

October 26, 2021

Via Electronic Filing

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

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

Dear Filing Center:

Enclosed for filing today in the above-named docket is Portland General Electric Company's Motion For Leave To File Sur-Reply And Sur-Reply To Waconda Solar, LLC's Reply To Waconda Solar, LLC's Motion To Stay Or For An Extension Of Time To Respond To Portland General Electric Company's Motion For Summary Judgment.

Thank you for your assistance.

Very truly yours,



Jeffrey S. Lovinger

Enclosure

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

WACONDA SOLAR, LLC,

Complainant,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

**PORTLAND GENERAL
ELECTRIC COMPANY'S
MOTION FOR LEAVE TO FILE
SUR-REPLY AND SUR-REPLY
TO WACONDA SOLAR, LLC'S
REPLY TO WACONDA SOLAR,
LLC'S MOTION TO STAY OR
FOR AN EXTENSION OF TIME
TO RESPOND TO PORTLAND
GENERAL ELECTRIC
COMPANY'S MOTION FOR
SUMMARY JUDGMENT**

Expedited Consideration Requested

I. INTRODUCTION

Portland General Electric Company ("PGE") requests leave to file a sur-reply in opposition to Waconda Solar, LLC's ("Waconda") Reply to Waconda's Motion to Stay or for an Extension of Time to Respond to PGE's Motion for Summary Judgment ("Reply"). PGE submits this sur-reply for two reasons:

1. PGE responds to Waconda's new argument in its Reply that one of the overlapping issues in this docket and in Docket No. DR 57 is "whether Oregon rules and contract provisions regarding reasonableness, non-discrimination, and contractual good faith apply to the iSIS process for providing information to the interconnection customer *and* reviewing the iSIS."¹ Neither question is alleged in Waconda's amended complaint. As a result, the questions do not present overlapping issues between this case and Docket No. DR 57.

¹ Waconda Solar's Reply in Support of its Motion to Stay or, In the Alternative, to Extend the Filing Deadline of Waconda Solar's Response to PGE's Modified Second Motion for Summary Judgment ("Waconda's Reply") at 4 (Oct. 19, 2021) (emphasis in original). The term "iSIS" refers to an "independent system impact study" of the type referenced in OAR 860-082-0060(7)(h).

2. PGE responds to Waconda's mischaracterizations of PGE's position concerning its obligation to evaluate and address alternative findings in an iSIS. Contrary to Waconda's assertions in its Reply, PGE has not: a) refused to "agree that it will review Waconda Solar's iSIS consistent with the rules[.]"² b) taken the position that "it can receive the iSIS, briefly review it, completely ignore the results of the iSIS, and then throw it in the trash[.]"³ or c) refused to agree "that its review [will be] consistent with the law."⁴ Those assertions misconstrue PGE's position in this docket and its view of its own obligations under the small generator interconnection rules.

II. REQUEST FOR LEAVE

A. BACKGROUND

PGE seeks leave to file a Sur-Reply responding to Waconda's Reply in support of its Motion to Stay or For an Extension of Time to Respond to PGE's Motion for Summary Judgment. Waconda filed its Motion to Stay on October 5, 2021. PGE filed its Response opposing the Motion on October 12, 2021. Waconda filed its Reply on October 19, 2021. PGE has conferred with Waconda, and Waconda opposes PGE's request for leave to file a Sur-Reply. PGE requests expedited consideration of PGE's request for leave to file a Sur-Reply so that PGE's Sur-Reply can be considered as part of the Administrative Law Judge's ("ALJ") or the Public Utility Commission's ("Commission") consideration of Waconda's Motion to Stay. PGE requests that the ALJ direct that Waconda Solar file any response opposing PGE's request for leave to file a Sur-Reply by October 29, 2021.

² *Id.* at 4, n.3.

³ *Id.* at 9.

⁴ *Id.*

B. LEGAL STANDARD

The Commission's rules do not authorize the filing of a sur-reply. However, as a matter of discretion, the Commission or its ALJs have allowed additional briefing not otherwise authorized by the procedural rules if the additional briefing may aid in understanding the issues in a docket, better explains a party's position, or will otherwise benefit the Commission's review of an issue.⁵ Allowing a supplemental brief is especially warranted when a moving party has raised a new argument in a reply because the party opposing the motion does not otherwise have an opportunity to respond to the moving party's argument.⁶

C. REQUEST

PGE respectfully requests that the ALJ grant PGE leave to file a brief Sur-Reply to Waconda's Reply supporting Waconda's Motion to Stay.

III. SUR-REPLY

Waconda is asking the Commission to stay this case and PGE's pending motion for summary judgment on all claims until after the Commission resolves a newly filed petition for declaratory ruling. Waconda claims the declaratory ruling action will resolve some, but not all of the issues that require resolution in this case. The Commission should deny the request for stay. The Commission has not yet determined whether it will even substantively consider the

⁵ See, e.g., *In the Matter of Sandy River LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1967, ALJ Ruling at 2 (Apr. 26, 2019) (granting leave to file sur-response and explaining supplemental briefing "may aid the understanding of issues in this docket[.]"), available at <https://edocs.puc.state.or.us/efdocs/HDA/um1967hda142343.pdf>; *In Re Pacific Power & Light, Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, Docket No. UE 177, Order No. 08-002 at 4 (Jan. 3, 2008) (granting motion to file a reply to a procedural motion in order to "provide additional information"); *In Re Portland Gen. Elec. Co. Application for Deferred Accounting of Excess Power Costs Due to Plant Outage*, Docket No. UM 1234, Order No. 07-227 at 4 (Jun. 8, 2007) (explaining that the Commission would accept a reply because it "better explains [the party's] original position").

⁶ See, e.g., *Ben-Kotel v. Howard Univ.*, 319 F3d 532, 536 (DC Cir 2003) (noting that trial court routinely grants motions for leave to file a sur-reply when a party would be unable to contest matters presented to the court for the first time in the opposing party's reply (citing *Lewis v. Rumsfeld*, 154 F Supp 2d 56, 61 (DC Cir 2001))).

petition for declaratory ruling as required by OAR 860-001-0430(2). *If* the Commission decides to substantively consider the petition for declaratory ruling, that petition will not resolve any of the issues that have been pleaded in this case and which remain in dispute.

There are no properly pleaded questions remaining to be resolved in this docket that are identical to those raised in the petition for declaratory ruling in DR 57. As a result, there is no basis to justify a stay of this docket to await a possible decision in DR 57. Staying this docket on the ground that the issues in Docket No. DR 57 are “relevant” to the issues in this docket would create unnecessary delay for no actual benefit. Because legal questions presented to the Commission in Docket No. DR 57 address legal questions that were never pleaded in this docket or are no longer in dispute in this docket, there is no identity of claims between the dockets. A stay would not promote judicial economy and would result in undue prejudice to PGE. As a result, the Commission should deny Waconda’s Motion to Stay.

The petition for declaratory ruling in Docket No. DR 57 asks the Commission to find:

(1) Interconnection Customers have a unilateral right to conduct an iSIS under OAR 860-082-0060(7)(h); (2) a utility must provide the Interconnection Customer with sufficient information for an iSIS to be performed; (3) a utility must provide the Interconnection Customer access to the utility’s system sufficient for the Interconnection Customer to complete its iSIS; and (4) a utility must review an Interconnection Customer’s iSIS to evaluate and address the alternative findings, (a) reasonably, including consistently with Good Utility Practice, (b) in a non-discriminatory manner, (c) to determine if the interconnection facilities or system upgrades are necessary to

safely interconnect and mitigate actual adverse impacts caused by the interconnection, and (d) in a manner consistent with the utility's contractual duty of good faith and fair dealing.⁷

In this case (Docket No. UM 1971), PGE agrees that Waconda can perform an iSIS, so there is no dispute in this case about whether an Interconnection Applicant has a right to conduct an iSIS. In this case, PGE has agreed to provide Waconda with system information if Waconda executes a non-disclosure agreement, so there is no dispute in this case about whether the utility must provide the Interconnection Applicant with sufficient information for an iSIS to be performed. In this case, PGE has agreed to provide Waconda with reasonable access to PGE's system if needed for Waconda to perform an iSIS, so there is no dispute in this case about whether the utility must provide the Interconnection Applicant with access to the utility's system.

In this case, Waconda's amended complaint does not allege that it is necessary to know what standard of review applies to a utility's evaluation of an iSIS before Waconda can conduct an iSIS. Further, Waconda has not provided PGE with an iSIS and PGE has not evaluated an iSIS, so PGE could not have failed to meet an alleged standard of review applicable to the evaluation of an iSIS.

In this case, Waconda's amended complaint does not allege that if Waconda provides PGE with an iSIS, then PGE must evaluate the iSIS consistent with a PGE contractual duty of good faith and fair dealing. Further, there can be no allegation that PGE has failed to evaluate Waconda's iSIS consistent with a contractual duty of good faith and fair dealing because Waconda has not provided PGE with an iSIS and PGE has not yet evaluated an iSIS.

⁷ See *In the Matter of Renewable Energy Coal., Community Renewable Energy Ass'n, and Oregon Solar + Storage Industries Ass'n*, Docket No. DR 57, Petition for Declaratory Ruling (Oct. 5, 2021), available at <https://edocs.puc.state.or.us/efdocs/HAA/dr57haa17048.pdf>.

In sum, there are no questions raised by the petition for declaratory ruling in Docket No. DR 57 which are also properly pleaded issues that require resolution in this case.

1. Waconda's new argument does not justify staying this docket.

In its Reply, Waconda argues “[a] core issue in the declaratory ruling is whether Oregon rules and contract provisions regarding reasonableness, non-discrimination, and contractual good faith apply to the iSIS process for providing information to the interconnection customer *and* reviewing the iSIS.”⁸ The amended complaint in this case does not allege that PGE violated contractual provisions regarding reasonableness, non-discrimination, and good faith and fair dealing by not providing system information to facilitate an iSIS. Further, the amended complaint in this case does not allege that PGE violated such contractual principles in evaluating an iSIS provided by Waconda (nor could it, because Waconda has not provided PGE with an iSIS).

Waconda's amended complaint alleges 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.”⁹ Waconda's amended complaint alleges that “PGE violated its duty of good faith and fair dealing when it unreasonably withheld consent to allow Waconda Solar to hire a third-party consultant to complete the remainder of its interconnection studies or to complete an independent System Impact Study.”¹⁰ This is not an allegation that PGE violated a contractual duty of reasonableness, non-discrimination, or good faith and fair dealing by not providing system information or by the manner of its evaluation of an iSIS. Waconda's amended complaint alleges “PGE's failure to cooperate with Waconda Solar, by providing the necessary

⁸ Waconda's Reply at 4 (emphasis in original).

⁹ Amended Complaint ¶ 144 (Jul. 31, 2019).

¹⁰ *Id.* ¶ 147.

information and access to PGE’s system, violated Waconda Solar’s legal right to have an independent System Impact Study performed.”¹¹ That is not an allegation that PGE violated a contractual duty of reasonableness, non-discrimination, or good faith or fair dealing by not providing system information or by not properly evaluating the results of an iSIS.

Waconda has not pleaded in this case the new argument that Waconda raised for the first time in its Reply—that contract principles should apply when the utility provides an interconnection applicant with system information necessary to conduct an iSIS. Further, the petitioners in Docket No. DR 57 did not ask the Commission to find that contract principles apply when a utility provides an interconnection applicant with system information so the applicant can conduct an iSIS. That question is not before the Commission in either docket. Instead, the petitioners in Docket No. DR 57 asked the Commission to find that contract principles apply when the utility is evaluating the results of an iSIS.

Waconda also incorrectly asserted in its Reply that PGE agrees that Waconda has properly placed before the Commission in this docket the question of whether “the interconnection rules or the duty of good faith and fair dealing . . . apply to the utility providing information[.]”¹² As discussed above, Waconda has pleaded no such claim in this case and PGE does not agree it has been properly placed before the Commission. There is no reasonable basis to stay this docket based on Waconda’s assertion that issues are raised in both this case and Docket No. DR 57, when the issues have not been pleaded in this case.

Aside from Waconda’s failure to allege in this case its new arguments that contract principles should apply both when PGE furnishes information necessary to conduct the iSIS and

¹¹ *Id.* ¶ 164.

¹² Waconda’s Reply at 7 (“It would not make sense for the interconnection rules or the duty of good faith and fair dealing to apply to the utility providing information (the issue PGE agrees that Waconda Solar raised), but not how the utility reviews the iSIS (the additional issue raised by the Interconnection Trade Associations).”).

when it evaluates and addresses alternative findings in an iSIS, both questions are premature for decision in this case. Waconda has not identified the information and access it needs to conduct an iSIS, has not executed a non-disclosure agreement, has not conducted an iSIS, and has not provided PGE an iSIS. Until those things happen, there can be no dispute between the parties concerning the manner in which PGE provides system information or evaluates and addresses alternative findings. Deciding legal questions based on a future hypothetical dispute would be a waste of the Commission's resources. That is one reason why courts abstain from issuing advisory opinions.¹³ For example, there may be no alternative findings when Waconda conducts an iSIS. PGE may accept and incorporate all alternative findings in the iSIS. There may be alternative findings in the iSIS that would be appropriate for PGE to reject even under the standard proposed by Waconda. Under any of those circumstances, PGE's conduct would meet the standard that Waconda wants the Commission to adopt in Docket No. DR 57.

In other words, no dispute has arisen that requires the Commission to announce the meaning of OAR 860-082-0060(7)(h) and apply it in this case, and such a dispute may never arise. That question will not be before the Commission in this docket unless Waconda completes an iSIS and PGE evaluates and addresses the iSIS's alternative findings in a manner that Waconda finds objectionable. The Commission should deny Waconda's motion to stay. PGE's position throughout this docket has remained constant: PGE will comply with the requirements

¹³ See *Wildwest Inst. v. Seesholtz*, No. CV-07-199-S-BLW, 2008 WL 3289486, at *2 (D Idaho Aug. 8, 2008) ("Because the very issues raised by Wildwest in this lawsuit . . . could be resolved in Wildwest's favor, the Court's consideration of those issues now would be a waste of judicial resources and a mere advisory opinion."); see also *United Public Workers of Am. (C.I.O.) v. Mitchell*, 330 US 75, 89-90 (1947) ("The power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough."); *In re Dick Cepek, Inc.*, 339 BR 730, 735 (9th Cir 2006) ("deferring resolution of a dispositive legal issue just to hear and decide possibly irrelevant factual issues results in the same harm that the ripeness doctrine is designed to prevent: the court is futilely deciding unnecessary issues. It is answering questions that do not actually require answering.").

of OAR 860-082-0060 when it receives Waconda's iSIS. The Commission should disregard Waconda's contrary assertions.

2. PGE's position throughout this docket has remained constant: PGE will comply with the requirements of OAR 860-082-0060 when it receives Waconda's iSIS. The Commission should disregard Waconda's contrary assertions.

Waconda argues that both dockets require the core legal determination that "Oregon rules and contract principles apply to the iSIS process."¹⁴ PGE has never taken the position in this docket that "Oregon rules" do not apply to the iSIS process. Assuming that Waconda refers to the Tier 4 Interconnection Review rules set forth in OAR 860-082-0060, PGE agrees that those rules apply and has agreed to review Waconda's iSIS consistent with them.¹⁵ And, although Waconda now has filed pages of argument that contract principles should apply to PGE's review of an iSIS, that question is not squarely before the Commission in this docket because Waconda has not alleged it in its pleadings.¹⁶

PGE does not now, and has never, taken the legal position that "it can receive the iSIS, briefly review it, completely ignore the results of the iSIS, and then throw it in the trash."¹⁷ PGE also has never refused to agree "that its review [of an iSIS will be] consistent with the law."¹⁸ PGE has repeatedly told Waconda the opposite. PGE's legal position is well-documented in the briefing on the pending motion for summary judgment, and PGE asks the Commission to draw

¹⁴ Waconda's Reply at 7.

¹⁵ See, e.g., PGE's Response at 10; PGE's Modified Second Motion for Summary Judgment at 38-41 (Sept. 15, 2021); Declaration of Rebecca Dodd in Support of PGE's Modified Second Motion for Summary Judgment, Ex. 1 at 1-2 (June 23, 2021, PGE Letter to Waconda at 1-2), Ex. 3 at 2-3 and 7-8 (July 30, 2021, PGE Letter to Waconda at 2-3 and 7-8), Ex. 5 at 2 (August 20, 2021, PGE Letter to Waconda at 2-3), Ex. 7 at 2 (September 14, 2021 PGE Letter to Waconda at 2) (Sept. 15, 2021).

¹⁶ See Amended Complaint.

¹⁷ Waconda's Reply at 9.

¹⁸ *Id.* at 8-9.

conclusions about PGE's legal position from its motion for summary judgment rather than Waconda's conjecture.

IV. CONCLUSION

For all these reasons, PGE respectfully requests that the Commission deny Waconda's Motion to Stay and impose a November 9, 2021, deadline for Waconda to respond to PGE's Modified Second Motion for Summary Judgment.

DATED this 26th day of October 2021.

Respectfully submitted,

s/ Donald Light

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