BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1967

SANDY RIVER SOLAR, LLC, Complainant, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	COMPLAINANT'S REPLY IN SUPPORT OF MOTION TO COMPEL

I. INTRODUCTION

Pursuant to OAR 860-001-0500(7), Sandy River Solar, LLC ("Sandy River") hereby files this reply in support of Complainant's Motion to Compel, filed on February 28, 2019. In its motion to compel, Sandy River sought to require PGE to respond to its Data Request No. 80, which requests:

> For each solar interconnection application submitted since January 2015, please provide:
>
> a. The Feasibility Study and any revised feasibility studies
>
> b. The System Impact Study and any revised system impact studies
>
> c. The Facilities Study and any revised feasibility studies
>
> d. The Interconnection Agreement and any revised interconnection agreement[1]

PGE argues that the request seeks information not relevant to this case, and that responding to the data request would be unreasonably burdensome. PGE also argues that

[1] Complainant's Motion to Compel at 4 (Feb. 28, 2019).

the probative value of the information sought is outweighed by the danger of unfair prejudice and confusion.[2]

The ALJ should grant Sandy River's request because, contrary to PGE's view, the information is highly relevant to the issues in this case because it is necessary to review in order to resolve Sandy River's complaint, and because the request is tailored to be the least burdensome approach possible. PGE's claim of the burden associated with producing the documents is unreasonable, and the provision of the documents themselves cannot work an undue prejudice to PGE.

II. BACKGROUND

Prior to its submission of testimony, on December 31, 2018, Sandy River filed a motion to compel PGE's production of certain information Sandy River requested and which PGE refused to provide. Among the information sought, Sandy River requested the production of various information related to other projects, including information that could be found in PGE's interconnection studies and agreements for those projects. In ruling on that first motion to compel, the ALJ denied the motion as it related to certain information, but noted that:

> Sandy River acknowledges that PGE may not have the requested information easily available and indicates a willingness to accept the underlying interconnection studies and agreements. Sandy River may request the underlying interconnection studies and agreements in a new data request, thereby allowing PGE to consider the request and respond.[3]

On February 6, 2019, Sandy River sent a data request number 80 to PGE, seeking the underlying interconnection studies and agreements, rather than information that PGE

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2 PGE Response at 4, 9.

3 February 5, 2019 Ruling at 7.

would have to glean from those documents. On February 20th, PGE responded to the Data Request, by providing only the interconnection studies and agreement for one additional project, and objecting to the provision of any other documents. Sandy River conferred with PGE, but was unable to agree to a resolution, and thus filed a motion to compel on February 28, 2019. PGE responded to that motion on March 22, 2019 ("PGE Response"), in accordance with a prior order of the ALJ establishing that date.[4]

In its Response, PGE continues to assert that the information is irrelevant to the case, overly burdensome to produce, and that it would work an unfair prejudice on PGE to have the information produced in this case. None of these objections justifies PGE's withholding of the documents, which it clearly possesses, and which are relevant to the issues in this proceeding.

III. LEGAL STANDARD

In a case before the Commission, discovery is available **"**regarding any matter, not privileged, that is relevant to the claim or defense of the party seeking discovery . . ."[5] Under the Commission's rules, information is relevant if it tends "to make the existence of any fact at issue in the proceedings more or less probable than it would be without the evidence."[6] Under the Commission's rules, discovery is not allowed if it is "unreasonably cumulative, duplicative, burdensome, or overly broad."[7]

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4 Prehearing Conference Memorandum (March 13, 2019).
5 ORCP 36B(1).
6 OAR 860-001-0450(1)(a).
7 OAR 860-001-0500(2).

IV. REPLY

A. The Interconnection Studies and Agreements for Recent Solar Projects Are Relevant to Sandy River's Claims that PGE's Interconnection Process Is Unworkable, Unreasonable, and that Sandy River is Being Harmed in that Process, and to Sandy River's Claims of Undue Discrimination by PGE

Sandy River has alleged, among other things, that PGE's actions in administering its interconnection queue are unreasonable, that PGE's process has become unreliable, and that, as an interconnection customer, Sandy River is unable to rely on information or timelines provided by PGE.[8] Sandy River has alleged that it has been harmed by unreasonable delays and process, and that its harm is connected to a larger problem with respect to PGE's interconnection process, and the company's approach to the topic overall.[9] Sandy River has alleged that PGE's process has essentially become unworkable for it, and seeks relief from the Commission in its complaint.

In light of these claims, how PGE has administered its interconnection process is demonstrably relevant. The documents requested in Data Request No. 80 are the best evidence of how PGE has administered its interconnection process, because it is through these documents that PGE implements that process. Thus, those studies are relevant because a review of those studies demonstrates that it is "more or less probable" that

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8 Sandy River/100, Snyder/2-3.

9 *Id.*; *See also* First Amended Complaint at 15-16 ("PGE's delays have caused and continue to cause economic damage to Sandy River Solar and compound to cause other delays harmful to Sandy River Solar. There continues to be a dispute over the cost to construct Sandy River Solar's interconnection facilities and system upgrades, the timeline during which those facilities and upgrades will be completed, the completeness of Sandy River Solar's System Impact Study and Facilities Study, and whether Sandy River Solar can hire a third party to complete the work.").

PGE's actions have been unreasonable, or that its process has broken down, than it would be without the evidence.[10]

PGE does not seriously dispute this logic, but instead seeks to convince the ALJ and the Commission that the case, strangely, is narrower than the issues alleged by Sandy River in its complaint. PGE argues that the case is really about whether Sandy River can insist, under the Commission's rules, on a right to hire a third-party to construct its interconnection facilities, and argues that this will be resolved as a matter of law, without regard to facts.[11] PGE thus implicitly argues that its administration of its interconnection process is not at issue in this case, and for this reason, the documents demonstrating its administration of its interconnection process are not relevant.

PGE is not in the driver's seat, however, when it comes to defining Sandy River's complaints. As described above, and throughout its motion to compel (as well as filings responding to PGE's motion for stay and motion for summary judgment), Sandy River's harm flows from PGE's administration of an unworkable interconnection process for small generator customers, including Sandy River. The fact that Sandy River sought, and continues to seek, as a remedy to that situation the ability to hire a third-party to construct its interconnection facilities does nothing to narrow the scope of the case. The ALJ should recognize PGE's tactic on this point, and address whether the interconnection

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10 OAR 860-001-0450(1)(a).

11 *See* PGE Response at 3 (asserting that the information Sandy River seeks is not relevant to the "primary legal issue before the Commission"); *See also id*. at 5-6 (arguing that Sandy River's use of a third-party is to be decided by summary judgment, and that the information sought is not relevant to any of Sandy River's prayers for relief).

studies and agreements are relevant to Sandy River's actual case before the Commission—not PGE's characterization of Sandy River's case for its own purposes.

Further, Sandy River has also alleged that PGE has discriminated against it by "not processing its interconnection application in a timely manner,"[12] "by hiring third-party consultants to complete its own interconnections or for other interconnection appli[cants],"[13] "by refusing to give its consent to allow Sandy River Solar to hire third-party consultants,"[14] by giving other interconnection "applicants shorter timelines to complete nearly identical interconnection requirements,"[15] and "by giving Sandy River Solar a longer timeline."[16] Thus PGE's actions with respect to other projects, as evidenced by the studies and agreements, are squarely relevant to that determination as well. Sandy River's assertions of discrimination necessarily require it to be able to review PGE's actions in other contexts, besides its own interconnection process.

The Court of Appeals has described the Commission's powers to prevent undue discrimination, and found that it is indeed an exercise that requires the Commission to look at the facts of any particular case.[17] And, it is important to recognize that a claim of

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12 First Amended Complaint at 24, ¶ 148.

13 *Id*. at ¶ 149.

14 *Id*. at ¶ 150.

15 *Id*. at ¶ 151.

16 *Id*. at ¶ 152.

17 *See Chase Gardens v. Oregon Pub. Util. Comm'n*, 131 Or App 602, 608 (1994) (holding that the Commission "must apply the terms 'undue or unreasonable preference or advantage,' or 'undue or unreasonable prejudice or disadvantage,' to a particular set of facts," and finding that the task for the Commission in claims of discrimination 'is to complete the general policy decision [of prohibiting a public utility from unjustly discriminating against a particular customer] by specifically applying it * * * to various fact situations'") (quoting *Springfield Educ. Ass'n v. Sch. Dist.,* 290 Or 217, 229 (1980)).

discrimination cannot, normally, be resolved by referring only to the facts associated with the complainant, because the claim, in and of itself, relates to how the complainant was treated in comparison to other similarly-situated individuals or projects. Courts have recognized that claims of discrimination in particular require reference to facts outside of the experience of the complainant alone.[18] The ALJ should not, therefore, allow PGE to deny Sandy River review of how PGE has treated other solar projects in the last few years, since it is essential that Sandy River review those instances in order to be able to confirm its view that PGE has unlawfully discriminated against it. This information is necessary to review in order to make it "more or less probable" that PGE's actions have constituted undue discrimination than it would be without the evidence, and thus this information is relevant.

PGE argues that the only way the information Sandy River seeks could be relevant is if Sandy River had requested that a third-party assist it by conducting the interconnection studies—making a distinction between the use of third-parties to conduct the studies versus a third-party assisting with the actual construction of the facilities.[19] But, PGE's view of the case is once again too narrow.

Sandy River is seeking a third-party to construct its facilities as a remedy to the fact that its interconnection process has been unreasonably delayed, that it cannot rely on PGE's information and timelines, and that it should have an opportunity to hire a third-

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[18] *See, e.g. Portland v. Bureau of Labor & Indus.*, 61 Or App 182, 189 (1982) ("Employment discrimination is rarely susceptible of direct proof, and proof of discrimination frequently depends on inferences drawn by the finder of fact from other evidence.").

[19] PGE Response at 8.

party under the circumstances to cut down on costs, and expedite its project. As explained in Sandy River's complaint:

> PGE's delays have caused and continue to cause economic damage to Sandy River Solar and compound to cause other delays harmful to Sandy River Solar. There continues to be a dispute over the cost to construct Sandy River Solar's interconnection facilities and system upgrades, the timeline during which those facilities and upgrades will be completed, the completeness of Sandy River Solar's System Impact Study and Facilities Study, and whether Sandy River Solar can hire a third party to complete the work.[20]

Sandy River seeks the ability to use a third-party's assistance as a remedy to the host of issues it has faced with PGE in its interconnection process, along with "any other such relief as the Commission deems necessary" in light of PGE's actions.[21] Sandy River's claims are broad enough to entitle Sandy River a review PGE's administration of its interconnection process as part of this case. The ALJ should reject PGE's argument on this point, which seems to be that one of the specific remedies sought by Sandy River somehow narrows the entire scope of the case, such that it is not entitled to explore PGE's actions in implementing an unworkable system for Sandy River.

It is also poignant that the rulemaking record associated with the Commission's rule on using third-party assistance to construct interconnection facilities shows that one of the very purposes of the rule was to allow a remedy for small generators that are aggrieved by the utility's actions in the interconnection process.[22] This highlights the fact that PGE's actions in administering an unworkable interconnection process are directly

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20 First Amended Complaint at 15-16.

21 *Id*. at 27.

22 The rulemaking record on this point is set forth in more detail in Sandy River's Response to PGE's Motion for Summary Judgment at 20-25 (March 26, 2019), and is not set forth in detail in this reply.

relevant to the relief that Sandy River seeks in this case by using a third-party's assistance.

B. The Information Sandy River Seeks Has High Probative Value

The information Sandy River seeks in its motion to compel has high probative value in this case. Without it, the Commission will have little to review in assessing Sandy River's claims that PGE's interconnection process has essentially become unreliable for small generators, and that the utility may be thwarting qualifying developers, including Sandy River, through the way in which it is administering its process. The interconnection studies and agreements go to the heart of Sandy River's claims on this topic, and they constitute the very information that must be reviewed.

C. The Probative Value Is Not Outweighed by A Danger of Unfair Prejudice, Confusion of the Issues, or Undue Delay

PGE argues that there would be unfair prejudice associated with providing the documents Sandy River seeks, and that this prejudice, or associated confusion, outweigh the probative value of the information Sandy River seeks. Specifically, PGE argues that it would need to provide clarity, and the case-specific context for each interconnection application in order for the Commission determine "whether any particular set of study results or interconnection agreements demonstrated mistakes or delays of the type alleged by Sandy River."[23] PGE goes further and argues that it would constitute unfair prejudice to allow the "documents to speak for themselves" as Sandy River had requested.[24]

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23 PGE Response at 10-11.

24 *Id.* at 11.

PGE's argument that providing the interconnection agreements and studies themselves would constitute unfair prejudice is not well-founded. First, PGE's defense relies on a somewhat misguided application of the Commission's rules. PGE cites the Commission's rules that relevant evidence "[m]ay be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay."[25] But this is not a rule providing for limitations on discovery; it is a rule governing admissibility.[26] And, it is clear that discovery is not limited based on considerations of admissibility.[27] Thus, PGE's argument that it would be prejudicial to *produce* the documentation is misplaced. Furthermore, to the extent PGE argues that it would be "confusing" to produce all of the information is also misplaced, because Sandy River is not seeking to add all of the studies to testimony. It is seeking to discover them for review. If PGE felt that something about the studies in Sandy River's testimony was unfairly prejudicial, that would be the time for PGE to raise its objections—not now.

More to the point, Sandy River does not believe it is persuasive at all for PGE to argue that unfair prejudice could come about by PGE's production of documents of this type. If the documents themselves tell a story that reflects poorly on PGE's interconnection process, that is clearly relevant to Sandy River's claims, and PGE cannot equate that with unfair prejudice. To the contrary, it would be a demonstration of harm to

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25 OAR-001-0450(1)(c).

26 *See id.* (setting forth that evidence may be "excluded" if there is a danger of unfair prejudice, and describing this after discussing admissibility of evidence in subpart "b").

27 *See* ORCP 36B(1) ("It is not a ground for objection that the information sought [in discovery] will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").

PGE and other interconnection customers, and a consideration that the Commission clearly should have in front of it as it decides Sandy River's case.

PGE's arguments about the complexities of the interconnection agreements and studies is also overblown. The studies, like any document, can speak for themselves, and PGE will be free to respond to any characterizations Sandy River makes about them. If Sandy River unfaithfully characterized them, which Sandy River would not intend to do, then PGE could respond, but PGE should not be allowed to pre-judge some future action it thinks Sandy River would take, and argue that it should be sheltered from providing the information on that basis.

PGE's approach to this topic also feels like a shell-game. When Sandy River first requested that PGE provide certain information related to its interconnection studies and agreements, PGE argued that PGE cannot be required to do so, because that is too burdensome to go through that process.[28] Thus, Sandy River asked for the documents themselves, so that they could simply show what they show, and so that Sandy River could do any required analysis itself. Now PGE argues that providing the documents themselves is overly burdensome, and that if the documents were allowed to "speak for themselves," that this "would risk creating confusion and prejudice."[29] Such a game seeks to inappropriately insulate PGE from any review of its actions under any circumstances.

Fundamentally, the ALJ should not entertain PGE's arguments about what the information may or may not show, what Sandy River may or may not assert, or what

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28 PGE Response to Sandy River's Motion to Compel at 13-17 (Jan. 9, 2019).
29 PGE Response at 11.

PGE may or may not say in response. The point at issue here is that the information is relevant, and should be discoverable for Sandy River's review.

D. The Information Sandy River Seeks Is Not Duplicative, Unduly Burdensome, or Overly Broad

PGE argues again that it would be unreasonably burdensome to be required to produce the interconnection studies and agreements for the last few years of solar project interconnections. Specifically, PGE asserts that the burden comes about because PGE would have to:

1) Review each document to make sure that it is responsive,
2) Ensure that it does not contain privileged information,
3) Ensure it is not subject to a non-disclosure agreement, and
4) Redact project-identifying information from each document.[30]

But, PGE has not provided any specific details about why this would need to be done in each case, and has not described how that translates into any specific undue burden.

First, PGE does not have to review each document to "make sure it is responsive." By definition it is responsive if it is an interconnection study or agreement, and if PGE is required to answer Sandy River's request. Second, PGE is unclear why its interconnection studies would contain "privileged information". This would seem unlikely, and if they did, presumably PGE would know what to look for and it would be isolated. Further, such a general objection could apply to anything subject to production, and if it were sustained as a valid objection, then this would completely frustrate the Commission's discovery process, which often requires the sharing of voluminous

[30] *Id.* at 9.

amounts of utility data and materials. Third, it is unclear why a non-disclosure agreement would exist that would present a need to do anything more than, potentially, remove identifying information from the studies and agreements. And, if that information needs to be removed, then surely this could be done by someone who knows to redact that, and the exercise could be appropriately assigned within PGE. More fundamentally, Sandy River has already explained that PGE's process in this regard seems more unwieldy than necessary, given that PacifiCorp has been able to provide interconnection study information freely on its OASIS.[31]

E. PGE Continues to Try, Inappropriately, to Control the Scope of This Case and Narrow It So That Its Actual Behavior Is Not Reviewed

PGE asserts that the "primary issue" in the case does not relate to the studies or interconnections process Sandy River seeks.[32] Presumably PGE is repeating a familiar theme of its advocacy—that the primary issue in the case is whether Sandy River can unilaterally insist on hiring a third-party to construct its interconnection facilities under the Commission's rules. PGE has asserted this throughout, in its motion for summary judgment, in its motion for stay, and throughout the discovery disputes in this case. Sandy River's response, not repeated here in detail, is that the case is broader than that, and that PGE has mischaracterized its legal position in any event.

PGE also asserts that the question regarding whether Sandy River can hire a third-party to construct the interconnection "is the question to be decided under PGE's motion

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31 Complainant's Motion to Compel at 15 (providing link to PacifiCorp's information, available at: http://www.oasis.oati.com/woa/docs/PPW/PPWdocs/pacificorplgiaq.htm)

32 PGE Response at 3.

for summary judgment."[33] Presumably, again, PGE is arguing that the interconnection agreements and studies requested should not be provided because the scope of this case is narrower, somehow, than what Complainant contends, and that the ALJ should not require PGE to be bothered by providing information that is relevant to Sandy River's other claims—that they should be ignored because they are not the "core" claim.

Sandy River's claims, as described above, are that PGE is administering its interconnection process in a way that is unworkable for small generators, including Sandy River, that PGE has discriminated against it, and that PGE has violated the Commission's rules. PGE continues to ignore this--or worse, to have the Commission endorse its narrow view of the case, even over Sandy River's clear expression of what its own claims are.

V. CONCLUSION

For all of the reasons described above, the Commission should grant Sandy River's motion to compel a response by PGE to its Data Request No. 80.

Dated this 29th day of March 2019.

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[33] *Id.* at 5.