please provide Waconda Solar with the system configuration so that [Waconda's] independent consultant can complete the study."[27]

On September 7, 2018, PGE sent Waconda a letter reiterating its refusal to consent to Waconda hiring a third party to conduct the remaining interconnection studies.[28] Waconda filed its complaint on September 28, 2018.[29] On October 25, 2018, PGE timely transmitted the system impact study report and an executable facilities study agreement to Waconda.[30] On November 1, 2018, PGE timely filed its answer.[31]

III. LEGAL STANDARD

A defendant may move for summary judgment in defendant's favor against all or any part of the claims asserted against it.[32] The Commission should grant the motion for summary judgment "if the pleadings, depositions, affidavits, declarations and admissions on file show 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."[33] The Commission should conclude that "[n]o genuine issue as to a material fact exists if, based upon the record before the court viewed in the manner most favorable to the adverse

[26] Compl. ¶ 83; Answer ¶ 83 and Ex. I (August 24, 2018 letter from Waconda to PGE).
[27] Compl. ¶ 84; Answer ¶ 84 and Ex. I (August 24, 2018 letter from Waconda to PGE).
[28] Compl. ¶ 85; Answer ¶ 85 and Ex. J (September 7, 2018 letter from PGE to Waconda).
[29] Compl. at 23.
[30] Answer at 2 n.1 and Ex. K (October 25, 2018 System Impact Study).
[31] Answer at 30.
[32] ORCP 47 B ("A party against whom any … claim is asserted . . . may, at any time move, with or without supporting affidavits or declarations, for summary judgment in that party's favor as to all or any part of any claim or defense.").
[33] ORCP 47 C.

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

party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment."[34]

For purposes of summary judgment, "[a] material fact is one that, under applicable law, might affect the outcome of a case."[35] The interpretation of a statute, rule, or Commission order is a question of law, and a dispute between the parties regarding the meaning of a rule or law does not prevent the Commission from deciding the proper interpretation in response to a motion for summary judgment.[36]

The party moving for summary judgment has the initial burden of showing that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law.[37] The nonmoving party has the burden of producing evidence on any issue raised in the motion as to which the nonmoving party would have the burden of persuasion at trial.[38]

IV. ARGUMENT

A. FIRST CLAIM: THE COMMISSION SHOULD DENY WACONDA'S FIRST CLAIM BECAUSE THE FEASIBILITY STUDIES CONTAIN THE INFORMATION REQUIRED BY THE RULES, THE ERRORS IDENTIFIED BY WACONDA WERE IMMATERIAL, AND PGE CORRECTED THE IDENTIFIED ERRORS IN SUBSEQUENT STUDY REPORTS.

Waconda's first claim for relief incorrectly asserts that PGE's feasibility study and revised feasibility study are incomplete and contain errors.[39] This claim fails for the reasons stated below.

---

[34] *Id*.
[35] *Zygar v. Johnson*, 169 Or App 638, 646 (2000) (internal citation omitted).
[36] *See, e.g., City of Portland v. PGE*, Docket No. UM 1262, Order No. 06-636 at 1-2 (Nov. 17, 2006) (Commission granted defendant PGE's motion for summary judgment and dismissed complaint after interpreting statute as a matter of law) (available at https://apps.puc.state.or.us/orders/2006ords/06-636.pdf).
[37] *Thompson v. Estate of Adrian L. Pannell*, 176 Or App 90, 100 (2001), *rev denied*, 333 Or 655 (2002) ("As the party moving for summary judgment … defendant had the initial burden to establish that there was no genuine issue as to … material fact.").
[38] ORCP 47 C.
[39] Compl. ¶¶ 94-96 ("PGE violated the Commission's rules by failing to provide a Feasibility Study with accurate information … by failing to identify articulate [*sic*.] the results of its studies in either the Feasibility Study or the Revised Feasibility Study … [and] by failing to identify the potential adverse system impacts in either the Feasibility Study or the revised Feasibility Study that are driving the interconnection requirements.").

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

1. PGE complied with its obligation to "identify" potentially adverse system impacts in the feasibility studies.

Waconda's first claim asserts that PGE's feasibility studies do not provide the information required by the Commission's rules.[40] Specifically, Waconda alleges: (1) that PGE's original and revised feasibility studies do not "identify the potential adverse system impacts … that are driving the interconnection requirements;"[41] and (2) that the original and revised feasibility studies "do[] not contain any of the information on any studies that were performed, the results of those studies, or the analysis of those studies."[42] As explained below, PGE's feasibility studies satisfied the requirements of the applicable rules.

(a) PGE identified potential adverse system impacts.

OAR 860-082-0060(6)(e) states: "The feasibility study must **identify** any potentially adverse system impacts on the public utility's transmission or distribution system or an affected system that may result from the interconnection of the small generator facility."[43] This is the only requirement in the rules regarding the content of the feasibility study. It is not surprising that the required content of the feasibility study report is so limited. The feasibility study is intended as a preliminary review to determine if there is enough potential impact to justify a comprehensive system impact study. The applicant and utility frequently skip this step, in favor of moving directly to the system impact study.

In order to determine what is required by this rule, the Commission should first examine the text and context of OAR 860-082-0060(6)(e).[44] "[T]here is no more persuasive evidence of

[40] Compl. ¶¶ 88-97.
[41] Compl. ¶ 96 ("PGE violated the Commission's rules by failing to identify the potential adverse system impacts in either its Feasibility Study or revised Feasibility Study that are driving the interconnection requirements.").
[42] *Id.* ¶¶ 27, 57 and 95.
[43] OAR 860-082-0060(6)(e) (emphasis added).
[44] *See State v. Gaines*, 346 Or 160, 171-172 (2009).

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

the intent" of the rulemaking authority than "the words by which [that authority] undertook to give expression to its wishes."[45] The text and context of this rule make it clear that the public utility is not required to provide a detailed analysis of potentially adverse system impacts but is required instead to simply "identify" such impacts.

The rules do not define the term "identify" or impose any specific requirements about what a utility must do to adequately identify an adverse system impact. When a term is not defined by the statute or regulation using the term, Oregon courts give words of common usage there plain, natural, and ordinary meaning.[46] The term "identify" means "to establish the identity of."[47] The term does not mean "to provide all analysis leading to a specific conclusion."

As used in OAR 860-082-0060(6)(e), the plain, natural, and ordinary meaning of PGE's obligation to "identify" potential adverse system impacts requires PGE to "establish the identity of" those impacts by stating what they are. The plain, natural, and ordinary meaning of the term "identify" does not mean that PGE must provide detailed analysis justifying its conclusions or indicating why it identified the adverse system impacts it identified.

In compliance with OAR 860-082-0060(6)(e), PGE's original feasibility study identifies three potential adverse impacts to PGE's system expected to result from the interconnection (and identifies no adverse impacts to any other affected systems):

(1) Overloaded Conductor: The study states the "proposed generation will exceed the thermal limits of the existing conductor" leading to the conclusion that approximately 2.5 miles of the overhead line will need to be reconductored.[48]

[45] *Id.* at 171 (internal quotation marks and citations omitted); *see also PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610 (1993) ("[T]he text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent.") (internal citation omitted).
[46] *Id.*
[47] *Webster's Third New Int'l Dictionary* 1955 (unabridged ed 2002).
[48] Compl., Attachment A at 5 (Feasibility Study at 5).

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

(2) Overloaded Protective Devices: The study states the installation of the Waconda project will cause "one capacitor bank and an existing recloser … to … become overloaded" and the study calls for those facilities to be replaced.[49]

(3) Potential to Backflow the Transmission System: Finally, the study notes that including the Waconda project on the feeder will make it possible for generation on the feeder and at the substation transformer to exceed daytime minimum load which could cause a "backflow into the transmission system" and cause "individual generators to feed one another and slows their response time for disconnection during a fault condition."[50] To address this impact and ensure generation is offline within 2 seconds, PGE indicated that a transfer trip protection scheme will be required and to accomplish transfer trip a Real-Time Automation Controller (RTAC) is also required.[51]

In the revised feasibility study, PGE provided some additional or clarifying information and corrected some immaterial errors in response to Waconda's feedback on the original study. The revised study noted the same three adverse impacts and provided the additional detail highlighted here in bold:

(1) Overloaded Conductor: The revised study states that the "proposed generation will exceed the thermal limits of the existing conductor" leading to the conclusion that **"two sections" of the overhead line** totaling approximately 2.5 miles need to be reconductored.[52]

(2) Overloaded Protective Devices: The revised study "identified two protective devices that become overloaded with the installation of Waconda Solar … **an existing hydraulic recloser located on Wapato St. NE [that is] … not capable of handling the two-way flow of power … [and] a 65T Fuse located on pole 1351 … [that will] become overloaded due to an increase in amps … [that will] exceed the fuse rating with the installation of the new generator"** and the study notes that both protective devices "will need to be replaced with electronic reclosers."[53]

(3) Potential to Backflow the Transmission System: Finally, the revised study notes the same risk of backflow and the same facilities needed to address that risk as identified in the original study.[54]

PGE estimated the cost of the required interconnection facilities to be $950,000.[55]

---

[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Compl., Attachment B at 5 (Revised Feasibility Study at 5).
[53] *Id.*
[54] *Id.* at 6.
[55] *Id.*

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

PGE also complied with its obligation under OAR 860-082-0060(6)(e) to identify adverse impacts considering the aggregate capacity of all existing or higher queued generation. Both the original and revised feasibility studies state:

> The Feasibility Study considers all generating facilities that, on the date the study was commenced: (i) were directly interconnected to PGE's Distribution System; (ii) were interconnect[ed] to Affected Systems and may have impact on the Interconnection request; [or] (iii) generating facilities having a pending higher queued Interconnection Request to interconnect to the Distribution System."[56]

Finally, the feasibility study agreement requires that PGE identify any thermal overload, voltage limit violations, or circuit breaker capacity exceedances that will occur because of the interconnection.[57] PGE did so. In both the original and revised feasibility studies, PGE identified that there would be a thermal overload of approximately 2.5 miles of overhead conductor.[58] And because PGE did not expect any voltage limit violations or circuit breaker capacity exceedances, PGE did not identify these issues as problems in either the original or revised feasibility study. Because PGE's facilities studies identified all the information required under OAR 860-082-0060(6)(e) and the facilities study agreement, PGE complied with its obligations and with the Commission's small generator interconnection rules.

(b) Further detail beyond identifying potential adverse system impacts is required for system impact studies, but not for feasibility studies.

OAR 860-082-0060(6) governs feasibility studies and only requires that a utility "identify" adverse system impacts. The rule does not require that the feasibility study detail the analysis or assumptions that allowed the utility to identify the expected system impacts.

This is made clear by the larger context of the interconnection rules. OAR 860-082-0060(7) governs system impact studies. That rule requires that a system impact study "must

[56] Compl., Attachment A at 4 (Feasibility Study at 4) and Attachment B at 4 (Revised Feasibility Study at 4).
[57] Answer, Ex. A at 2 (Feasibility Study Agreement at Sections 6.2 and 6.3).
[58] Compl., Attachment A at 5 (Feasibility Study at 5) and Attachment B at 5 (Revised Feasibility Study at 5).

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

identify **and detail** the impacts on the public utility's transmission or distribution system or on an affected system that would result from the interconnection of the small generator facility[.]"[59] OAR 860-082-0060(7)(g) then enumerates the details that the system impact study must provide:

> (A) A short circuit analysis; (B) A stability analysis; (C) A power flow analysis; (D) Voltage drop and flicker studies; (E) Protection and set point coordination studies; (F) Grounding reviews; (G) The underlying assumptions of the study; (H) The results of the analyses; and (I) Any potential impediments to providing the requested interconnection service.[60]

The express terms of the Commission's rules make it clear that the feasibility study need only identify expected adverse system impacts while the system impact study must identify and detail such expected impacts and that the utility must provide detailed studies, assumptions, and analysis as part of the system impact study but not as part of the feasibility study.

It makes sense that the Commission's rules require less analysis in the feasibility study. The Commission's small generator interconnection rules are modeled to some extent on the Federal Energy Regulatory Commission's ("FERC") interconnection rules, and FERC's rules make it clear that the feasibility study is intended to be a preliminary evaluation of adverse system impacts, while the system impact study is intended to comprehensively evaluate such impacts.[61] Similarly, under the Commission's rules, the feasibility study results are intended to preliminarily identify potentially adverse system impacts arising from the proposed interconnection.[62] The rules

---

[59] OAR 860-082-0060(7)(e) (emphasis added).
[60] OAR 860-082-0060(7)(g).
[61] *Standardization of Generator Interconnection Agreements and Procedures*, 104 FERC ¶ 61,103, 18 CFR Part 35, Order No. 2003 at 13 (July 24, 2003) (FERC noted that the feasibility study is intended to "evaluate **on a preliminary basis** the feasibility of the proposed interconnection" while the follow-up system impact study is intended to "evaluate **on a comprehensive basis** the impact of the proposed interconnection on the reliability") (emphasis added) (available at https://www.ferc.gov/legal/maj-ord-reg/land-docs/order2003.asp) (a courtesy copy is attached as Exhibit 1 to Declaration of Molly Honoré in Support of PGE's Motion for Summary Judgment ("Honoré Decl.")).
[62] *Compare* OAR 860-082-0060(6)(e) requiring only that the utility "identify" adverse system impacts in the feasibility study to OAR 860-082-0060(7)(e) and (g) requiring utility to "identify and detail" adverse system impacts in the system impact study and enumerating specific studies, assumptions and analysis to be included in the system impact study; *see also* Honoré Decl., Ex. 2 at 5 (*In the Matter of a Rulemaking to Adopt Rules Related to Small Generator Interconnection*, Docket No. AR 521, Staff Second Set of Comments Workshop Edits at 5 (Oct. 10, 2007)) (early version of proposed Oregon small generator interconnection rules defining "Interconnection Feasibility Study" as "a

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

governing the feasibility study do not require detailed results and do not require that the utility engage in or provide the results of various engineering analyses. This detailed level of review and analysis occurs at the system impact study stage.

The Commission knew how to require that an interconnection study include "information on any studies that were performed, the results of those studies, or the analysis of those studies."[63] The Commission required that the utility provide specific studies, and the assumptions and analysis from those studies in the system impact study. But the Commission did not include any such requirements for the feasibility study. In interpreting its own rules governing feasibility studies, the Commission may not now insert requirements that are not contained in the rules.[64]

PGE's feasibility studies identified the adverse system impacts expected from the interconnection and therefore provided the level of information required by the Commission's rules. There is no basis to conclude that PGE's original or revised feasibility studies to Waconda are deficient or fail to meet the requirements of the rules or the feasibility study agreement. Consequently, the Commission should deny Waconda's first claim for relief.

2. The errors in the feasibility studies identified by Waconda were immaterial and have been corrected by PGE.

The Commission should deny Waconda's first claim for relief for an additional reason. Waconda's first claim for relief alleges that PGE's original feasibility study contains inaccurate information.[65] But the errors Waconda identifies in the original feasibility study were immaterial

preliminary evaluation of the system impact and cost of interconnecting" the small generator to the utility's system and defining "Interconnection System Impact Study" as an "engineering study" evaluating such impacts)).

[63] *See* Compl. ¶¶ 27 and 57.

[64] ORS 174.010 (a judge cannot "insert what has been omitted, or [] omit what has been inserted" when interpreting a statute or regulation).

[65] Compl. ¶¶ 20, 50 and 94.

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

to the outcome of the study, and PGE addressed and corrected the alleged errors in subsequent studies.

The first two alleged errors are minor, typographical errors that had no effect on the purpose of the feasibility study, which is to identify potential adverse system impacts arising from the proposed interconnection. Those errors are: (1) PGE erroneously stated it received the interconnection application on **April** 23, 2018, when it actually received the application by regular mail on **March** 23, 2018;[66] and (2) PGE stated it assigned to Waconda an interconnection queue position as required by OAR 860-082-00**8**5(29) when the correct rule citation is OAR 860-082-00**1**5(29).[67] Waconda did not raise either of these concerns directly with PGE before Waconda filed its complaint. Neither of these typographical errors impact the determinations made in the feasibility study and both were corrected in the next study report issued by PGE after they were identified by Waconda (the October 25, 2018 system impacts study report).[68]

The next three alleged errors involved numeric values reporting the amount of existing and proposed generation load on aspects of PGE's system or the rated capability of PGE's substation transformer.[69] While these errors arguably had the *potential* to impact PGE's feasibility study conclusions, it turns out that none of these errors actually altered PGE's conclusions.[70] PGE identified the same three expected adverse system impacts in the original feasibility study (before the erroneous values were identified and corrected) and in the revised feasibility study (after the

[66] Compl. ¶ 21, Attachment A at 3 (Feasibility Study at 3), and Attachment B at 3 (Revised Feasibility Study at 3); Answer ¶ 21.
[67] Compl. ¶ 22, Attachment A at 3 (Feasibility Study at 3), and Attachment B at 3 (Revised Feasibility Study at 3); Answer ¶ 22.
[68] Answer ¶¶ 21, 22 and Ex. K at 3 (System Impact Study at 3).
[69] Compl. ¶¶ 25, 26, 42 ("PGE errored in the Feasibility Study by stating that the proposed and existing generation on the distribution line is 15.47 MW; it should have read 11.65 MW."), 43 ("PGE errored in the Feasibility Study by stating that the substation transformer was rated at 14MW; it should have read 25 MW."), and Attachment A at 5 (Feasibility Study at 5).
[70] Answer ¶¶ 25 and 26.

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

erroneous values were identified and corrected).[71] This demonstrates that the errors in question were immaterial. PGE has corrected each of the erroneous values (in the revised feasibility study), and Waconda has acknowledged this fact in its complaint.[72]

Finally, Waconda asserts that PGE "incorrectly identified the portion of the distribution line that would need to be re-conductored."[73] PGE's original feasibility study identified the need to reconductor approximately 2.5 miles of overhead line and described the start and end points of the area requiring the reconductor.[74] PGE's revised feasibility study provides greater detail and clarifies that the reconductoring will occur to two line segments totaling 2.5 miles; the revised study then identified the start and end point of each segment.[75] There is no requirement that PGE describe the proposed reconductoring work at the level of detail requested by Waconda, so there is no basis to conclude that PGE made an "error" when it initially described the need to reconductor approximately 2.5 miles of overhead line without specifying that the reconductor would involve two separate line segments. Even if it was an error not to provide that level of detail, it made no difference to the conclusions of the feasibility study; both identified thermal overload of approximately 2.5 miles of overhead line as an expected adverse impact of the interconnection.[76] There are no further revisions to the feasibility study required to address this issue.

---

[71] *See* pages 8 and 9 above (discussing how the original and revised feasibility study identified the same three expected adverse system impacts arising from the proposed interconnection).

[72] Compl. ¶¶ 51 ("The Revised Facility Study corrects a statement that the proposed and existing generation totals 11.65 MW on the distribution line."), 52 ("The Revised Facility Study corrects a statement that the substation transformer is rated at 25 MW."), and Attachment B at 5 (Revised Feasibility Study at 5); Answer ¶¶ 51 and 52.

[73] *See* Compl. ¶ 44 ("PGE errored in the Feasibility Study by incorrectly stating the portion of the distribution line that would need to be re-conductored.") and 53 ("The Revised Feasibility Study included new sections of the distribution line to be re-conductored.")

[74] *Id.*, Attachment A at 5 (Feasibility Study at 5).

[75] *See id.* ¶¶ 44 ("PGE errored in the Feasibility Study by incorrectly stating the portion of the distribution line that would need to be re-conductored.") and 53 ("The Revised Feasibility Study included new sections of the distribution line to be re-conductored.") and Attachment B at 5 (Revised Feasibility Study at 5).

[76] *See* Compl., Attachment A at 3-5 (Feasibility Study at 3-5) and Attachment B at 3-6 (Revised Feasibility Study at 3-6).

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

Because all of the errors alleged by Waconda were immaterial and have been corrected in subsequent studies, the Commission should not order PGE to issue a new feasibility study. Instead, the Commission should dismiss Waconda's first claim for relief.

B. SECOND CLAIM: THE COMMISSION SHOULD DENY WACONDA'S SECOND CLAIM BECAUSE WACONDA CANNOT REQUIRE PGE TO CONSENT TO USE A THIRD-PARTY CONTRACTOR TO COMPLETE INTERCONNECTION STUDIES AND PGE HAS NOT FAILED IN ANY DUTY REGARDING AN INDEPENDENT SYSTEM IMPACT STUDY.

Waconda cannot prevail on its second claim for relief because: (1) PGE is not required to agree to Waconda's request that it be allowed to hire a third party to conduct any remaining interconnection studies; (2) it was not unreasonable for PGE to retain control of the interconnection studies; and (3) Waconda's assertions regarding an independent system impact study fail because (a) Waconda has not alleged that PGE violated any specific rules or duties with regard to an independent system impact study; (b) Waconda has never requested specific information or access to support an independent system impact study nor identified any party that would be conducting an independent system impact study; and (c) Waconda is not entitled to information from PGE in order to conduct an independent system impact at this stage of the interconnection process.

1. PGE is not required to agree to Waconda's request to hire a third party to conduct the remaining interconnection studies.

The interconnection rules for small qualifying facilities do not give applicants the right to demand to use a third-party consultant to perform interconnection studies. Rather, the rules provide that the utility will conduct up to three interconnection studies (feasibility study, system impact study, and facilities study) to determine whether interconnecting a small generator will adversely impact PGE's system or any affected systems, to detail any such impacts and identify the necessary interconnection facilities or system upgrades to PGE's system to mitigate such

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

adverse impacts, and to estimate the cost and schedule to construct such interconnection facilities and system upgrades.[77]

Although the rules permit the utility to hire a third-party consultant to complete any interconnection study,[78] there is no requirement that the utility obtain the interconnection customer's consent before the utility hires it's own third-party consultant to conduct some or all of the interconnection studies. OAR 860-082-0060(9) addresses the ability of utilities and applicants to agree to use a third-party consultant to perform interconnection studies. The rule states:

> The public utility may contract with a third-party consultant to complete a feasibility study, system impact study, or facilities study. A public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete a feasibility study, system impact study, or facilities study, subject to public utility oversight and approval.[79]

The rule permits the utility to refuse to agree to allow the applicant to hire a third party to conduct the required studies. Further, there is no requirement that the utility justify the "reasonableness" of its decision.

Waconda claims that PGE may not unreasonably refuse to agree to allow Waconda to hire a third-party consultant to conduct the remaining interconnection studies. But the Commission has already interpreted this language in a nearly identical rule provision and determined that the rule's text, context, and rulemaking and regulatory history do not provide the relief sought by Waconda.

---

[77] *See* OAR 860-082-0060(6), OAR 860-082-0060(7) and OAR 860-082-0060(8) providing for the utility to conduct a feasibility study, a system impact study, and a facilities study respectively.
[78] OAR 860-082-0060(9) ("The public utility may contract with a third-party consultant to complete a feasibility study, system impact study, or facilities study.").
[79] OAR 860-082-0060(9).

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

In Order No. 19-218 in Docket No. UM 1967, the Commission granted PGE's motion for partial summary judgment and held that OAR 860-082-0060(8)(f)—which has the same text, context, and history as OAR 860-082-0060(9)—allows PGE to refuse to agree to allow an applicant to hire a third-party consultant to conduct necessary interconnection construction work, regardless of whether it would be "more reasonable" than the utility conducting the work.[80] Docket No. UM 1967 involved an interconnection dispute regarding a qualifying facility owned by Sandy River Solar LLC ("Sandy River"). The developer of the Sandy River project and the Waconda project is the same entity. In Order No. 19-218, the Commission concluded the utility has the right to insist to perform the interconnection construction work itself and that it does not need to justify its refusal to agree to allow the applicant to hire a third party to do the work as the "more reasonable" approach.[81] The exact same analysis, reasoning, and conclusions apply in this case where Waconda is arguing that PGE must agree to allow Waconda to hire a third party to conduct the required interconnection studies.

(a) The Commission has already determined that the language in OAR 860-082-0060(9) does not confer a right on an applicant to demand to use a third-party contractor.

The language in OAR 860-082-0060(9), quoted above, contains the same language as OAR 860-082-0060(8)(f), which the Commission interpreted in Order No. 19-218 in UM 1967. The language of OAR 860-082-0060(8)(f) states:

> The public utility may contract with a third-party consultant to complete the interconnection facilities and system upgrades identified in the facilities study. A public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight and approval.[82]

[80] *Sandy River Solar, LLC v. PGE*, Docket No. UM 1967, Order No. 19-218 at 1 (June 24, 2019).
[81] *Id.* at 1.
[82] OAR 860-082-0060)(8)(f).

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

In Docket No. UM 1967, PGE moved against the applicant's claim that the Commission should require PGE to allow the applicant to use a third-party consultant pursuant to OAR 860-082-0060(8)(f).[83] The Commission granted PGE's motion, finding that the use of the word "may" in the rule gives PGE the "discretion to decide whether to hire a third-party contractor to facilitate the interconnection of a small generator, either on its own or in conjunction with a small generator . . . ."[84] The Commission further explained that under the text and context of the rule, as well as any legislative history:

> We do not interpret OAR 860-082-0060(8)(f) as either requiring that PGE reasonably exercise its discretion to agree to, or indicating that we have the authority to direct PGE to, hire a third-party consultant to complete Sandy River's interconnection facilities and upgrades.[85]

The same conclusion applies here. For the sake of efficiency in this proceeding, PGE does not restate in full the arguments that it presented in support of its motion for partial summary judgment in Docket No. UM 1967.[86] Those arguments, however, support the same conclusion under OAR 860-082-0060(9). The rule does not require PGE to *reasonably* exercise its discretion to agree to hire a third-party consultant to complete interconnection studies, and it does not give the Commission authority to direct PGE to hire a third-party consultant to complete those studies.

[83] Docket No. UM 1967, Order No. 19-218 at 2.
[84] *Id.* at 23.
[85] *Id.* at 25.
[86] PGE originally drafted this motion for summary judgment before the Commission issued Order No. 19-218. The original draft of the motion for summary judgment included analysis regarding the text, context, and rulemaking and regulatory history underlying OAR 860-082-0060(9) articulating why the rule does not compel PGE to reasonably exercise its discretion to agree that an interconnection applicant may hire a third-party consultant to complete interconnection studies. PGE has removed that detailed briefing because it is repetitive of PGE's motion for partial summary judgment in Docket No. UM 1967. To the extent necessary to support this motion, PGE adopts by reference the arguments and information filed in support of partial summary judgment in Docket No. UM 1967. If the Commission would prefer or believes it is necessary, PGE can file those arguments in detail in this docket and reserves its right to do so.

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

(b) Any requests to change the rule should be addressed in general policy Docket No. UM 2000.

In UM 1967, the Commission considered legislative history from the rulemaking docket for the small generator interconnection rules (Docket No. AR 521) and determined that the history does not indicate any latent ambiguity in OAR 860-082-0060(8)(f).[87] That legislative history also does not indicate any latent ambiguity in the identical language in OAR 860-082-0060(9). The comments offered in connection with AR 521 did not make any distinction between the process governing the use of third-party contractors for interconnection studies versus the construction of interconnection facilities and upgrades.[88] As a result, the rules outline the same procedure for both circumstances.

In Docket No. AR 521, the Commission rejected a proposed rule revision that would have given interconnection applicants the "option" to hire their own consultant to conduct the interconnection studies.[89]

Stakeholders had the opportunity to address this issue in general policy Docket No. UM 1610 in 2012. The initial issues list proposed by Staff in Docket No. UM 1610 included whether the interconnection process should allow "at QFs[']request or upon certain conditions, third-party contractors to perform certain functions in the interconnection review process that are currently performed by the utility[.]"[90] Applicant-aligned groups argued to include this issue in the final issues list for the policy docket in order for the Commission to "consider specific and

[87] Docket No. UM 1967, Order No. 19-218 at 23-25.
[88] *See, e.g.*, Honoré Decl., Ex. 3 at 5-6 (Docket No. AR 521, Sorenson's Comments at 5-6 (Nov. 27, 2007)); Honoré Decl., Ex. 4 at 3 (Docket No. AR 521, ETO's Comments at 3 (Nov. 9, 2007)); Honoré Decl., Ex. 5 at 6 (Docket No. AR 521, PGE's Comments at 3 (Nov. 27, 2007))
[89] Docket No. AR 521, Order No. 09-196 at 4 (Jun. 8, 2009) ("We clarify, however, that work conducted by third-party contractors is always subject to the public utility's review and approval.") (available at https://apps.puc.state.or.us/orders/2009ords/09-196.pdf).
[90] Honoré Decl., Ex. 6 at 6 (Docket No. UM 1610, Staff's Proposed Issues List at 6 (Oct. 3, 2012)).

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

limited revisions to its interconnection rules, practices, and policies" to improve the interconnection process for applicants.[91]

In other words, in 2012 applicants understood that the current rules did not allow the applicant to demand to use third-party contractors, and they wanted the Commission to consider revisions to its current rules that would give applicants that option. The administrative law judge ("ALJ") finalized the issues list on October 25, 2012, including a revised issue on the use of third-party contractors: "Should QFs have the ability to elect a larger role for third party contractors in the interconnection process? If so, how could that be accomplished?"[92] That issue ultimately was not addressed further in Docket No. UM 1610.

In February 2019, the Commission opened an investigation into PURPA implementation in Docket No. UM 2000.[93] Staff posted a draft white paper on May 28, 2019, prioritizing issues that would be addressed in the docket.[94] Under "near-term" or "fast-track" actions for interconnection, Staff listed "What options does a QF have to perform its own studies, or upgrades," and "Should independent third parties be retained to review studies."[95] The parties to Docket No. UM 2000 are currently commenting on the draft white paper to guide Staff and the Commission in investigating these issues. All three public utilities operating in Oregon are participating in that docket, along with multiple QF trade associations. The issue is complicated and carries several long-term implications for public utilities. Pursuant to the procedures in Docket No. UM 2000, the interested parties will be able to discuss this issue in more depth and determine

[91] Honoré Decl., Ex. 7 at 9 (Docket No. UM 1610, Renewable Energy Coalition Response to Disputed Issues at 6 (Oct. 10, 2012)).
[92] Honoré Decl., Ex. 8 at 6 (Docket No. UM 1610, ALJ Ruling, Appendix A at 3 (Oct. 25, 2012)); *see also* Honoré Decl., Ex. 9 at 3 (Docket No. UM 1610, Staff's Response to Disputed Issues at 3 (Oct. 10, 2012)).
[93] *In the Matter of Commission Investigation into PURPA Implementation*, Docket No. UM 2000, Order No. 19-051 (Feb. 19, 2019) (available at https://apps.puc.state.or.us/orders/2019ords/19-051.pdf).
[94] Honoré Decl., Ex. 10 (Docket No. UM 2000, Draft White Paper (May 28, 2019)).
[95] *Id* at 4-5 (Docket No. UM 2000, Draft White Paper at 17-18).

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

whether there is a functional way for interconnection customers to offer input into the use of third-party contractors in the interconnection process.

As recognized by the parties and Commission in Docket Nos. AR 521 and UM 1601, and by the Commission in Order No. 19-218, the current rules do not permit applicants to demand to use third-party contractors in the interconnection process. Changes to existing rules and policy, if any, should be made on a going forward basis as the result of thorough investigation and after an opportunity for notice and comment in Docket No. UM 2000.

(c) In any event, PGE acted reasonably when it refused to allow Waconda to hire a third-party contractor to perform a system impact study.

OAR 860-082-0060(9) does not include any reasonableness requirement; however, even if it did, Waconda's second claim for relief should be denied because there is no genuine issue of material fact regarding whether PGE acted reasonably. Waconda is arguing that it is "more reasonable" to allow Waconda to hire a third party to complete the studies than to allow PGE to complete the studies because PGE allegedly missed interconnection deadlines and issued an inadequate feasibility study.[96] But as noted in Section IV(A), above, PGE's feasibility study and revised feasibility study provided all the information required by the rules and the study agreement, and any alleged errors in the study were immaterial and ultimately corrected by PGE. Further, as described in Section IV(C) below, PGE did not miss any interconnection deadlines.

Waconda also alleges that it was unreasonable for PGE to refuse to agree that Waconda could hire a third-party consultant to conduct the remaining studies because PGE allegedly has a history of missing interconnection deadlines and of providing inaccurate study results.[97] Waconda cannot rely on alleged missed deadlines and alleged inadequate study results in *other*

[96] *See* Compl. at 4, ¶¶ 117-121.
[97] *Id*.

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

interconnection proceedings. For the Commission to give any credence to Waconda's allegation of missed deadlines or inadequate study results in other interconnection proceedings, the Commission would be required to effectively adjudicate the facts in the absence of any pending complaints. This is highly impractical, potentially prejudicial and confusing, and entirely unnecessary. Regardless, PGE did not miss any interconnection deadlines or provide inadequate feasibility studies in connection with Waconda's interconnection request. PGE has complied with its obligations to Waconda, so there is no reason for the Commission to permit a fishing expedition into every interconnection application PGE has ever processed.

Because PGE has complied with the requirements of the interconnection process, there is no basis to conclude that it would be unreasonable for PGE to conduct the remaining studies or that it would be more reasonable to allow Waconda to hire a third-party to conduct the remaining studies. And in any event, as the Commission has already decided in Docket No. UM 1967, Order No. 19-218, PGE is not required to engage in a reasonableness balancing test regarding who should complete the remaining interconnection studies—PGE has the right to refuse and to retain the responsibility to conduct the studies itself.[98]

2. PGE has not failed to meet any duty with regard to an independent system impact study.

Waconda also incorrectly alleges that PGE must provide Waconda with "the system configuration" so that Waconda's consultant can conduct an independent system impact study.[99] There are several reasons why this "claim" must fail.

First, none of the rules identified by Waconda require PGE to provide Waconda with access to or information regarding its system. Waconda's complaint alleges: "on August 24, 2018,

[98] *See* Docket No. UM 1967, Order No. 19-218 at 1.
[99] Compl. ¶ 84.

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

Waconda Solar informed PGE of its intent to have an independent System Impact Study performed under OAR 860-082-0060(7)(h) in addition to PGE's own study, and requested that PGE provide the existing system configuration."[100] Waconda's second claim for relief states: (1) that Waconda "has a right to have an independent System Impact Study completed [citing OAR 860-082-0060(7)(h)]";[101] and (2) that "PGE has an obligation to provide reasonable information and reasonable access to its system so that an independent System Impact Study can be performed."[102] But PGE has not violated OAR 860-082-0060(7)(h), because the rule does not require the relief Waconda seeks.

OAR 860-082-0060(7)(h) does not say anything about a utility's obligation to provide certain information or access to an applicant in connection with an independent study. The rule only states that "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." Here, Waconda has not provided PGE with an independent system impact study so PGE cannot be in violation of OAR 860-082-0060(7)(h) for failing to address the findings of Waconda's non-existent independent study.

The only rule that addresses a utility's obligation to comply with requests for information is OAR 860-082-0020. That rule requires PGE to "comply with reasonable requests for access to or copies of" "information … includ[ing] relevant existing studies and other materials that may be used to understand the feasibility of interconnecting … at a particular point on the public utility's transmission or distribution system." But the complaint does not assert or allege any violation of OAR 860-082-0020. Reading between the lines and implying claims where none are actually

[100] *Id.* ¶ 84.
[101] *Id.* ¶ 101.
[102] *Id.* ¶ 106.

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

stated, the most that can be gleaned from the Complaint is that Waconda would like the Commission to hold that PGE has violated an **unidentified duty** to provide **unspecified information** or **unspecified system access** when Waconda requested that PGE provide Waconda with its "system configuration" in a single letter dated August 24, 2018.[103]

Second, even if OAR 860-082-0060(7)(h) can be read as requiring that utilities provide certain information under certain circumstances, Waconda's alleged request was too vague and ambiguous to have triggered any such requirement. Waconda, through its counsel, made one passing statement requesting that PGE provide Waconda with PGE's "system configuration" so that Waconda's independent consultant could complete a study.[104] In the five months between Waconda's application for an interconnection and the letter from Waconda's attorney, Waconda never made any requests to PGE for any specific information in connection with an independent system impact study.[105] And in the more than 11 months since the August 2018 letter, Waconda has not requested any specific information in service of an independent system impact study, even though the parties have engaged in extensive settlement discussions regarding the content of PGE's system impact study.[106] In short, Waconda has never made any serious effort to obtain information from PGE or engage in an independent system impact study and has never identified any specific information or access that it seeks from PGE.

Third, under the small generator interconnection process established by the Commission, August 24, 2018 was too late to start the process of seeking information in support of an independent system impact study. The letter was well after Waconda had submitted an interconnection request, participated in a scoping meeting, entered into a feasibility study

[103] *See id.* ¶ 84; Answer ¶ 84 and Ex. I (August 24, 2018 letter from Waconda to PGE).
[104] *Id.*
[105] Zappe Decl. ¶ 8.
[106] *Id.*

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

agreement, received a feasibility study and revised feasibility study, and after it had executed a system impact study agreement with PGE.

The Commission's small generator interconnection rules do not require that a public utility provide system information to an interconnection applicant so late in the process for the purpose of facilitating an independent system impact study. The only rule that discusses an independent system impact study is OAR 860-082-0060(7)(h), which provides that as part of its primary system impact study, a public utility must address the findings in any independent system impact study provided by the applicant.

The only part of the small generator interconnection rules that requires the public utility to provide system information to the applicant is OAR 860-082-0020. That rule, however, only addresses the "pre-application process." The rule states that "[e]ach public utility must designate an employee or office from which relevant information about the … public utility's … system … may be obtained through informal requests for a **potential applicant** proposing a small generator facility at a specific site."[107] The rule creates additional rights and limitations to information related to the interconnection and the utility's system. The "potential applicant" must make "reasonable requests" for information before it has filed an interconnection application. The rule then protects utilities from providing materials that would violate security requirements, confidentiality obligations to third parties, or that would be contrary to federal or state regulations. It also permits utilities to require confidentiality agreements to protect confidential or proprietary information.[108] There is no requirement under the rules, and no process established by the rules, for the applicant to seek system information from the utility once the interconnection application is submitted.

[107] OAR 860-082-0020(1).
[108] *Id*.

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

Waconda did not request any information from PGE to assist it in preparing an independent system impact study during the pre-application process, and instead submitted its application and participated in months of iterative communications with PGE throughout the interconnection process.

In order to maintain its queue, PGE must receive timely requests for information from applicants in the interconnection process. Had Waconda requested specific information from PGE earlier, PGE could have arranged an appropriate disclosure of information that would have protected PGE's confidential information and would not have otherwise delayed the interconnection queue. By waiting until months into the process, and only after significant milestones were reached, and by failing to request any specific information and instead submitting only the most general of requests for the "system configuration," Waconda effectively waived any right it had to obtain information from PGE for purposes of preparing an independent study.

Because Waconda has not alleged the violation of any specific rules or obligations, has not requested any specific information or access, and is not entitled, at this stage, to access PGE's information for the purposes of preparing an independent system impact study, the Commission should deny Waconda's second claim for relief.

C. THIRD CLAIM: THE COMMISSION SHOULD DENY WACONDA'S THIRD CLAIM BECAUSE PGE DID NOT MISS ANY INTERCONNECTION APPLICATION DEADLINES.

Waconda's third claim alleges that PGE has missed interconnection deadlines and that, as a result, the Commission should order PGE to extend Waconda's COD under its PPA.[109] The Commission should deny Waconda's third claim for four independent reasons. First, PGE has not missed any interconnection deadlines. Second, the claim is premature and the alleged harm is too

[109] Compl. ¶¶ 124-34 and at 22-23 (Prayer for Relief ¶¶ 4 and 9).

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

speculative to support relief at present because it is unclear: (a) whether Waconda will miss its COD; (b) whether Waconda will suffer any damages if it misses its COD but cures within the one-year period provided by the PPA; or (c) whether PGE's alleged actions will be the cause of Waconda missing its COD or failing to timely cure. Third, Waconda is responsible for creating its own timing dilemma by selecting an overly aggressive COD before Waconda obtained any interconnection study estimating the time required to interconnect the project, and by refusing to execute a facilities study agreement. Fourth, the Commission does not have the authority to grant the relief requested by Waconda because PURPA prohibits the Commission from modifying the terms of an executed and effective QF PPA.

1. PGE has not missed any interconnection deadlines.

Waconda asks the Commission to issue an order "[f]inding PGE in violation of its obligation to meet interconnection deadlines."[110] Specifically, Waconda alleges that PGE violated the Commission's rules by not notifying Waconda that its interconnection application was complete within ten business days of PGE receiving the application.[111] Waconda also alleges that PGE failed to make reasonable, good-faith efforts to follow the schedule set forth in the feasibility study agreement.[112] And Waconda alleges that PGE did not respond to Waconda's questions about the feasibility study within a reasonable amount of time.[113] As relief for these alleged violations, Waconda asks the Commission to order PGE to "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."[114]

[110] *Id.* at 22 (Prayer for Relief ¶ 4).
[111] *Id.* ¶ 129.
[112] *Id.* ¶ 131.
[113] *Id.* ¶ 133.
[114] *Id.* at 23 (Prayer for Relief ¶ 9).

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

The Commission should deny this claim as a matter of law because there are no material facts in dispute, and the facts before the Commission demonstrate that PGE did not miss any interconnection deadlines, did not fail to meet the schedule established by the feasibility study agreement, and did not take an unreasonable amount of time to respond to Waconda's questions about the feasibility study.

(a) Acknowledgment of Waconda's interconnection application was timely.

The interconnection process can begin with a "pre-application process" during which the potential applicant can seek information from the utility.[115] In this case, Waconda did not request any information from PGE under the pre-application process.

When an applicant forgoes the pre-application process, it moves directly to filing an interconnection application.[116] Waconda submitted an interconnection application to PGE on March 20, 2018.[117] Under the Commission's rules, PGE then had 10 business days (*i.e.*, until April 3, 2018) to provide Waconda with notice as to "whether the application is complete."[118] On March 27, 2018, PGE timely provided Waconda with written notice that the application appeared to be complete.[119]

PGE's March 27, 2018 email to Waconda stated:

> We are sending this notification to inform you that the Tier 4 Small Generator Facility Interconnection Application for the following projects has been received.
>
> Waconda Solar LLC

[115] *See* OAR 860-082-0020 (Commission small generator interconnection rule entitled "Pre-Application Process").
[116] OAR 860-082-0025(1)(a) ("A person proposing to interconnect a new small generator facility to a public utility's transmission or distribution system must submit an application to the public utility.").
[117] Compl. ¶ 9; Answer ¶ 9.
[118] OAR 860-082-0025(7)(a) ("Within 10 business days of receipt of an application to interconnect a small generator facility, the interconnecting public utility must provide written notice to the applicant stating whether the application is complete.").
[119] Answer at ¶ 9; Zappe Decl. ¶ 3 and Ex. 1 at 1 (March 27, 2018 email from PGE to Waconda).

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

> From our preliminary review, the application appears complete.[120]

After PGE sent this email, both PGE and Waconda proceeded with the interconnection application process in a manner consistent with the shared understanding that the application was complete. PGE and Waconda scheduled a scoping meeting[121] and PGE assigned the application an interconnection queue position.[122] PGE assigns a queue position and schedules a scoping meeting only if the application is deemed complete.[123] If PGE had concluded that the application was not complete, then under OAR 860-082-0025(7)(a)(A), PGE would have provided Waconda "with a detailed list of the information needed to complete the application."[124]

Five business days after PGE received Waconda's interconnection application, PGE notified Waconda that PGE considered the application to be complete.[125] PGE then assigned the application a queue position and scheduled a scoping meeting consistent with finding the application complete.[126] Waconda raised no objection to PGE's approach, did not request any clarification of the March 27, 2018 email, and never suggested that PGE failed to provide any required notice until September 28, 2018, when Waconda filed its complaint.

There is no basis to conclude that PGE failed to provide timely notice that Waconda's application was complete or that the parties did not understand PGE's March 27, 2018 notice as deeming the application complete. The Commission should therefore reject Waconda's assertion

[120] *Id*.
[121] Compl. ¶ 12; Answer ¶ 12; Zappe Decl. ¶ 4 and Ex 2 (April 5, 2018 email exchange between PGE and Waconda).
[122] Compl. ¶ 10 and Attachment A at 3 (Feasibility Study at 3); Answer ¶¶ 10 and 22; Zappe Decl. ¶ 3.
[123] OAR 860-082-0025(7)(a)(A); OAR 860-082-0025(7)(b) ("Once the public utility deems an application to be complete, the public utility must assign the application a queue position.").
[124] OAR 860-082-0025(7)(a)(A).
[125] *See* Zappe Decl. ¶ 3 and Ex. 1 at 1 (March 27, 2018 email from PGE to Waconda).
[126] *Id*. ¶¶ 3-4 and Ex. 2 (April 5, 2018 email exchange between PGE and Waconda).

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

in the complaint that "PGE violated the Commission's rules by failing to notify Waconda Solar that its interconnection application was complete within 10 business days."[127]

(b) The scoping meeting was timely.

After PGE provided Waconda with notice that the application was complete on March 27, 2018, PGE then had 10 business days to schedule a scoping meeting (*i.e.*, until April 10, 2018).[128] The rules permits PGE and Waconda to agree to reasonable extensions to any interconnection deadline.[129] On April 5, 2018, PGE sent Waconda an email proposing a scoping meeting on April 9, 2018, or April 11, 2018.[130] The same day, Waconda responded by email that it preferred to hold the scoping meeting on April 11, 2018.[131]

On April 11, 2018, the parties held a scoping meeting by means of a conference call.[132] While this meeting occurred 11 business days after the notice of complete application, Waconda requested the date and therefore requested a one-business-day extension of the 10-business day deadline.[133] As a result, the April 11, 2018 scoping meeting was timely under the Commission's small generator interconnection rules.

(c) The feasibility study was timely.

The rules provide that PGE had five business days after the April 11, 2018 scoping meeting within which to provide Waconda with an executable feasibility study agreement.[134] PGE timely

[127] Compl. ¶ 129.
[128] OAR 860-082-0060(5) ("A public utility must schedule a scoping meeting within 10 business days after notifying an applicant that its application is complete.").
[129] OAR 860-082-0010(2) ("A public utility and an applicant or interconnection customer may agree to reasonable extensions to required timelines in these rules without requesting a waiver from the Commission.").
[130] Zappe Decl. ¶ 4 and Ex. 2 at 1-2 (April 5, 2018 email exchange between PGE and Waconda).
[131] *Id*.
[132] Compl. ¶ 12; Answer ¶ 12; Zappe Decl. ¶ 4.
[133] *See* Zappe Decl. ¶ 4 and Ex. 2 at 1 (April 5, 2018 email exchange between PGE and Waconda).
[134] OAR 860-082-0060(6) ("If a public utility reasonably concludes that an adequate evaluation of an application requires a feasibility study, then the public utility must provide the applicant with an executable feasibility study agreement within five business days of the date of the scoping meeting.").

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

provided an executable feasibility study agreement to Waconda on the next business day, April 12, 2018.[135] Waconda executed the feasibility study agreement on April 17, 2018,[136] and PGE received Waconda's feasibility study deposit on April 19, 2018.[137] PGE then executed the feasibility study agreement on April 26, 2018.[138]

Under the terms of Attachment B to the feasibility study agreement, Waconda and PGE agreed that PGE would have "at least 60 business days to complete the study from the time [PGE] receive[s] both the signed study agreement and the initial study deposit of $1000.00."[139] Waconda signed the study agreement on April 17, 2018,[140] and PGE received the study deposit on April 19, 2018.[141] This means that PGE had at least 60 business days from April 19, 2018, or until July 16, 2018, to provide Waconda with the results of the feasibility study. PGE completed the feasibility study on July 10, 2018, and timely transmitted the results to Waconda on the same day.[142] PGE therefore provided Waconda the feasibility study 56 business days after PGE received the study deposit and 58 business days after Waconda executed the feasibility study agreement, which was within the 60-business day deadline.

(d) The system impact study was timely.

Under the rules, after PGE provided Waconda with the feasibility study results on July 10, 2018, PGE then had five business days to provide Waconda with an executable system impact

[135] Compl. ¶ 14; Answer ¶ 14.
[136] Compl. ¶ 15; Answer ¶ 15 and Ex. A at 3 (Feasibility Study Agreement at 3).
[137] Compl. ¶ 15 (alleging deposit check was mailed to PGE on April 17, 2018) Zappe Decl. ¶ 5 (stating deposit was received by PGE on April 19, 2018).
[138] Answer, Ex. A at 3 (Feasibility Study Agreement at 3).
[139] *Id.* at 2 and 5 (Section 7 of the feasibility study agreement provides that the study will be completed and the results transmitted to the applicant within 60 calendar days after the agreement is signed by both parties unless an alternate schedule has been agreed to by the parties and provides that Attachment B is incorporated as part of the agreement. Attachment B states that "PGE will need at least 60 business days to complete the study from the time we [PGE] receive both the signed study agreement and the initial study deposit of $1,000.00").
[140] Compl. ¶ 15; Answer ¶ 15 and Ex. A at 3 (Feasibility Study Agreement at 3).
[141] Zappe Decl. ¶ 5.
[142] *Id.* ¶ 6; Compl. ¶ 19 and Attachment A (Feasibility Study); Answer ¶ 19 and Ex. B (July 10, 2018 email from PGE to Waconda).

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

study agreement.[143] PGE timely provided an executable system impact study agreement to Waconda on July 10, 2018, the same day it completed the feasibility study and transmitted the study results to Waconda.[144]

Waconda executed the system impact study agreement on July 27, 2018, and PGE executed the study agreement on August 10, 2018.[145] Under the terms of the executed system impact study agreement, PGE had 60 business days from the date the agreement was executed by both parties (*i.e.*, until November 6, 2018) to complete the system impact study and provide the results to Waconda.[146] PGE timely completed the system impact study and transmitted the results to Waconda on October 25, 2018 (which was after Waconda filed its complaint but before PGE filed its answer).[147]

(e) PGE responded to Waconda's questions regarding the feasibility study results within a reasonable period.

On July 12, 2018, Waconda sent PGE an email asking questions about the feasibility study results and requesting additional information.[148] Waconda sent this email to PGE after PGE had provided Waconda with the feasibility study results and an executable system impact study agreement, but before the parties had executed the system impact study agreement. There is no specified process under the interconnection rules for the applicant to ask questions or request additional information about the feasibility study results. As a result, there is no deadline specified by the rules by which PGE was required to provide a response to Waconda's July 12, 2018 email.

[143] OAR 860-082-0060(7) ("If a public utility is required to perform a system impact study … then the public utility must provide the applicant with an executable system impact study agreement within five business days of completing the feasibility study ….").
[144] Compl. ¶ 32; Answer ¶ 32 and Ex. B (July 10, 2018 email from PGE to Waconda); Zappe Decl. ¶ 6.
[145] Answer, Ex. C at 3 (System Impact Study Agreement at 3).
[146] *Id.* at 2 (Section 6 of the System Impact Study Agreement states in relevant part: "The System Impact Study shall be completed and the results transmitted to the Applicant within sixty (60) business days after this Agreement is signed by the Parties unless otherwise agreed to as part of this Agreement.").
[147] Zappe Decl. ¶ 7; Answer at 1 and Ex. K (System Impact Study).
[148] Compl. ¶ 33; Answer ¶ 33 and Ex. D (July 12, 2018 email from Waconda to PGE).

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

PGE responded and provided additional and clarifying information on July 27, 2018, which was 11 business days after Waconda sent its questions and request for additional information.[149]

PGE's response was timely under the circumstances. Waconda's July 12, 2018 email asked eight questions and made two additional information requests.[150] Considering that PGE was processing many pending interconnection requests and considering that the rules typically allow the utility 60 business days to conduct studies and provide results, there is no basis to conclude that it was unreasonable for PGE to respond to Waconda's July 12 email within 11 business days.

(f) Waconda requested that PGE provide a revised set of feasibility study results and PGE did so within a reasonable period.

On the evening of July 27, 2018, the same day that PGE provided a written response to Waconda's July 12, 2018 questions, Waconda sent PGE an email requesting that PGE provide a revised or updated set of feasibility study results to "correct the errors" identified in the original set of study results.[151] Earlier on the same day, July 27, 2018, Waconda executed the system impact study agreement.[152] There is no specified process under the Commission's interconnection rules for an applicant to request or the utility to provide a revised set of study results to provide clarifications or correct identified errors in the original study. As a result, there was no requirement that PGE agree to provide a revised feasibility study and no deadline for doing so. Waconda had agreed to proceed to the next step in the process by executing the system impact study agreement. That triggered a new timeline for PGE to provide Waconda with the results of the system impact study. Despite the lack of a requirement or deadline under the rules, PGE issued a revised

[149] Compl. ¶ 41; Answer ¶ 41 and Ex. F (July 27, 2018 email from PGE to Waconda).
[150] Answer, Ex. D (July 12, 2018 email from Waconda to PGE).
[151] Compl. ¶ 45; Answer ¶ 45 and Ex. G (July 27, 2018 9:43 PM email from Waconda to PGE).
[152] Compl. ¶ 37; Answer ¶ 37 and Ex. E (July 27, 2018 3:45 PM email from Waconda to PGE forwarding executed system impact study agreement and stating that Waconda was returning the executed agreement "solely to preserve Waconda Solar's position in the interconnection queue."); *see also* Answer, Ex. C at 1 and 3 (System Impact Study Agreement at 1 and 3, demonstrating that Waconda executed the agreement on July 27, 2018).

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

feasibility study on August 16, 2018—25 business days after Waconda requested a revised set of study results—that incorporated the corrections and information originally communicated to Waconda on July 27, 2018.[153]

Again, PGE's response was timely under the circumstances. There was no applicable deadline under the rules, and PGE was already working on the system impact study. There is no basis to conclude that it was unreasonable for PGE to accommodate Waconda's request and issue a revised set of feasibility study results 25 business days after PGE received Waconda's request.

Because PGE has met all applicable interconnection deadlines, the Commission should deny Waconda's third claim for relief which alleges that PGE missed interconnection deadlines.

2. Waconda's claim is premature because the alleged harm for which it seeks relief is too speculative.

The Commission should also deny Waconda's third claim for relief because Waconda's alleged harm is purely speculative. Waconda suggests that, as a result of delay in the interconnection process, it will miss its COD under its PPA.[154] Waconda therefore requests that the Commission enter an order "[r]equiring 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 has caused."[155] Waconda's requested relief is premature. It is currently unclear whether Waconda will miss its scheduled COD under the PPA, whether Waconda will cure such an outcome during the one-year cure period provided under the PPA, or whether Waconda will suffer any economic damages as a result.

[153] *See* Compl. ¶ 49 and Attachment B (Revised Feasibility Study); Answer ⁋ 49.
[154] *See* Compl. at 23 (Prayer for Relief ¶ 9).
[155] *Id.*

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

Under its PPA, Waconda selected a COD of February 1, 2020.[156] If Waconda's project is not in-service and delivering power to PGE by that date, then PGE may send Waconda a notice of default and Waconda would then have one-year to cure that default.[157] If Waconda's project is not in-service by February 1, 2020, and if PGE sends notice of default, then there is a chance that Waconda may be required to pay PGE damages in the form of Lost Energy Value.[158] However, such damages will only obtain if market prices exceed contract prices during Waconda's cure period, and this is uncertain.[159]

In addition, while it appears unlikely that Waconda can achieve commercial operation by February 1, 2020, it is not yet certain that it will not do so. If Waconda does not achieve commercial operation by February 1, 2020, there is no way to know at present whether PGE's actions will be the cause of Waconda's failure to meet the COD or whether Waconda will fail to meet the date for reasons unrelated to PGE. And, if Waconda misses its COD there is no way to know now whether Waconda will be able to cure within one year as permitted by the PPA, or whether Waconda will be exposed to any delay damages during such a cure period.

Waconda therefore seeks relief from the Commission to avoid damages that may never materialize. A plaintiff cannot recover damages if it is uncertain whether the plaintiff has been damaged as a result of the wrongful act of the defendant.[160] And even if the plaintiff proves

[156] *See* Docket No. RE 143, Waconda PPA at 6 (Section 2.2.2 states, "By February 1, 2020 Seller shall have completed all requirements under Section 1.5 and shall have established the Commercial Operation Date.").
[157] *Id.* at 12 (Section 9.2 states "In the event of a default … PGE may provide Seller with written notice of default. Seller shall have one year in which to cure the default during which time the Seller shall pay PGE damages equal to the Lost Energy Value.").
[158] *Id.*
[159] *Id.* at 3, 5 and 12 (Waconda's PPA at Section 1.16, defining Lost Energy Value, Section 1.35, defining Start-Up Lost Energy Value, and Section 9.2, defining terms of Default, Remedies, and Termination).
[160] *Chapman v. Gen. Petroleum Corp. of Cal*, 152 Or 147, 152 (1935).

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

causation, the plaintiff must also establish the existence and amount of any damages with reasonable certainty—speculative damages, by contrast, are never allowed.[161]

Because the existence of any harm is speculative and PGE's responsibility for any such harm is also speculative, the Commission should deny Waconda's third claim for relief.

3. Waconda created its own timing dilemma by selecting an overly aggressive COD and by refusing to execute a facilities study agreement.

The Commission should also deny Waconda's third claim because Waconda is solely responsible for any chance it will miss its selected COD. Waconda selected an overly aggressive COD before Waconda had obtained any interconnection study results or any estimate of the time required to interconnect the project. It appears Waconda selected that early COD in an effort to "lock in" preferable rates before a rate change on May 23, 2018. Waconda should have been aware of the risks associated with its decision. As a result of its gamble, Waconda selected an overly aggressive COD, which was revealed as unrealistic as soon as Waconda obtained PGE's feasibility study results and PGE's preliminary estimate of the time required to interconnect the project.

Waconda could have waited until it obtained more information from PGE before executing a PPA. For example, Waconda could have waited until after it received one or more rounds of interconnection studies from PGE before executing a PPA. Instead, Waconda executed its PPA on May 21, 2018, after the parties executed the feasibility study agreement in April 2018, but before PGE timely completed the feasibility study and transmitted the study results to Waconda on July 10, 2018.[162] Further, even though Waconda had the right to select a COD that is as much

[161] *Parker v. Harris Pine Mills*, 206 Or 187, 197 (1955) ("In every case actual damages sustained must be established by evidence upon which their existence and amount may be determined with reasonable certainty. Speculative damages are never allowed."); *Merchants Paper Co. v. Newton*, 292 Or App 497, 506 (2018), *rev den*, 265 Or 407 (2019) ("In every case actual damages sustained must be established by evidence upon which their existence and amount may be determined with reasonable certainty. Speculative damages are never allowed.") (internal quotation marks and citation omitted).

[162] Compl. ¶¶ 15, 18, and 19; Answer ¶¶ 15, 18, and 19; Zappe Decl. ¶ 6.

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

as 36 months after the PPA effective date (*i.e.*, Waconda could have selected a commercial operation date of approximately June 4, 2021), Waconda instead chose a COD that was only 20 months after the PPA effective date (February 1, 2020).[163]

Waconda was in control of the timing of its PPA effective date, the timing of its COD, and the timing of its interconnection study process. Waconda could have started its interconnection study process earlier, deferred entering into a PPA until a later date, or selected a later COD. If Waconda had selected a COD 36-months from the PPA effective date, or if Waconda had waited until it had more information before executing a PPA, then it is likely Waconda would not be facing the timing dilemma it is facing today. The Commission should not grant the relief requested by the third claim when the harm feared by Waconda is the result of its own actions in selecting an aggressive COD.

4. The Commission lacks the authority to order a change in the terms of an executed PURPA PPA.

The Commission should further deny Waconda's third claim because the Commission lacks the authority to grant the relief requested. Section 210(e) of PURPA exempts QFs from "utility-type" regulation by state utility commissions.[164] As a practical matter, the courts have held that the prohibition against "utility-type regulation" means that a state commission cannot order the modification of the terms and conditions contained in an executed and effective power purchase agreement between a utility and a QF.[165]

---

[163] Docket No. RE 143, Waconda PPA at 6 (Section 2.2.2 states, "By February 1, 2020 Seller … shall have established the Commercial Operation Date."); *see* Docket No. UM 1610, Order No. 15-130 at 2 (Apr. 16, 2015) ("The stipulating parties agree that QFs can select a scheduled COD anytime within three years of contract execution and that a QF can elect a scheduled COD that is more than three years from contract execution if the QF can establish that a period in excess of three years is reasonable and necessary and the utility agrees to the scheduled COD.") (available at https://apps.puc.state.or.us/orders/2015ords/15-130.pdf).

[164] *See* 16 U.S.C. § 824a-3(c)(1) and 18 C.F.R § 292.602(c)(1).

[165] *See e.g.*, *Freehold Cogeneration Assocs., L.P. v. Bd. Of Reg. Comm'rs of State of N.J*, 44 F3d 1178, 1192 (3d Cir. 1995) (state agency modification of an executed PURPA power purchase agreement violates the PURPA § 210(e) prohibition on "utility-type" regulation of qualifying facilities).

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

The Commission has recognized this limitation. In Docket No. UM 1894, Order No. 18-025, the Commission considered its authority to interpret the terms of a standard PPA entered into under PURPA.[166] The Commission concluded that it has the authority to interpret the terms of a QF PPA, but the Commission expressly recognized: "We do not have the authority to alter the terms of the contract, or its established avoided cost prices, once it is executed."[167]

Under the third claim for relief, Waconda asks the Commission to order a change in two key terms in its fully executed and effective QF PPA: the scheduled COD and the termination date.[168] Because the Commission cannot engage in "utility-type" regulation of an executed QF PPA, the Commission lacks the authority to modify the scheduled commercial operation date or the termination date and the third claim for relief should be denied.

D. FOURTH CLAIM: THE COMMISSION SHOULD DENY WACONDA'S FOURTH CLAIM BECAUSE PGE DID NOT SUBJECT WACONDA TO UNDUE OR UNREASONABLE PREJUDICE.

PGE also asks the Commission to deny Waconda's fourth claim for relief. Waconda's fourth claim for relief seeks a determination from the Commission that PGE subjected Waconda to undue or unreasonable prejudice based on Waconda's allegations that: (1) PGE did not process Waconda's interconnection application in a timely manner;[169] (2) PGE hired third-party consultants to complete its own interconnection studies or for other interconnection applications;[170] and (3) PGE refused to consent to allow Waconda to hire third-party consultants to complete interconnection studies.[171]

---

[166] *In the Matter of Portland Gen. Elec. Co. v. Pacific Northwest Solar, LLC*, Docket No. UM 1894, Order No. 18-025 (Jan. 25, 2018) (available at https://apps.puc.state.or.us/orders/2018ords/18-025.pdf).
[167] *Id.* at 4.
[168] Compl. at 22 and 23 (Prayer for Relief ¶¶ 4 and 9).
[169] Compl. ¶ 137.
[170] *Id.* ¶ 138.
[171] *Id.* ¶ 139.

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

1. PGE acted within its authority and discretion under the applicable interconnection rules.

As shown above, PGE has processed Waconda's interconnection application in a timely manner[172] and PGE did not violate the rules when it refused to agree to Waconda hiring a third party to complete the interconnection studies.[173]

The rules also make clear that PGE is entitled to exercise its discretion over when to use its own third-party consultants. The first sentence of OAR 860-082-0060(9) provides that "The public utility may contract with a third-party consultant to complete a feasibility study, system impact study, or facilities study."[174] That sentence does not require PGE to obtain the applicant's approval before PGE uses its own consultant to assist with studies. PGE therefore acts well within its authority when it decides whether to use its own third-party consultant, regardless of the applicant's opinion regarding that decision.

2. PGE cannot violate ORS 757.325 by complying with the authority and discretion granted to it by the Commission through the interconnection rules.

If a utility complies with applicable interconnection rules promulgated by the Commission, then the utility cannot also be in violation of ORS 757.325. ORS 757.325 is a general enabling statute that states that no public utility "shall make or give undue or unreasonable preference or advantage to any particular person."[175] A practice authorized by the Commission cannot constitute "undue" or "unreasonable" preference. To the extent the statute requires a utility to act reasonably or fairly with respect to applicants, the Commission has already taken that into account in the formal rule making process.

---

[172] *See* Section IV(C) above.
[173] *See* Section IV(B) above.
[174] OAR 8606-082-0060(9).
[175] ORS 757.325(1).

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

When the Commission enacted the regulations in OAR Chapter 860, Division 082, it determined how the utility must act under certain circumstances, when an applicant has the right to information or input throughout the process, and when the utility has discretion and control over its decision-making process. In Docket No. UM 1967, the Commission determined that those rules do not give the Commission the authority to direct a utility to hire a third-party consultant.[176] Allowing an applicant to sue a utility under ORS 757.325 every time the applicant disagrees with a decision that has been placed within the utility's discretion would upend the rules and the interconnection process.

The Commission's rules authorize the utility to conduct the required studies.[177] The rules further authorize the utility to hire its own consultant to assist or to conduct the required studies on the utility's behalf.[178] The rules do not require that the utility obtain the applicant's approval before the utility elects to hire its own consultant. Finally, the rules provide that the utility and the applicant *may* agree that the applicant will hire a third party to conduct the studies, but the rules do not require either the utility or the applicant to agree to this alternative approach.[179] Under this construct established by the Commission's own rules, it cannot be an act of discrimination under ORS 757.325 for the utility (or the applicant) to exercise the discretion entrusted to it under the rules.

The rules do not require the utility to use its own third-party contractor in every case if the utility uses its third-party contractor in one particular case. Likewise, the rules do not require the

[176] Docket No. UM 1967, Order No. 19-218 at 25 ("We do not interpret OAR 860-082-0060(8)(f) as either requiring that PGE reasonably exercise its discretion to agree to, or indicating that we have the authority to direct PGE to, hire a third-party consultant to complete Sandy River's interconnection facilities and system upgrades.").
[177] OAR 860-082-0060(6); OAR 860-082-0060(7); OAR 860-082-0060(8).
[178] OAR 860-082-0060(9) ("The public utility may contract with a third-party consultant to complete a feasibility study, system impact study, or facilities study.").
[179] *Id.* ("A public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete a feasibility study, system impact study, or facilities study, subject to public utility oversight and approval.").

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

utility to agree to allow the applicant to hire a third-party consultant to conduct the studies if the utility agreed to allow a different applicant to hire a third-party to conduct studies in a different case. By attempting to inappropriately apply ORS 757.325 to the Commission's interconnection rules, Waconda is attempting to remove from the rules the very discretion they establish to treat different interconnection requests differently. The Commission should deny this request as it would invalidate the flexibility and discretion created by the Commission's rules.

Waconda's fourth claim for relief must be denied because PGE has at all times acted within the confines of the interconnection rules.

V. CONCLUSION

For the reasons stated above, PGE respectfully request the Commission deny Waconda's claims and dismiss Waconda's complaint.

DATED this 23rd day of July, 2019.

Respectfully submitted,

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

Jeffrey S. Lovinger, OSB #960147
Molly K. Honoré, OSB #125250
Markowitz Herbold PC
1211 SW Fifth Avenue, Suite 3000
Portland, OR 97204
Tel: (503) 295-3085
Fax: (503) 323-9105
JeffreyLovinger@MarkowitzHerbold.com
MollyHonore@MarkowitzHerbold.com

891597