MARKOWITZ HERBOLD PC

Jeffrey S. Lovinger | Lawyer
JeffreyLovinger@MarkowitzHerbold.com

February 27, 2019

Via Electronic Filing

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

Re: UM 1967 - Sandy River Solar, LLC v. Portland General Electric Company

Attention Filing Center:

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

Thank you for your assistance.

Very truly yours,

Jeffrey S. Lovinger

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1967

SANDY RIVER SOLAR, LLC, Complainant, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	**PORTLAND GENERAL ELECTRIC COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT** ***Oral Argument Requested***

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I. MOTION

Pursuant to OAR 860-001-0420 and ORCP 47, Portland General Electric Company ("PGE") moves for summary judgment against complainant Sandy River Solar, LLC's ("Sandy River") second claim for relief in the above-captioned complaint proceeding. PGE requests that the Commission deny Sandy River's second claim for relief and paragraphs 3 and 7 of Sandy River's prayer for relief. PGE requests oral argument on this motion.

II. INTRODUCTION

This dispute centers on the Small Generator Interconnection Procedures in OAR 860-082-0060. Interconnection customer Sandy River's second claim for relief asks the Commission to require PGE to allow Sandy River to use a third-party consultant to construct interconnection facilities and system upgrades on PGE's distribution system. The rules do not permit the relief that Sandy River seeks, and therefore Sandy River's second claim should be denied as a matter of law. Resolving this issue now, before proceeding any further with discovery or the current procedural schedule for testimony and a hearing, will simplify and expedite the resolution of this proceeding. The legal issue presented for resolution in this motion is the core legal issue in the case and the threshold question regarding the relevance of many of Sandy River's data requests. By resolving this motion for summary judgment, the Commission will resolve the key dispute between the parties and this may allow the parties to settle the remaining subsidiary issues or will greatly simplify their resolution if the case must proceed to hearing.

III. BACKGROUND

A. FACTS

Sandy River is a limited liability company proposing to construct a 1.85 megawatt solar qualifying facility ("QF") and to interconnect to PGE's 13 kV Dunns Corner distribution feeder near Sandy, Oregon.[1] PGE and Sandy River have completed all studies required by OAR Chapter 860, Division 082.[2] PGE has informed Sandy River that there are improvements to the Dunns Rd substation that must occur before the Sandy River project can safely and reliably interconnect to PGE's system.[3] PGE has explained that these substation improvements are currently scheduled to be completed in February 2020 as part of higher queued interconnection request SPQ0070.[4] In July 2018, PGE informed Sandy River that it would take approximately 18 months (until about February 2020) to complete the Sandy River interconnection and place it in service.[5] PGE and Sandy River have not yet executed an interconnection agreement.[6]

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[1] First Am. Compl. ¶¶ 2, 8 (Sep. 27, 2018); Compl., Att. C at 3 (Revised Facility Study and Redline Revised Facility Study) (Aug. 24, 2018).

[2] Am. Compl. ¶¶ 12, 15, 23, 26, 70; Answer to First Am. Compl. ("Answer") at 1, 4-5, ¶¶ 12, 15, 23, 26, 70 (Oct. 9, 2018).

[3] Compl., Att. C at 6 (Revised Facility Study and Redline Revised Facility Study: "The construction completion date of this Sandy River Solar project is contingent on the construction and completion of a higher queued project."); Answer at 2, ¶ 66 and Ex. J; *see also* Declaration of Molly Honoré in Support of PGE's Mot. for Partial Summ. J. ("Honoré Decl."), Ex. 1 at 6 (PGE Resp. to Data Request 11: "As PGE has previously explained to Sandy River Solar, most of the time provided for in the estimated construction schedule is to allow time for higher queued interconnection project SPQ0070 to be completed. That project includes the installation of new relays at the substation that are a necessary requirement for the Sandy River interconnection.") at 8 (PGE Resp. to Data Request 14: "… [T]he SEL-487E transformer relay requirements being installed under SPQ0070 must be complete for Sandy River Solar to interconnect. The estimated construction schedule proposed as part of the Revised Facilities Study includes time to allow the completion of such work as part of the interconnection of SPQ0070, which is a necessary requirement for the Sandy River Solar interconnection.").

[4] *Id.* at 4 and 10 (PGE Resp. to Data Request 1 and Attachment 001-G) (indicating that SPQ0070 has a scheduled in-service date of Feb. 17, 2020).

[5] First Am. Compl. ¶¶ 69-70, 78; Answer at 2, ¶¶ 69-70, and Ex. J at 1; Compl., Att. C at 5-6 (Revised Facility Study); *see also* Honoré Decl., Ex. 1 at 4, 6, 8, and 10 (PGE Resp. to DR 1, PGE Resp. to DR 11, PGE Resp. to DR 14, and Attachment 01-G).

[6] First Am. Compl. at 1.

On August 2, 2018, Sandy River demanded by letter that PGE allow Sandy River to hire a third-party consultant to construct the required interconnection facilities and system upgrades.[7] On August 10, 2018, PGE responded and explained that OAR 860-082-0060(8)(f) does not require PGE to agree to allow Sandy River to hire a third-party consultant, and that PGE was not willing to agree under the circumstances.[8] In response, Sandy River filed the complaint in this proceeding. Sandy River's second claim for relief and paragraphs 3 and 7 of Sandy River's prayer for relief asks the Commission to require PGE to grant Sandy River's request to hire a third-party consultant, on the basis that it was "unreasonable" for PGE to refuse Sandy River's request.[9] The hearing date is currently set for May 9, 2019.[10]

Renewable Energy Coalition ("REC") recently petitioned to intervene in this complaint proceeding.[11] REC states that it intends to align itself with Sandy River, including with respect to Sandy River's second claim for relief.[12]

Contrary to the positions of both Sandy River and REC, the rules do not require PGE to agree to the use of third-party contractors to perform work on PGE's electrical system, and the rules simply do not provide for application of any "reasonableness" standard on PGE's consideration of requests by interconnection customers to hire third-party contractors.

[7] First Am. Compl. ¶ 81; Answer ¶ 81 and Ex. N at 1-2 (Aug. 2, 2018 Letter from Sandy River to PGE).
[8] First Am. Compl. ¶ 84; Answer ¶ 84 and Ex. O at 1-2 (Aug. 10, 2018 Letter from PGE to Sandy River).
[9] First Am. Compl. ¶¶ 117-32 and Prayer for Relief ¶¶ 3, 7.
[10] Docket No. UM 1967, ALJ Memorandum at 1 (Nov. 14, 2018) (prehearing conference memorandum setting procedural schedule).
[11] Docket No. UM 1967, REC's Petition to Intervene (Jan. 29, 2019).
[12] *Id.* ¶ 7.

B. STATUTORY FRAMEWORK/HISTORY OF RULES

1. Initial Rulemaking for OAR 860-082-0060 (AR 521).

The Commission adopted OAR 860-082-0060 pursuant to its authority under the federal Public Utility Regulatory Policies Act of 1978 ("PURPA"), which vests authority in state regulatory agencies to implement rules that require utilities like PGE to offer to purchase energy from QFs.[13] In July 2007, the Public Utility Commission of Oregon's Staff ("Staff") initiated Docket No. AR 521 to adopt rules respecting small generator interconnection with a public utility's electrical system.[14] In order to qualify as "small generators" under the rules, the customer must have a nameplate capacity of 10 megawatts or less.[15]

Staff held workshops for participants to discuss the proposed rules and file comments. Staff initially contemplated the involvement of third-party consultants in the design of interconnection facilities. Staff's initial proposed rule stated that the parties "may agree to permit the Interconnection Customer to separately arrange for a third party to design and estimate the construction costs for the required Interconnection Facilities."[16]

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[13] 16 USC § 824a-3(a), (f)(1).
[14] *In the Matter of a Rulemaking to Adopt Rules Related to Small Generator Interconnection*, Docket No. AR 521, Compl. (July 24, 2007).
[15] OAR 860-082-0005(1).
[16] Honoré Decl., Ex. 2 at 5 (Docket No. AR 521, Staff Second Set of Comments and Workshop Edits re Oregon Small Generator Interconnection PUC Staff's Proposed Rules at 23, Draft OAR 860-082-055(6)(b) at 23 (Oct. 2, 2007)). Attached to the Honoré Decl. are courtesy copies of excerpts of certain administrative filings from the Commission and other governmental agencies, and documents and records in the files of the Commission that have been made a part of the files in the regular course of performing the Commission's duties. For the sake of space, PGE has provided excerpts of the relevant portions of these documents. However, the Commission can take official notice of these documents in their entirety as part of issuing a decision on this motion. OAR 860-001-0460(1)(d).

During the commenting process, John Lowe,[17] on behalf of Sorenson Engineering, Inc., advocated to change Staff's proposed language to instead give the interconnection customer "the option" to use third-party consultants in the interconnection process.[18] Sorenson wanted the language to state that the Interconnection Customer "shall have the option of having an agreed-upon third party consultant design and estimate the construction costs for the required Interconnection Facilities."[19]

Because Sorenson's proposed "option" language would give the interconnection customer the right to demand the use of third-party contractors, Sorenson included some additional language in its proposed changes that would protect the public utility. The additional language would require the interconnection customer to "waive the required timeframes associated with the Interconnection Facilities Study, and hold the Utility harmless with regard to its results" if a third-party consultant were used.[20] Energy Trust of Oregon, Inc. ("ETO") also commented on the proposed rules, and similarly advocated to give the interconnection customer "the option" to have system upgrades be performed by an independent contractor.[21]

PGE responded to the comments by emphasizing that significant safeguards would be required for PGE to allow third-party contractors to work on its system.[22]

[17] Mr. Lowe has offered testimony in this proceeding on behalf of REC. *See* Docket No. UM 1967, REC/100, Lowe (Feb. 7, 2019).
[18] Honoré Decl., Ex. 3 at 5-6 (Docket No. AR 521, Comments of Sorenson Engineering, Inc. at 5-6 (Nov. 27, 2007)).
[19] *Id*. at 6.
[20] *Id*.
[21] Honoré Decl., Ex. 4 at 3 (Docket No. AR 521, ETO's Comments at 3 (Nov. 9, 2007)).
[22] Honoré Decl., Ex. 5 at 6-7 (Docket No. AR 521, PGE's Comments at 3-4 (Nov. 27, 2007)).

Further, PGE commented that "significant additional protections" would be needed beyond the proposed rules, if Sorenson and ETO's changes were adopted.[23]

Sorenson's and ETO's proposed changes were not adopted. Following the initial comment period, the Commission "substantially revised the proposed rules in response to the comments received from the rulemaking participants, as well as to further refine and clarify the rules."[24] The Commission then re-filed the revised proposed rules and established a new schedule for public comment.[25] The revised rules did not include the language proposed by Sorenson or ETO that would have given the interconnection customer "the option" to use a third-party contractor. Instead, the Commission modified the rules slightly, but retained the permissive language from the original draft.[26] The final rule 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. [27]

2. UM 1610 history

The use of third-party contractors in the interconnection process was revisited in 2012, in general policy Docket No. UM 1610. Although the parties to that docket discussed revising the current rules to give QFs the right to use third-party contractors

[23] *Id*. at 3.
[24] Honoré Decl., Ex. 6 at 1 (Docket No. AR 521, Memorandum and Notice of Workshop at 1 (June 4, 2008)).
[25] *Id.*
[26] *Id*. at 6 (Draft Small Generator Interconnection Rules at 22, Section 860-082-0060(8)(f)).
[27] OAR 860-082-0060(8)(f).

under certain conditions, no changes were ultimately adopted. The parties—including REC—understood that the issue would be revisited in a later general policy docket.

The Commission opened Docket No. UM 1610 to investigate issues related to QF contracting and pricing.[28] PGE and REC both intervened in that proceeding,[29] along with other public utilities and QF-aligned parties.[30] Staff proposed an initial list of issues relating to PURPA implementation and QF contracting.[31] The initial issues list included "Issue VII.B," which addressed the use of third-party contractors:

> Should the interconnection process 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?[32]

The parties responded to the proposed issues list to address disputed issues, including VII.B. REC argued to include Issue VII.B in the issues list because it wanted the Commission to "consider specific and limited revisions to its interconnection rules, practices, and policies" to improve the interconnection processes for QFs.[33] In other words, REC understood that the current rules did not allow the QF to demand to use third-party contractors, and wanted the Commission to consider revisions to its current rules that would give QFs that option.

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[28] *In the Matters of Idaho Power Company, Application to Revise the Methodology Used to Determine Standard Avoided Cost Prices and Motion for Temporary Stay of Obligation to Enter into New Power Purchase Agreements with Qualifying Facilities, and Request to Revise Standard Contract Avoided Cost Prices paid to Qualifying Facilities under Schedule 85*, Docket Nos. UM 1590 & UM 1593, Order No. 12-146 at 1, 2 (Apr. 25, 2012).

[29] *In the Matter of Public Utility Commission of Oregon, Staff Investigation Into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, PGE's Petition to Intervene (July 10, 2012); Docket No. UM 1610, REC's Petition to Intervene (Aug. 1, 2012).

[30] *See, e.g.*, Docket No. UM 1610, Idaho Power Company's Petition to Intervene (July 11, 2012); Docket No. UM 1610, Community Renewable Energy Association's Petition to Intervene (Aug. 2, 2012).

[31] Honoré Decl., Ex. 7 (Docket No. UM 1610, Staff's Proposed Issues List (Oct. 3, 2012)).

[32] *Id.* at 6.

[33] Honoré Decl., Ex. 8 at 9 (Docket No. UM 1610, REC Resp. to Disputed Issues at 6 (Oct. 10, 2012)).

The ALJ finalized the issues list on October 25, 2012, including a revised Issue "7.B"[34] as recommended by Staff: "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?"[35] The parties addressed the issues in multiple phases. Phase I did not include Issue 7.B.[36] Phase II, which commenced in February 2014, initially included Issue 7.B.[37] However, in 2015 the parties agreed to remove Issue 7.B from Phase II and address it either in a third phase of Docket No. UM 1610, or in a separate general policy docket following completion of Phase II.[38]

Issue 7.B has so far not been addressed in UM 1610, and a separate docket has not been opened to permit further discussion of the issue. The rules therefore remain unchanged, and—as previously recognized by REC—do not give the QFs the right to use third-party contractors in the interconnection process.

3. Applicable Standards for Summary Judgment.

A defendant may move for summary judgment in defendant's favor against all or any part of the claims asserted against it.[39] 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

[34] The Commission stopped using roman numerals when it issued its revised Issues List.
[35] Docket No. UM 1610, ALJ Ruling, Appendix A at 3 (Oct. 25, 2012); *see also* Docket No. UM 1610, Staff's Response to Disputed Issues at 2 (Oct. 10, 2012).
[36] Docket No. UM 1610, ALJ Ruling, Appendix A at 1-3 (Dec. 21, 2012).
[37] Docket No. UM 1610, Order No. 14-058 at 32, Appendix A at 3 (Feb. 24, 2014).
[38] Honoré Decl., Ex. 9 at 10 (Docket No. UM 1610, Parties' Brief in Support of Stipulation Re: Issues List at 10 (Feb. 26, 2015)).
[39] 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 thereof.").

party is entitled to prevail as a matter of law."[40] 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 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."[41]

For purposes of summary judgment, "[a] material fact is one that, under applicable law, might affect the outcome of a case."[42] 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.[43]

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.[44] 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.[45]

Because OAR 860-082-0060(8)(f) does not give a QF the right to unilaterally opt to use a third-party consultant to complete interconnection facilities and system upgrades

[40] ORCP 47 C.
[41] *Id*.
[42] *Zygar v. Johnson*, 169 Or App 638, 646 (2000) (citation omitted).
[43] *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).
[44] *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.").
[45] ORCP 47 C.

on the public utility's system, Sandy River's second claim for relief must fail as a matter of law.

IV. ARGUMENT

This motion turns on the plain language in OAR 860-082-0060(8)(f):

> 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.[46]

Sandy River alleges that this language imposes on PGE the following obligations:

> 1. "[T]o not unreasonably refuse to grant its consent" to allow Sandy River "to hire a third-party consultant to complete the interconnection facilities and system upgrades[;]"[47]
>
> 2. "[T]o provide a list of approved third-party consultants[;]"[48] and
>
> 3. "[T]o inform [Sandy River] of the process upon which PGE will review any third-party consultant selected by [Sandy River] to determine if they are qualified and have the experience and knowledge to properly and safely do the work."[49]

None of those obligations exist anywhere in the rules. To the contrary, the plain language of OAR 860-082-0060(8)(f) allows PGE to withhold its consent to allow the small generator interconnection customer to use a third-party contractor or consultant to construct interconnection facilities or system upgrades. The regulation as written makes sense because PGE owns the interconnection facilities and system upgrades, and has affirmative obligations to other QFs and customers to maintain its systems and ensure

[46] OAR 860-082-0060(8)(f); *see also* Am. Compl. ¶¶ 118-19.
[47] *Id.* ¶ 120.
[48] *Id.* ¶ 122.
[49] *Id.* ¶ 124.

they operate safely and reliably. Imposing an amorphous reasonableness standard onto the regulations would be inefficient and unworkable for small interconnection projects.

Furthermore, the Commission, PGE, and REC have already acknowledged that the rules currently do not allow an interconnection customer to force utilities to permit the customer to use third-party contractors. The Commission may decide to open a general policy docket allowing interested parties to weigh in on revisions to OAR 860-082-0060(8)(f), and to address concerns Sandy River and REC have about the current rules. However, it is not proper in this case-specific proceeding for Sandy River and REC to impose an obligation on PGE that does not yet exist.

A. THE TEXT AND CONTEXT OF OAR 860-080-0060(8)(F) DO NOT REQUIRE PGE TO PERMIT SANDY RIVER TO HIRE A THIRD-PARTY CONSULTANT.

The Commission should first examine the text and context of OAR 860-080-0060(8)(f) to determine its meaning.[50] "[T]here is no more persuasive evidence of the intent" of the rulemaking authority than "the words by which [that authority] undertook to give expression to its wishes."[51] The text and context of this rule make perfectly clear that the public utility is not required to agree, under any circumstances, to permit small generator interconnection customers to use third-party contractors to perform work on the public utility's system.

[50] *State v. Gaines*, 346 Or 160, 171-72 (2009).
[51] *Id*. at 171 (quotation marks and citations omitted); *see also PGE Co. v. Bureau of Labor & 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." (citation omitted).

1. The plain language of the regulation gives PGE the discretion to decide whether to allow the interconnection customer to use a third-party consultant.

Under OAR 860-082-0035, the default rule is that the public utility constructs, owns, operates, and maintains interconnection facilities and system upgrades.[52] OAR 860-082-0060(8)(f) is an optional modification of this default rule. It permits the public utility to use its own third-party contractor, or gives the utility the discretion to permit the interconnection customer to use a third-party contractor to construct the facilities and upgrades. The text of OAR 860-080-0060(8)(f) is clear: "a public utility and an applicant *may* agree in writing to allow the applicant to hire a third-party consultant . . . ."[53] The regulation provides only that the public utility "may" agree—it is not required to permit the applicant to hire a third-party consultant, and the public utility is not subject to any reasonableness standard with respect to its decision.[54] "May" is

[52] *See* OAR 860-082-0035(2) ("The public utility *constructs*, owns, operates, and maintains the interconnection facilities.") (emphasis added); OAR 860-082-0035(4) ("A public utility must design, procure, *construct*, install, and own any system upgrades to the public utility's transmission or distribution system necessitated by the interconnection of a small generator facility.") (emphasis added).

[53] OAR 860-080-0060(8)(f) (emphasis added).

[54] As stated above, contrary to the allegations in Sandy River's First Amended Complaint, OAR 860-080-0060(8)(f) does not include any language requiring the public utility to provide a list of approved third-party consultants, or to inform the applicant about the public utility's process of reviewing proposed third-party consultants. Interconnection customers recently proposed in comments during FERC's formal rulemaking for revisions to the *large* generator interconnection rules that FERC require utilities to maintain a list of contractors available to interconnection customers. Honoré Decl., Ex. 10, ¶ 110 (*Reform of Generator Interconnection Procedures & Agreements*, 163 FERC ¶ 61,043, 18 CFR Part 37, Order No. 845 (Apr. 19, 2018)). (Available at https://www.ferc.gov/whats-new/comm-meet/2018/041918/E-2.pdf.) As discussed below, the procedures and agreements applicable to large qualifying facilities—under FERC and as adopted by the Oregon Public Utility Commission—are significantly different than those applicable to small generators, and expressly include an option to build. *See* A.2, *infra*. Even under the rules applicable to large QFs, however, FERC rejected the customers' requests. FERC determined that the existing rules did not impose an obligation on utilities to provide a list of approved contractors to interconnection customers, and declined to adopt that change in revisions to the rules. Honoré Decl., Ex. 10, ¶ 110 (163 FERC ¶ 61,043, Order No. 845.

permissive, not mandatory. It gives PGE the authority to agree to allow the applicant to hire a third-party consultant, but does not require PGE to agree.[55]

The Commission cannot ignore the use of "may" in the regulation, and cannot interpret the regulation to mean that a public utility *must* agree to permit an applicant to hire a third-party consultant.[56] If the Commission had intended to say that a public utility *must* agree to use third-party consultants to construct interconnection facilities and system upgrades—as Sorenson and ETO advocated during the rulemaking process—the Commission would have said so.

2. The Commission knew how to mandate use of third-party consultants when it wanted to.

The Commission knew exactly how to express its intent to require the use of third-party consultants under certain circumstances in the interconnection process, because it did just that for large generators in the Standard Oregon Qualifying Facility Large Generator Interconnection Procedures ("QF-LGIP"). The Commission adopted the QF-LGIP in Docket No. UM 1401, Order No. 10-132, on April 7, 2010. Section 13.4 governs the use of third-party consultants for interconnection studies, and states:

> 13.4 **Third Parties Conducting Studies**
>
> If (i) at the time of the signing of an Interconnection Study Agreement there is disagreement as to the estimated time to complete an Interconnection Study, (ii) Interconnection Customer receives notice pursuant to Articles 6.3, 7.4 or 8.3 that Transmission Provider will not complete an Interconnection Study within the applicable timeframe for such Interconnection Study, or (iii) Interconnection

[55] *PGE*, 317 Or at 610 ("[W]ords of common usage typically should be given their plain, natural, and ordinary meaning." (citation omitted)); *Nibler v. Oregon Dept. of Transp.*, 338 Or 19, 26 (2006) ("[T]he word 'may' ordinarily denotes permission or the authority to do something." (citation omitted)).
[56] ORS 174.010 (a judge cannot "insert what has been omitted, or [] omit what has been inserted" when interpreting a statute or regulation).

> Customer receives neither the Interconnection Study nor a notice under Articles 6.3, 7.4 or 8.3 within the applicable timeframe for such Interconnection Study, **then Interconnection Customer may require Transmission Provider to utilize a third party consultant reasonably acceptable to Interconnection Customer and Transmission Provider to perform such Interconnection Study under the direction of Transmission Provider**. At other times, Transmission Provider may also utilize a third party consultant to perform such Interconnection Study, either in response to a general request of Interconnection Customer, or on its own volition.[57]

The provision continues and provides further restrictions on the use of a third-party consultants, including requiring that they be subject to Article 26 of the Standard Oregon Qualifying Facility Large Generator Interconnection Agreement ("QF-LGIA") (provisions generally applicable to subcontractors), and limited to situations where the public utility "determines that doing so will help maintain or accelerate the study process" for the interconnection customer and otherwise not interfere with the public utility's progress on studies for other pending interconnection requests.[58]

The QF-LGIA also expressly includes an "Option to Build," which gives the Interconnection Customer the right to assume responsibility for the design, procurement, and construction of the interconnection facilities and stand alone network upgrades.[59] The Option to Build only applies when the utility notifies the Interconnection Customer that the customer's designated in-service, initial synchronization, and commercial

[57] *In the Matter of Public Utility Commission of Oregon, Investigation into Interconnection of PURPA Qualifying Facilities With Nameplate Capacity Larger Than 20 Megawatts to a Public Utility's Transmission or Distribution System,* Docket No. UM 1401, Order No. 10-132, Appendix A at 40 (QF-LGIP at Section 13.4) (Apr. 7, 2010) (emphasis added).
[58] *Id*.
[59] *Id*., Appendix B at 23 (QF-LGIA at Section 5.1.3).

operation dates are unacceptable.[60] If the Interconnection Customer exercises the Option to Build, a number of safeguards apply to protect the utility, including, but not limited to:

- The Interconnection Customer must use "Good Utility Practice" to construct the facilities and upgrades and using specifications provided in advance by the utility;

- The Interconnection Customer's construction must comply with all requirements of law and reliability standards to which the utility would be subject when the utility constructs facilities and upgrades;

- The utility must review and approve the design and construction of the facilities and upgrades;

- Prior to construction, the Interconnection Customer must provide the utility with a schedule for construction, and must respond promptly to requests for information from the utility;

- At any time during construction, the utility has the right to gain unrestricted access to inspect the construction of the facilities and upgrades;

- The customer must indemnify the utility for claims arising from the customer's construction of the facilities and upgrades; and

- The customer must deliver to the utility "as-built" drawings, information, and any other documents reasonably required by the utility to assure the facilities and upgrades are built to the standards and specifications required by the utility.[61]

In other words, where the Commission intended to include an obligation on the public utility to allow interconnection customers to construct interconnection facilities and system upgrades—and to use third-party consultants to do that work—it did so.

[60] *Id*. Oregon's QF-LGIA mirrors the LGIA under FERC. FERC recently adopted rules that expanded the Option to Build beyond circumstances when the utility does not accept the customer's designated dates. Honoré Decl., Ex. 10 at 14 (163 FERC ¶ 61,043, Order No. 845 at Section 5.1.3). FERC recognized that the QF-LGIA had sufficient safeguards to protect utilities in the event the customer exercises the option, including the safeguards in Section 5.2. *Id*. ¶¶ 91, 93-94, 103. Further, FERC refused to apply these same changes to the SGIA and SGIP (which do not include the option to build), noting that "the differences between the large and small interconnection processes are significant enough to prevent us from acting in this proceeding." *Id*. at ¶ 549.

[61] Docket No. UM 1401, Order No. 10-132, Appendix B at 17-19, Section 5.2.

"[W]hen the legislature includes an express provision in one statute but omits such a provision in another statute, it may be inferred that such an omission was deliberate."[62] Had the Commission intended to allow a small generator interconnection customer to require a public utility to use a third-party consultant, it would have used language similar to that used in the QF-LGIP and QF-LGIA, and it would have included the extensive safeguards enumerated—in detail—in Section 5.2 of the QF-LGIA. The fact that the Commission omitted that language from the small generator rules demonstrates the Commission did not intend to impose the same standard in the small generator interconnection process. Instead, the Commission meant what it said in OAR 860-082-0060(8)(f): it intended to leave it up to the public utility's discretion whether to permit the use of third-party consultants with small QFs.[63]

3. Sandy River's interpretation of the rule would create an impermissible internal conflict in the rule.

The plain language of OAR 860-082-0060(8)(f) also cannot permit an interconnection customer to dictate the selection of and use of third-party consultants for

[62] *Emerald People's Utility Dist. v. Pac. Power & Light Co.*, 302 Or 256, 269 (1986) (citation omitted).

[63] The same distinction applies under the Federal Energy Regulatory Commission's interconnection rules governing interconnection to PGE's transmission system under PGE's Open Access Transmission Tariff ("OATT"). Under its FERC-mandated and approved OATT, PGE is required to allow a large interconnection customer (capacity greater than 20 MW) to hire a third-party consultant to construct needed interconnection facilities and stand-alone network upgrades under certain limited circumstances. (Honoré Decl., Ex. 11 at 7-11 (PGE Open Access Transmission Tariff, Volume No. 8 ("PGE-8"), Attachment O, Appendix 6, Standard Large Generator Interconnection Agreement (LGIA) at Sections 5.1-5.3).) (Available at http://www.oasis.oati.com/PGE/PGEdocs/PGE-8_OATT.pdf.) But PGE's FERC-mandated and approved OATT does not require PGE to agree to allow small interconnection customers (capacity of 20 MW or less) to hire third-party consultants to construct interconnection facilities or system upgrades. (*See generally*, *id.* at 2-4 (PGE-8, Attachment M, Small Generator Interconnection Procedures.) Instead, under the small generator interconnection procedures found in the OATT, PGE remains free to insist that PGE or its consultants will construct any required interconnection facilities or system upgrades. (*Id*. at 4 (PGE-8, Attachment M at Section 3.5.4.)

the interconnection process, because it would render additional language in that same provision meaningless.[64]

The first sentence of OAR 860-082-0060(8)(f) provides, without limitation, that the "public utility may contract with a third-party consultant to complete the interconnection facilities and system upgrades identified in the facilities study."[65] It does not give the interconnection customer any oversight or input into that decision—it leaves it up to the discretion of the utility.

However, under Sandy River's interpretation of the second sentence of that rule, the interconnection customer would have control over the public utility's decision with respect to third-party contractors. As discussed above, Sandy River requires the second sentence to be interpreted as follows:

> A public utility ~~and an applicant may~~ [*must*] agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades [*so long as applicant's request is reasonable*], subject to public utility oversight and approval.

If the rule is read to require the utility to allow the interconnection customer to hire a third-party consultant, then the customer would effectively have a "veto" over the utility's authority to hire its own consultant to conduct the work. There would be no meaning to the first sentence of the rule.

A proper reading of the entire provision that harmonizes the first two sentences gives the public utility full authority and discretion to dictate the use of third-party

[64] *See* ORS 174.010 (when possible, the court should adopt statutory construction that will give effect to all particulars of a statute); *see also Brown v. Saif Corp.*, 361 Or 241, 281 (2017) (courts should not interpret statutes in a way that renders a provision meaningless, particularly when the result is to "conclude that an entire section that the legislature took the trouble to enact has no effect whatever.").
[65] OAR 860-082-0060(8)(f).

contractors. The public utility *may* choose to hire its own third-party contractor, or it *may* agree to permit the interconnection customer to hire a third-party contractor. By clear implication, the public utility may also decide to complete the interconnection facilities and systems upgrades on its own.[66] Regardless, the public utility – not the interconnection customer – has the sole authority to make that decision.

B. IF THE COMMISSION HAD INTENDED TO GIVE THE QF THE RIGHT TO USE THIRD-PARTY CONTRACTORS, IT WOULD HAVE INCLUDED MORE PROTECTIONS FOR THE PUBLIC UTILITY IN THE EVENT THE QF EXERCISED THAT RIGHT.

The rulemaking history of OAR 860-082-0060(8)(f), and a comparison of similar provisions in the QF-LGIP, show that the plain language must control, because the Commission would have included more protections for the public utility had it intended to allow QFs to demand to use third-party contractors.

1. The rulemaking history supports PGE's interpretation.

Although legislative history may be considered as part of statutory interpretation, regardless of whether a judge finds any ambiguity in the language of the statute, a court (and in this case, the Commission) has discretion to decide how much weight to give that history.[67] Furthermore, "not all legislative history is entitled to equal weight . . . ."[68]

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[66] Indeed, the default assumption, stated expressly in OAR 860-082-035(2) and (4), is that the utility will construct the required interconnection facilities and systems upgrades.

[67] ORS 174.020; *Gaines*, 346 Or at 172. The text and context of the language of the statute or rule "remain primary, and must be given primary weight in the analysis." *Id.* at 171; *see also Ransom v. Radiology Specialists of Nw.*, 363 Or 552, 576 (2018) ("If the legislature's intentions as revealed in the legislative history do not find expression in the text of the law, that legislative history is of 'no weight' at all." (citation omitted)).

[68] *Topolic v. Rolie*, 131 Or App 72, 76 (1994) (citation omitted).

Statements made by persons who are not part of the rulemaking authority—even if they are made before a legislative committee—have little or no significance.[69]

Because the plain language of the rule gives PGE the discretion over whether to use third-party consultants, the rulemaking history should be given little to no weight—particularly to the extent that it is used to contradict the plain language. Regardless, the rulemaking history does not support Sandy River's interpretation of the rule.

Sorenson and ETO, through formal comments, advocated to change the rule to give the QF the "option" to use a third-party contractor.[70] A party with an option to do something has the right or power to force the desired result.[71] Sorenson and ETO therefore proposed rules that would have given the QF the right or power to choose whether to use a third-party contractor. This proposal would have essentially made the rules under the QF-LGIP and LGIA applicable to small generators as well. The Commission rejected these changes, and instead adopted language that gave the public utility that discretion. The history therefore shows that this exact issue was proposed by QF-aligned groups, considered by the Commission, and ultimately rejected when the Commission adopted the current rule.

Furthermore, when Sorenson proposed its revisions, it proposed additional language that would give the public utility protections in the event a third-party contractor was used, similar to the protections provided to the public utility when a large generator interconnection customer exercises the Option to Build: the interconnection

[69] *See id*.; *Thompson v. IDS Life Ins. Co.*, 274 Or 649, 652 (1976) (discounting a witness's comments before the House Committee on State and Federal Affairs as "of little or no help" in interpreting antidiscrimination law in insurance context, and noting comments made after a statute is enacted "are of little value").
[70] Honoré Decl., Ex. 3 at 6 (Docket No. AR 521, Comments of Sorenson Engineering, Inc. at 6); Honoré Decl., Ex. 4 at 3 (Docket No. AR 521, ETO's Comments at 3).
[71] *Black's Law Dictionary* (10th ed 2014).

customer would have to "waive the required timeframes associated with the Interconnection Facilities Study, and hold the Utility harmless with regard to its results . . . ."[72] Sorenson therefore recognized that giving QFs the right to use third-party contractors would impact the public utility, including creating liability concerns.

In response, PGE commented that even those additions would not be enough if the option language were adopted, and that "significant additional protections" would be needed beyond the proposed rules.[73] The fact that the current rules do not have either the option language, or the additional protections for the public utility, shows that the Commission could not have intended to allow a QF to control this process.

2. The Commission provided additional protections for the utilities in the QF-LGIP and QF-LGIA in connection with giving the QFs the option to use third-party contractors.

As discussed above, the QF-LGIP and QF-LGIA permit large generator interconnection customers to use third-party contractors, and give those customers the option to build the interconnection facilities and upgrades under certain circumstances. However, those rules contain a number of additional protections for the public utility. The rules specifically require the interconnection customer to retain all liability to the public utility for the acts of their contractor, and to indemnify the utility for claims arising from the customer's construction of the facilities and upgrades.[74] And the use of third-party contractors is limited to situations where the public utility or transmission provider determines that the use of the contractor will not interfere with the utility's work for other

[72] Honoré Decl., Ex. 3 at 6 (Docket No. AR 521, Comments of Sorenson Engineering, Inc. at 6).
[73] Honoré Decl., Ex. 5 at 6 (Docket No. AR 521, PGE's Comments at 3).
[74] Docket No. AR 1401, Order No. 10-132, Appendix A at 40 (QF-LGIP at Section 13.4) and Appendix B at 18, 66-67 (QF-LGIA at Sections 5.2(7) and 26.1).

pending interconnection requests.[75] Further, the QF-LGIA details certain safeguards that apply throughout the design and construction process that ensure the utility has sufficient oversight of the construction.[76] If the Commission had intended to give small QFs the right to construct upgrades on the utility's system over the utility's objection, the Commission would have established similar controls in the small generator rules.

C. IT MAKES SENSE THAT THE STANDARD OREGON QUALIFYING FACILITY SMALL GENERATOR INTERCONNECTION PROCEDURES ("SGIP") AND THE LGIP/LGIA TAKE DIFFERENT APPROACHES.

The small generator rules are supposed to be streamlined, less complex, and therefore easier for less sophisticated, small QFs. The process and other controls that need to be in place if a QF is going to take responsibility for construction on the utility's system, especially over the utility's objection, need to be significant, and built into the rule. The fact that the rule does not currently contain these protections means that Sandy River's interpretation of the rule must be rejected.

The plain language of the rule makes sense given the context of the interconnection process. The Tier 4 Interconnection Review process governed by OAR 860-082-0060 requires public utilities to approve applications to interconnect small generator facilities only "if the public utility determines that the safety and reliability of the public utility's transmission or distribution system will not be compromised by interconnecting the small generator facility."[77] The demands of small generator facilities must give way to the public utility's obligations to maintain the safety and reliability of

[75] *Id.*, Appendix A at 40 (QF-LGIP at Section 13.4).
[76] *Id*., Appendix B at 17-19 (QF-LGIA at Section 5.2).
[77] OAR 860-082-0060(2).

its system. This means that the public utility must have authority and discretion over whether to permit third-party consultants to perform work on the utility's system.

Furthermore, it would be impracticable to impose a reasonableness standard into the decision over whether to use third-party contractors for small generator interconnection facilities and system upgrades. Allowing an interconnection customer to hire a third-party consultant to construct the interconnection facilities and system upgrades that will become a part of PGE's system would unnecessarily complicate the interconnection process because PGE would need to develop and enter into a contractual relationship with the interconnection customer that establishes the standards to which the customer's third-party consultant would construct the improvements and that establishes and appropriately assigns responsibility, liability, testing, approval and oversight rights as between PGE, the interconnection customer, and the customer's third-party consultant. It is more complex and administratively burdensome for PGE to attempt to exercise appropriate control and oversight over a third-party consultant hired by the customer and lacking privity of contract with PGE, than it is for PGE to exercise the requisite control and oversight over its own employees or its own consultants, with whom PGE enjoys privity of contract.

Small QF interconnections are standardized in order to minimize transaction costs and ultimately to make such interconnections simpler and less burdensome than large QF interconnections.[78] As part of that simplification, the small QF interconnection rules lack many of the protections associated with the large QF interconnection rules. It is therefore

[78] *See, e.g.*, Honoré Decl., Ex. 12 at 2-3 (*In the Matter of Public Utility Commission of Oregon, Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 15-16 (May 13, 2005)).

impracticable and inappropriate to infer that a small QF interconnection customer has a right to compel the utility to approve the customer's use of a third-party consultant to construct the utility's facilities or improvements when the utility has expressed a preference to construct such improvements itself.

In addition, the public utility owes an obligation to interconnection customers higher in the queue. Practically, under many situations (including this case) the use of a third-party contractor will not expedite the interconnection process, because higher-queued projects still must be completed before lower-queued projects can be placed in-service.

D. ANY CHANGES TO THE COMMISSION'S RULE GOVERNING THIRD-PARTY CONSULTANTS SHOULD BE CONSIDERED, IF AT ALL, IN A GENERAL POLICY DOCKET, NOT IN THIS PROJECT-SPECIFIC COMPLAINT PROCEEDING.

The discussions in general policy Docket No. UM 1610 further show that the current rule prohibits the relief requested by Sandy River. If REC and Sandy River want to advocate for a rule change, the issue should be examined in a new general policy docket focusing on interconnection, and not in this case-specific proceeding.

REC and PGE both participated in Docket No. UM 1610,[79] which initially contemplated discussing modifications to the rules governing the use of third-party contractors in the interconnection process. REC acknowledged in that proceeding that the current rules do not permit an interconnection customer to control a public utility's decision to use third-party contractors. Specifically, REC stated that it wanted the Commission to consider a "potential solution" to concerns that REC had with respect to

[79] *See* Docket No. UM 1610, PGE's Petition to Intervene; *see also*, Docket No. UM 1610, REC's Petition to Intervene.

the interconnection process.[80] REC's solution was "allowing QFs the ability to use and contract with utility-approved third parties for portions of the interconnection work, from studies to construction."[81] REC stated further that it wanted the Commission to "consider specific and limited revisions to its interconnection rules, practices, and policies" that would broaden that role.[82]

In 2012, REC knew that the current rules did not permit QFs to elect any role for third-party contractors in the interconnection process. That is why REC advocated for a rule change. If the Commission chooses to address the use of third-party contractors, it should do so in a general policy docket. The issue is complicated and involves a number of long-term implications for public utilities. The parties to Docket No. UM 1601 knew this—that is why Issue 7.B expressly asked how to accomplish the QFs' goal. Interested parties need to be able to discuss this issue in more depth, and determine whether there is a functional way for successful interconnection customers to offer input into the use of third-party contractors in the interconnection process.

[80] Honoré Decl., Ex. 8 at 8 (Docket No. UM 1610, REC Resp. to Disputed Issues at 5).
[81] *Id.*
[82] *Id*. at 6.

V. CONCLUSION

For the foregoing reasons, PGE respectfully requests the Commission grant its motion for partial summary judgment and deny Sandy River's second claim for relief.

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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 97204-3730
Tel: (503) 295-3085
Fax: (503) 323-9105
JeffreyLovinger@MarkowitzHerbold.com
MollyHonore@MarkowitzHerbold.com