

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1967

SANDY RIVER SOLAR, LLC,

Complainant,

v.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

COMPLAINANT'S RESPONSE TO
PGE'S MOTION TO STAY

I. INTRODUCTION

Pursuant to OAR 860-001-0420(4), Sandy River Solar, LLC (“Sandy River”) hereby files this Response to Portland General Electric Company’s (“PGE’s”) Motion to Stay Discovery and Procedural schedule, filed in this case on February 27, 2019. Sandy River requests that the Administrative Law Judge (“ALJ”) maintain the current procedural schedule, which will allow Sandy River an opportunity to obtain a final and timely resolution that will provide Sandy River with practical relief. Specifically, Sandy River continues to request that this case be processed so that an Oregon Public Utility Commission (the “Commission” or “OPUC”) order is issued by July 31, 2019 (or soon thereafter) so that Sandy River can retain a third-party consultant to construct the interconnection facilities and meet its commercial operation date of December 1, 2019 (or soon thereafter). Sandy River requests that the Commission require the parties to take up PGE’s narrowly-crafted legal question in the context of the regular briefing phase

of this case, and allow the parties to continue to develop the factual record in this case that will be necessary to decide *any* of Sandy River's claims and requested relief.

II. BACKGROUND

This case involves a complaint filed by Sandy River against PGE on August 24, 2018. Sandy River's complaint and testimony have alleged that PGE's actions are unreasonable and unlawful because PGE has failed to provide reliable, timely, or accurate interconnection studies to Sandy River, and has failed to meet its general obligations to Sandy River as an interconnection customer. Sandy River has been unable to rely on information provided by PGE to make informed business decisions, and has encountered unresponsiveness and other numerous challenges in its efforts to move the interconnection forward.

Sandy River's complaint and testimony and intervenor Renewable Energy Coalition's testimony explain that PGE's failures to appropriately administer its interconnection process are not limited to Sandy River, and both Sandy River and Renewable Energy Coalition assert that Sandy River's problems with PGE are part of a larger problem with PGE's interconnection department and the approach the company has taken to interconnections in general. These issues include unreliable time estimates, cost estimates and statements regarding what interconnection facilities are required, frequently missed interconnection deadlines (both those required by the Oregon Administrative Rules and PGE's own estimates regarding how long it will take to complete its tasks), and significant variances in PGE's cost estimates between studies. PGE's studies have also contained mistakes and required unnecessary actions by interconnection customers, and PGE has charged interconnection customers for work it

did not perform. Sandy River has also alleged that PGE has unlawfully discriminated against its project through its actions during the interconnection process.

As a remedy to PGE's failures, Sandy River has sought to hire its own third-party consultant to complete the interconnection work, under PGE's oversight. Specifically, Sandy River has requested, among other things, that the Commission order PGE to: 1) provide complete interconnection studies that would allow Sandy River or a third-party consultant to understand and properly evaluate the need, types and cost of any required interconnection upgrades; and 2) allow Sandy River, subject to PGE's reasonable oversight, to hire qualified and experienced third-party consultants to properly and safely construct the required interconnection upgrades.

The hiring of third-parties is allowed under the Commission's administrative rules, which provide in OAR 860-082-0060(8)(f) that a public utility and applicant may agree to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades. PGE has flatly refused to allow Sandy River to hire a third-party to do this work, however, and has taken the position that it may withhold its consent for any reason, without respect to whether it would be reasonable to have a third-party perform the work instead. In other words, PGE argues that its discretion is not subject to any test of reasonableness, and therefore that PGE's refusal is incontrovertible.

A procedural schedule was established that included a July 31, 2019 date for a requested Commission order, which would be almost one year from the date the Complaint was filed in August 2018. On February 27, 2019, six months after the Complaint was filed and less than a month before PGE's testimony is due, PGE filed a

Motion for Partial Summary Judgment, as well as a Motion to Stay Discovery and the Procedural Schedule in this case. PGE could have filed its motion for partial summary Judgment earlier, but elected to wait.

Since PGE first raised the possibility of potentially filing a dispositive motion, counsel for Sandy River has repeatedly requested that, if PGE wished the case to be resolved through dispositive motions, PGE not unilaterally file a motion for summary judgement. Instead, counsel for Sandy River requested that PGE agree to discuss what the proper schedule should be with the ALJ to ensure that the case is processed in an orderly and timely fashion without Sandy River needing to simultaneously litigate the whole scope of the proceeding and respond to a motion for summary judgment. PGE ignored these requests.

In its motion for partial summary judgment, PGE seeks a Commission determination that the Commission's administrative rules do not require it to agree to the use of a third-party by Sandy River. PGE urges the Commission to make such a determination because, in PGE's view, that is the "core legal issue" in the case, and resolving it now would be an efficient way to administer the case.¹ PGE then argues for a stay to prevent ongoing discovery, anticipating that the scope of the case will be narrowed, and also arguing that a resolution of the motion for partial summary judgment may allow the parties to "resolve any remaining areas of disagreement without the need for a hearing."²

¹ PGE's Motion for Partial Summary Judgment at 1 (Feb. 27, 2019).

² PGE's Motion to Stay Discovery at 4 (Feb. 27, 2019).

In this Response, Sandy River urges the Commission to reject PGE's Motion for a Stay because a stay at this point in the proceedings puts an unwarranted economic strain on Sandy River by potentially delaying its project's completion, and subjecting it to additional construction costs and damages. Additionally, PGE has failed to meet its burden in demonstrating why a denial of Sandy River's rights to discovery would be appropriate. PGE's proposed stay of discovery makes no sense in a case where discovery is ongoing and necessary in order to develop the factual record against which the legal questions in this case must be applied, even if PGE's motion for partial summary judgment is granted.

Additionally, the stay is not warranted because it is wholly tied to PGE's motion for partial summary judgement, which lacks merit. PGE's motion for partial summary judgment addresses a strawman argument rather than the actual salient legal issues in the case. Resolving PGE's stated legal question, therefore, does not resolve any of Sandy River's claims in the case or dispose of any of its requests for relief. In light of this, sequencing the case to take up PGE's stated question at this time would make no sense in terms of an efficient administration of this case, and would only burden the parties and Commission.

PGE's motion for partial summary judgement also lacks merit because in it, PGE asks the Commission to make a remarkable finding that PGE is not subject to a reasonableness standard in implementing its discretion and operating under the Commission's rules. PGE's motion contains no legal justification for such a finding. Finally, PGE's motion for partial summary judgment assumes material facts that are in dispute, and is thus not well-founded.

PGE's requested stay will also serve to undermine, rather than promote, judicial economy, administrative efficiency, and cost-efficiency for the parties.

Rather than allowing the case to be derailed by PGE's motions, the ALJ should order that this proceeding go forward under the current schedule. This will allow the parties to develop the factual record that is required in order to fully resolve any of the questions that will be presented in the case, will allow the process to be completed on time, and will still give every opportunity to resolve all of the legal issues (including PGE's legal position stated in its motion for summary judgment) through the normal briefing process.

III. ARGUMENT

A. PGE's Requested Stay Would Unreasonably Prejudice Sandy River

It is important to Sandy River to maintain the procedural schedule in this case, in order to keep its project on schedule and to ensure that it remains viable. When the schedule was set in this case, a target date for a full resolution was established for July 31, 2019.

This was not an arbitrary date, but was set because Sandy River has real economic needs to have its facility and interconnection fully completed by December 1, 2019. Sandy River's Power Purchase Agreement ("PPA") with PGE specifies a commercial operation date ("COD") of December 1, 2019.³ Sandy River needs to keep moving toward that date to ensure that it can avoid paying damages to PGE for missing the COD⁴

³ PGE's Answer, Exhibit D Standard Renewable In-System Variable Power Purchase Agreement at § 2.2.2 (Oct. 9, 2018).

⁴ Within the PPA, Sandy River must pay PGE damages equal to the Lost Energy

or potentially being terminated after its cure period expires. In addition, financing for projects can be more difficult if the project is in litigation or unlikely to reach COD.

There are construction timing issues, and expiring tax credits and other cost increases that will impact Sandy River, if the facility is not completed expeditiously. For example, the Investment Tax Credit (“ITC”) changes from 30% to 26% in January 1, 2020. Thus, regardless of the outcome of this case, Sandy River needs a prompt resolution so that it can work toward finalization of the project.

To provide Sandy River with its full practical value, a Commission order in Sandy River’s favor will need to occur sufficiently far in advance of Sandy River’s COD. This is because there are important events that need to occur between commercial operation and the date of the Commission’s order so that Sandy River can hire a qualified and experienced third-party consultant to properly and safely construct the required interconnection upgrades. Sandy River will need to have enough time to select a qualified and experienced consultant, work with PGE to gain its reasonable approval, and then have its generation and interconnection facility constructed by December 1, 2019 or soon thereafter. Sandy River believes this tight timing is possible, if PGE is ordered, or wants it, to happen. For example, the interconnection work is not complex and should only take a few to several weeks of actual construction,⁵ utilities frequently allow interconnection customers to retain third-party consultants,⁶ and the Federal Energy Regulatory Commission already requires PGE to have procedures in place to allow an

Value if Sandy River does not reach its commercial operation date of December 1, 2019.

⁵ Sandy River/100, Snyder/23.

⁶ Sandy River/200, Goertz/3.

interconnection customer to hire a third party for non-state jurisdictional interconnections.⁷

The ALJ should disregard PGE's unsupported claims that the interconnection cannot be completed until sometime in February, 2020.⁸ Sandy River believed, based on the information it had received from PGE up to the time of its PPA, that the project could reasonably be constructed by December 1, 2019. PGE's most recent study indicates that construction will begin on September 1, 2019, with an in-service date of December 2, 2019.⁹ PGE's assertions that the interconnection cannot be completed until February 2020 are based on PGE's claim that work must first be performed for higher queued projects.¹⁰ Even if correct, which Sandy River disputes, Sandy River could agree to fund the interconnection work for a higher queued project to move up its interconnection date.¹¹ Regardless, either a December 2019 or February 2020 interconnection and project commercial operations is imminent and requires prompt resolution of this proceeding.

In order for Sandy River to align its construction schedule with PGE finalizing its work on this timeline, the project will need to be constructed in the middle of winter.¹² This adds additional construction delays and costs due to the construction conditions prevailing during that time, and the mitigation required in order to construct when the

⁷ Sandy River/100, Snyder/19-20.

⁸ PGE's Motion for Partial Summary Judgment at 2.

⁹ Initial Complaint, Attachment C Revised Facility Study at 6 (Aug. 24, 2018).

¹⁰ Sandy River/100, Snyder/11.

¹¹ Complaint, Attachment C Revised Facility Study at 6 ("There may also be an opportunity to move up the completion date for this project if [Sandy River] agree[s] to assume responsibility for the cost and accommodate the design and construction schedule for the fiber optic communication facilities required of the higher queued project.").

¹² Sandy River/100, Snyder/24-25.

soils are saturated.¹³ Moreover, if PGE’s timelines slip further, or if Sandy River deems it is prohibitive to construct the project during the winter, Sandy River may need to make a decision to construct the project sooner and undertake the costs associated with an inoperable asset that would simply be waiting for PGE to finish its interconnection work.¹⁴

Sandy River believes it is reasonable to obtain a resolution of its complaint within the timeframe presented in the current procedural schedule, and that it should not be exposed to these significant economic impacts, or risks to the project, that would come about under PGE’s motion to stay.

B. PGE’s Motion for Partial Summary Judgment Is Untimely and its Late Filing in this Case Will Harm Sandy River and Benefit PGE

Staying the proceeding to address PGE’s motion for partial summary judgement would prejudice Sandy River and inappropriately benefit PGE because it was unnecessarily filed at a time that, if granted, will force a disruption to the schedule. PGE could have, but elected not to, seek partial summary judgment earlier in the proceeding, and Sandy River’s need for prompt resolution should not be harmed because PGE waited to file until a few weeks before its testimony is due.

PGE argues that “[r]apid resolution of the motion for stay is important because of upcoming deadlines that will apply in the absence of a stay” including PGE’s response testimony, which is due on March 21, 2019.¹⁵ PGE’s view is that its motion for partial summary judgement does not depend on the resolution of disputed factual issues, which

¹³ *Id.*

¹⁴ *Id.* at 25.

¹⁵ PGE’s Motion to Stay Discovery at 2.

means that PGE could have filed its motion months ago, and at a time that it would not have to be concerned about the potential for testimony deadlines to come before its resolution. And, given the lengthy motions and work PGE put into the 50 pages of argument regarding its motions, it seems that PGE could have just as easily invested that time and those resources in its testimony in the case. Given the number of disputed material factual allegations contained in PGE's recent filings, it would have been far more appropriate for PGE to simply have filed its testimony. The timing of the filings is especially problematic, and of PGE's own making, and Sandy River urges the ALJ to not allow PGE's motions practice to be used to thwart the Sandy River project through imposing unnecessary economic difficulties.

C. PGE Has Not Met Its Burden of Showing That a Suspension of Discovery Is Warranted

PGE argues that its motion for stay, pending the determination of its motion for partial summary judgment, will prevent discovery that will prove unnecessary if the Commission grants its motion.¹⁶ A motion to stay discovery, however, is not granted automatically, even when a potentially dispositive motion is filed.¹⁷ Instead, the ability

¹⁶ *Id.*

¹⁷ *See* ORCP 36C(1) (describing the circumstances under which a court may limit discovery upon motion by a party and for good cause shown.); *See also e.g. Ciuffitelli v. Deloitte & Touche, LLC*, 2016 U.S. Dist. LEXIS 163546, 14, 2016 WL 6963039 (D.Or. 2016) (“District courts in this circuit have rejected the general proposition that a pending dispositive motion justifies a stay of discovery.”) (citing *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 603 (D. Nev. 2011) (“The fact that a non-frivolous motion is pending is simply not enough to warrant a blanket stay of all discovery.”)); *Mlejnecky v. Olympus Imaging Am., Inc.*, No. 2 :10-cv-02630 JAM KJN, 2011 U.S. Dist. LEXIS 16128, 2011 WL 489743, at 5-6 (E. D. Cal. Feb.7, 2011) (federal rules do not provide for discovery stay pending potentially dispositive motion); *Turner Broadcasting System, Inc. v. Tracinda Corp.*, 175 F.R.D. 554, 556 (D. Nev. 1997) (“[A] pending Motion to

to halt or even limit discovery is a discretionary tool used only in extraordinary circumstances. According to the Ninth Circuit, “a party seeking a stay of discovery carries a heavy burden of making a ‘strong showing’ why discovery should be denied.”¹⁸ And in this case, where PGE’s motion for summary judgment is only partial (seeking resolution of one legal issue articulated by PGE, which as explained below does not match the legal theory articulated by the Complainants), PGE’s burden should be even heavier.

Courts typically employ a case-by-case analysis when determining whether to issue a stay of discovery, and look to a number of factors.¹⁹ These factors include, among others, whether the complaint or the potentially dispositive motion raises issues of fact or law, rather than only raises procedural issues; the posture or stage of the litigation; and other relevant circumstances.²⁰ In this case, a number of factors dictate against a stay of discovery, including that: 1) PGE has made assertions about disputed facts in its motion seeking summary judgment; 2) this case is at an early stage and discovery (and related disputes) are ongoing; and 3) PGE’s motion for partial summary judgment, upon

Dismiss is not ordinarily a situation that in and of itself would warrant a stay of discovery.”); *Skellerup Indus. Ltd. v. City of L.A.*, 163 F.R.D. 598, 600-01 (C.D. Cal. 1995) (“Had the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) would stay discovery, the Rules would contain a provision for that effect . . .”).

¹⁸ *Ciuffitelli* at 16 (quoting *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)).

¹⁹ Although neither Oregon nor the Ninth Circuit have articulated a controlling standard, the Federal District Court of Oregon has offered an extensive explanation that provides guidance to the Commission. See *id.* at 14-19 (discussing the *Skellerup* Factors).

²⁰ *Id.*

which its motion to stay is based, lacks merit, and cannot resolve all (or any) of the disputed claims.

First, PGE, ironically, has made numerous factual assertions in its motion for partial summary judgment, where it argues that its assertions should be resolved on a legal basis because there is “no genuine issue as to any material fact and that . . . [PGE] is entitled to prevail as a matter of law.”²¹ These factual assertions include PGE’s view that the rulemaking record shows that the rule regarding use of third-parties was meant to prohibit a reasonableness obligation on utilities.²² PGE also asserts that the Commission’s failure to match the rule with language found in its large generator interconnection rules demonstrates that the Commission determined that there was no reasonableness obligation imposed on utilities under the small generator interconnection rules.²³ It also characterizes various parties’ positions in those proceedings, including PGE, Energy Trust of Oregon, and the Sorenson Engineering.²⁴ John Lowe, executive director of the Renewable Energy Coalition, participated in those proceedings and submitted testimony on these very issues that is counter to PGE’s interpretations.²⁵ Sandy River also served discovery requests on PGE on these issues.²⁶ Thus, PGE cannot

²¹ PGE’s Motion for Partial Summary Judgment at 8-9 (quoting ORCP 47C).

²² *Id.* at 18-20.

²³ *Id.*

²⁴ *Id.* at 5-6.

²⁵ *See* REC/100, Lowe/4-9 (describing John Lowe’s view of the rulemaking proceedings in which he was involved).

²⁶ Ordinarily Sandy River would have waited until PGE’s responsive testimony to submit discovery regarding PGE’s factual assertions; however, as they were raised in a Motion for Partial Summary Judgment, Sandy River served them.

claim that these are undisputed facts regarding the “core” issue it raises in its motion for partial summary judgment.

PGE has also made numerous factual assertions in its letter to the ALJ²⁷ and in its motions before the Commission.²⁸ These include that Sandy River’s project cannot be placed online until February 2020, and that PGE has offered valid and justifiable reasons for its denial of the use of a third-party.²⁹ The truth of these assertions should not be tested through motions, but should be sponsored by witnesses. In the ordinary course of litigation Sandy River is entitled to conduct discovery on these assertions to test PGE’s statements, and also to voice its differing view of those facts through testimony. That these factual disputes remain indicates that PGE’s motions should be denied as unfounded.

Second, a stay of discovery in the case is inappropriate because this case is still in its early stages, and discovery in the proceeding is ongoing. In fact, PGE has objected to a number of Sandy River’s requests, including its interconnection agreements and studies that are necessary to review and put into the record in order to demonstrate Sandy River’s factual assertions. There is a pending motion to compel the production of this information,³⁰ which should be resolved in order to ensure that the Commission can review the relevant facts when considering Sandy River’s complaint and PGE’s responses.³¹

²⁷ See PGE Letter to ALJ Traci Kirkpatrick (Mar. 1, 2019).

²⁸ PGE Motion for Stay; PGE Motion for Partial Summary Judgment.

²⁹ See PGE Letter to ALJ Traci Kirkpatrick at 2 (regarding February 2020 date).

³⁰ See Complainant’s Motion to Compel (Feb. 28, 2019).

³¹ Sandy River recognizes that PGE disagrees with the scope of discovery that

Importantly, PGE's motion for partial summary judgement will not limit or reduce the need for this discovery because, as explained further below, the information Sandy River seeks is relevant to legal issues not identified by PGE, and which Sandy River will describe in its briefing in this case.

The Commission should consider the merits of PGE's motion for partial summary judgement in determining whether a stay is warranted. As described below, PGE's motion lacks merit.

D. PGE's Motion for Stay is Not Warranted Because the Motion for Partial Summary Judgement Lacks Merit

PGE's Motion for Stay is wholly tied to its Motion for Summary Judgment.³² Thus, PGE's request to stay the case is only warranted to the extent that the motion for partial summary judgment represents a timely, important, and meritorious filing, and only to the extent that it would significantly benefit the administration of the case to have the partial summary judgement motion decided prior to determining the other remaining issues in the case. On this latter point, there is no reason that PGE's articulated legal question should be decided prior to any of the other numerous and fact-specific questions that are raised in this proceeding, because it can easily, and most efficiently be decided

Sandy River has served on PGE. Despite the fact that neither Sandy River nor PGE is motivated to have discovery disputes, and both parties and the Commission would like to avoid the resources required to resolve those disputes, those disputes are best resolved through motions to compel, as necessary, and parties' responses. PGE cannot rationally claim that its motion for partial summary judgment will limit discovery in the case on the topic of whether PGE's actions in administering its interconnection process are reasonable because that issue will be relevant to numerous questions raised in this case. *See infra* section D.3.

³² *See* PGE's Motion to Stay Discovery at 2 (explaining the connection between PGE's motion for stay and its motion for partial summary judgment).

under the current case schedule (which includes legal briefing), and because it will not dispose of any of Sandy River's claims or requests for relief in any event.

Sandy River will respond, if necessary, to PGE's motion for partial summary judgement in its response to that motion at the later date allowed under the Commission's rules and any ALJ order, but lays out its view of PGE's motion at a high level here because of its connection to PGE's motion for stay. PGE's motion for partial summary judgement is not appropriately timed, does not represent an important or constructive request in the case, and is not meritorious.

1. PGE's Motion for Partial Summary Judgement Addresses a Strawman Argument

In its motion for partial summary judgment, PGE contends that the Commission should address the "core" legal issue in the case, and that if it does so, the prospects are good that the entire case would be resolved.³³ PGE's motion, however, addresses a strawman argument, put forth by PGE because it is easier to attack than Sandy River's real position in this case. For the purposes of considering whether to stay the proceeding, it is important to understand that, if the Commission agrees with PGE's legal view regarding the meaning of the interconnection rules, then there are important and material legal and factual issues remaining on *all* of Sandy River's claims for relief.

Sandy River has faced a host of challenges in dealing with PGE as it seeks to interconnect its project. These involve a lack of responsiveness, incorrect information, missed deadlines, and unreliable work. Sandy River's complaint alleges these facts, and argues that PGE's actions have been unreasonable and inconsistent with its duties under

³³ PGE Motion for Partial Summary Judgment at 1.

PURPA and the Commission's implementation of it.³⁴ Sandy River seeks relief from these actions by PGE.³⁵

Sandy River has asserted that an appropriate remedy, or outcome of the case that should be imposed upon PGE would be to require it to allow Sandy River to hire a third party to assist with the interconnection. Such an opportunity already exists in the Commission's rules, and has been requested by Sandy River. But, PGE flatly refuses and argues that under no circumstances can it be required to allow such an action. Sandy River asserts that *in addition* to PGE's unreasonable and unlawful actions with respect to the interconnection process to date, PGE's refusal to allow Sandy River to use a third-party's assistance under PGE's oversight is also unreasonable.³⁶ Sandy River's complaint provides specific reasons why PGE's refusal to allow Sandy River to hire a third party in order to address its issues is unreasonable under the facts of this case,³⁷ and seeks an order of the Commission allowing it to hire a third-party for those reasons.

Rather than addressing Sandy River's assertions of PGE's unreasonable behavior, however, PGE's motion for partial summary judgment presents the Commission with a

³⁴ First Amended Complaint.

³⁵ *Id.* at 25-27.

³⁶ *Id.* at 20-22.

³⁷ See First Amended Complaint at ¶¶ 125-131 (Sept. 27, 2018) (identifying that PGE has not provided any explanation why it has refused to provide its consent; that PGE already hires third parties to conduct this work; that PGE has already admitted to a "strain on resources" that is impacting its ability to perform interconnections; that a third party could mobilize more quickly and perform the work; that a third party could more cost-effectively perform the work; and that PGE has simply unilaterally refused to let any applicant hire a third-party for design and construction).

legal issue that really represents only a subset of the issues Sandy River has raised in its complaint and through this case. And, PGE presents it inaccurately in any event.

In its motion, PGE recites the language of OAR 860-082-0060(8)(f), then states,

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[;]'
2. '[T]o provide a list of approved third-party consultants[;]' 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.'

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.³⁸

Sandy River disagrees with PGE's interpretation of the rules, and will argue that their most reasonable interpretation provides that PGE cannot simply decide that there are no circumstances under which an interconnection customer can hire a third-party consultant.

More important for the purposes of whether the case should be stayed is that PGE ignores that Sandy River's complaint does not allege that these obligations are only found in the language of the rule itself. Rather, they arise from a duty placed upon utilities to act reasonably with respect to how they treat their customers, including their interconnection customers. And they arise from a duty to act with reasonableness in all actions that are subject to the Commission's regulation, including a utility's exercise of

³⁸ PGE's Motion for Partial Summary Judgement at 10.

its judgment and discretion with respect to customers and utility stakeholders. Finally, these obligations reflect the parties' intentions and understandings during the rulemaking process where the rule was created, which show the reasonableness of Sandy River's request to use a third-party to mitigate its challenges with PGE in the interconnection process. Sandy River seeks relief from PGE's unreasonable actions. Thus, Sandy River's claims require a determination of whether PGE's actions were reasonable, and not just a review of the rule's literal terms.

2. PGE's Motion for Partial Summary Judgment Does Not Support the Determination It Actually Asks the Commission to Make

In its motion for partial summary judgment, PGE essentially seeks to turn the case into a review of the specific words of the rule and to show that because the language does not spell out with specificity what constitutes reasonable actions of a utility, no such obligation exists. In reality, PGE's view of the law is the novel one. PGE argues that where a rule (in this case the rule regarding use of a third-party contractor to complete an interconnection) fails to state the specific actions that constitute a reasonable implementation of the rule, the utility is relieved from any requirement to be reasonable. Or, alternatively, PGE is arguing that where a rule provides some level of discretion with respect to a utility's actions, that its discretion is wholly unfettered by any duty to exercise its discretion with reasonableness.

Indeed, PGE's motion for partial summary judgment makes clear that PGE's view is that no reasonableness standard applies to its exercise of discretion under the rule.

PGE asserts:

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.³⁹

PGE explains its position further, making unmistakably clear its view that it has no duty to act reasonably in exercising its discretion under the rule:

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.⁴⁰

* * *

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*.⁴¹

* * *

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 contractors.⁴²

Surprisingly, PGE’s motion for partial summary judgment provides no legal argument supporting the notion that its discretion is unfettered by a requirement to act reasonably, aside from noting that the rule’s specific language does not include the word “reasonable.” PGE’s motion is, therefore, strikingly deficient in justifying what it really asks the Commission to decide through a motion for partial summary judgement—that no

³⁹ *Id.* at 3.

⁴⁰ *Id.* at 11 (emphasis added).

⁴¹ *Id.* at 12 (emphasis added).

⁴² *Id.* at 17-18 (emphasis added).

duty of reasonableness applies to its exercise of discretion under the Commission's rules regarding the use of third-parties for interconnection.

Sandy River views the Commission's authorities as rife with language imposing a duty upon public utilities to act in a reasonable manner, and the Commission's authority to order utilities to do so. For instance, ORS 756.040 address the Commission's general powers, and states that in addition to any duties otherwise vested in the Commission, the Commission shall "protect [] customers, and the public generally, from unjust and unreasonable exactions and practices [by the utilities]." ORS 757.325 also requires that utilities not act unreasonably in giving preference or advantage to any person. This provision would include PGE itself, to whom PGE is reserving *all* of its activities with respect to interconnections. PGE offers no view at all as to why these and other stated obligations for it to act reasonably would not apply to the circumstance presented in this case, where Sandy River seeks review of PGE's decision to flatly refuse Sandy River's request despite the difficulties described by Sandy River in its complaint regarding the interconnection.

Sandy River has not yet presented, and will likely not present until the briefing stage of this case, its legal argument as to why PGE's actions with respect to Sandy River, including its flat refusal to allow the use of a third-party, are unreasonable. As stated above, PGE has not even addressed this in its own motion. Instead, Sandy River is first entitled (and required) to develop a factual record on PGE's actions, through this proceeding, and to then apply law to those facts. Sandy River thus points to these statutes only as examples of the types of sources from which PGE's duty to act reasonably arises, and to demonstrate the insufficiency of PGE's request to decide through summary

judgement whether its actions in refusing Sandy River's request to use a third party were reasonable. Sandy River also notes that the rulemaking proceeding itself gives insights into whether it was intended that utilities have an unquestionable and absolute right to refuse to allow the use of a third-party under all circumstances. Given that PGE has addressed none of the assertions that it has acted unreasonably in its motion for partial summary judgment, the Commission should not stay the case pending resolution of that motion, because it is inadequate to support the argument that PGE is making.

3. The Commission Must Resolve Contested Factual Questions, In Addition to Legal Questions in Order to Resolve Sandy River's Complaint

As stated above, Sandy River should not be required at this stage to put forth its total legal argument in this case. That is normally deemed appropriate only during the briefing stage of the case, after the factual record is established. However, Sandy River can articulate at least a few of the legal questions that likely will be presented in this case, and which will require the resolution of contested factual issues in order to apply them. These stand in contrast to PGE's narrowly-crafted legal question, and show that PGE's Motion for Partial Summary Judgment will not be dispositive of the questions in this case, even if considered by the Commission. Some of the likely legal issues include:

- Whether there is a general duty of reasonableness that applies to utilities' activities in administering its interconnection program;
- If so, does PGE act reasonably when it fails to administer a workable interconnection process, and instead provides erroneous and unreliable information to an interconnection customer?
- Does the Commission have broad enough authority to direct a utility to take measures to mitigate harm it has caused to an interconnection customer through its unreasonable administration of its interconnection process, including an extension of the interconnection customer's COD in its PPA?

- Would the use of a third-party by an interconnection customer that is aggrieved by a utility's unreliable interconnection process be an appropriate and reasonable remedy to the situation?
- Can a utility fail in its interconnection obligations, and still refuse to allow the use of third-party in those circumstances? Did the relevant rulemaking show an intent for the rule to have a different result?
- Can a utility be an unreliable counterpart in the interconnection process and still enjoy a sole monopoly over the planning and construction of interconnections by generators that are entitled to sell their power to the utility? Does the existence of a rule that allows use of third-parties represent a remedy that the Commission may impose in such an instance?
- Does a utility give undue preference to itself, or unlawfully discriminate against its interconnections customers when it refuses to reasonably allow those customers to utilize a third-party to design and construct interconnection facilities, subject to the public utility's oversight and approval, as is allowed by rule?
- What information should a utility be required to provide to an interconnection customer in its studies?
- When should a utility be required to pay penalties for its unreasonable interconnection actions?

This by no means is a definitive or exclusive list of the legal questions that may be appropriate to answer in this case. However, as these questions show, PGE's statement of the legal question posed in its Motion for Partial Summary Judgment does not dispose of any of them.⁴³ Additionally, nearly all of these questions involve the

⁴³ PGE's precise arguments in its Motion for Partial Summary Judgment are also, inconsistent or at least unclear. For example, PGE argues that "[t]he 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." PGE's Motion for Partial Summary Judgment at 1. But, the rules clearly do not *prohibit* the remedy that Sandy River seeks in this case.

resolution of factual questions, which calls for the completion of testimony, discovery, and the right to cross-examine witnesses.

A review of Sandy River's complaint also shows that PGE's narrowly-constructed legal question, even if answered through its motion for partial summary judgment, does not dispose of *any* of Sandy River's actual legal claims or requests for relief stated in the complaint. Sandy River's first claim is that it is entitled to relief because PGE failed to provide complete information in its System Impact Study and Facilities Study, and that it violated the Commission's rules on these topics.⁴⁴ This is not resolved by reference to OAR 860-082-0060(8)(f), and PGE's legal theory in its motion for partial summary judgment is not dispositive in any respect of this claim.

Sandy River's second claim is that it is entitled to relief because PGE unreasonably withheld its consent to allow Sandy River to hire a third-party consultant to complete its interconnection facilities and system upgrades.⁴⁵ Although PGE argues that this claim is resolved by its motion for partial summary judgement, PGE has envisioned the legal basis for this claim for relief too narrowly, as described above. Resolving this claim requires a determination of whether PGE's *actions* and *justifications* in refusing to provide Sandy River this option were unreasonable, and requires a review of the facts surrounding those actions and justifications.

Sandy River's third claim is that it is entitled to relief because PGE failed to meet deadlines required under the Commission's rules for interconnections, and PGE's failures

⁴⁴ First Amended Complaint at 16-20.

⁴⁵ *Id.* at 20-22.

causes additional cost and delay to Sandy River.⁴⁶ And, its fourth claim is that it is entitled to relief because PGE subjected it to undue or unreasonable prejudice or disadvantage and treated other QFs and PGE's own projects with undue or unreasonable preference or advantage.⁴⁷ Neither of these claims is resolved by PGE's motion for partial summary judgement either, and thus *none* of Sandy River's claims is resolved even if PGE's motion were to be granted.

Sandy River's complaint also specifies 11 different requests for relief in a Commission order. These include:

1. Finding PGE in violation of its obligation to provide a complete System Impact Study;
2. Finding PGE in violation of its obligation to provide a complete Facilities Study;
3. Finding PGE in violation of its obligation to reasonably consider and consent to Sandy River Solar's request to hire a third-party consultant to complete its interconnection facilities and system upgrades;
4. Finding PGE in violation of its obligation to not make or give undue preference, unreasonable preference or advantage to any other QF or itself;
5. Requiring that PGE provide a complete System Impact Study;
6. Requiring that PGE provide a complete Facilities Study;
7. Requiring that PGE to allow Sandy River Solar to hire a third-party consultant to complete its interconnection facilities and system upgrades;
8. Requiring that PGE not make or give undue preference, unreasonable preference or advantage to any other QF or itself;
9. Requiring that PGE grant an extension of Sandy River Solar's interconnection queue position, power purchase agreement commercial

⁴⁶ *Id.* at 22-24.

⁴⁷ *Id.* at 24-25.

operation date, and power purchase agreement termination date pending the outcome of this litigation;

10. Instituting penalties up to \$10,000 pursuant to ORS 756.990 against PGE for each violation of relevant statute; and

11. Granting any other such relief as the Commission deems necessary.⁴⁸

The only requests for relief by Sandy River that even arguably are affected by PGE's motion for partial summary judgment are requests 3 and 7. And, neither of these can be disposed of through a review of OAR 860-082-0060(8)(f) alone, without reviewing the reasonableness of PGE's actions.

Although these claims will involve a review of the language of OAR, PGE's narrow legal question regarding the language does not resolve the issue in total, and reflects only a part of what needs to be determined. Sandy River also notes that, in any event, Sandy River does not agree with PGE's interpretation that the language is wholly permissive with respect to the topic of utilities' use of third-parties, or its interpretation that PGE is in conformance with the rule when it fails to grant any process or actual option to customers that could benefit from the use of third-parties.

Put simply, it makes no sense to stay the case pending a determination of PGE's strawman argument which, even if decided by the Commission, fails to dispose of Sandy River's actual legal arguments and factual assessments. This is especially true given that Sandy River has claimed PGE is causing unreasonable delay and harm to Sandy River through its actions, which justifies action by the Commission (including Sandy River's ninth and tenth claims for relief) and a potential seeking of damages by Sandy River.⁴⁹

⁴⁸ *Id.* at 25-27.

⁴⁹ *See In Re Columbia Basin Electric Coop. Inc. v. PacifiCorp*, Docket No. UM

E. PGE’s Requested Stay Will Not Lead to Judicial Economy

PGE asserts that the ALJ should grant its motion for a stay because doing so would lead to judicial economy.⁵⁰ Judicial economy is served where an action leads to an efficient consideration of the relevant issues, and avoids “piecemeal litigation.”⁵¹

PGE’s requested stay would, in fact, *lead to* a piecemeal approach to the case, where one argument would be decided before the rest of the arguments would then proceed. As stated above, such an approach would be especially non-sensical given that the legal issue presented in PGE’s motion for partial summary judgment is not the actual legal issues that will be presented in this case. Thus, PGE’s proposal would have the Commission litigate a hypothetical legal issue, freeze the proceeding until that was concluded, and then turn its attention to the actual legal issues in the case. Such a piecemeal approach is inefficient, prejudicial to Sandy River’s interests in a timely resolution of this case, and would not promote any judicial economy.

Additionally, even if PGE’s stated legal question did resolve even one of Sandy River’s claims, there are numerous other claims that need to be addressed in this case, and which would unquestionably require the continuation of the case. These include Sandy River’s claims of discrimination by PGE, and that PGE has violated the

1670, ALJ Ruling at 5 (April 28, 2014) (finding that the Commission does not have the authority to order a utility company to pay damages, and that monetary damages must instead be sought in court).

⁵⁰ PGE’s Motion to Stay Discovery at 4.

⁵¹ *See In Re Application of PGE for an Investigation into Least Cost Plan Plant Retirement*, Docket No. DR 10, Order No. 08-117 at 4 (Feb. 13, 2008) (“The Court of Appeals added that, ‘for reasons of judicial economy and agency efficiency,’ all issues relating to Trojan ‘should be resolved in one forum rather than through piecemeal litigation.’”).

Commission's rules and its own deadlines in administering Sandy River's interconnection.⁵²

PGE's requested stay, therefore, would not lead to judicial economy. Instead, it would be certain to lead to *more* judicial process, because it piles an unnecessary motions practice on top of legal and factual questions that will need to be resolved even if PGE's motion were decided in its favor.

F. PGE's Requested Stay Will Not Lead to Administrative Efficiency

PGE also argues that the stay it seeks would lead to administrative efficiency. Sandy River interprets this to mean that it would lead to efficiencies for the Commissioners, in addition to the judicial economy allegedly realized by the ALJ and parties. For the same weaknesses in PGE's argument regarding judicial economy, PGE's argument that the stay would lead to administrative efficiency fails.

The Commission is well-suited to deciding cases where the factual record is developed, and the legal arguments briefed. In this case, PGE seeks a stay to address a hypothetical and inapposite legal question, and delays the development of the record of factual issues to which the actual legal questions will be applied. Involving the Commission in such a process would only increase their workload, and it invite them to make decisions in the absence of vetted relevant facts.

G. PGE's Requested Stay Will Not Reduce the Parties' Costs

⁵² First Amended Complaint at 22-25 (Complainant's third and fourth claims for relief).

PGE argues that its motion for stay will reduce the parties' costs.⁵³ This is difficult to understand when the inapplicability of PGE's argument is considered. The parties' costs will only be increased (and have increased already) to the extent they are required to participate in an involved motions practice, only to find that the disposition of the motions has done nothing to answer the questions that will be presented in order to resolve the case.

More accurately, PGE's requested stay would only serve to stack PGE's resources against Sandy River's by imposing additional costs on *both* parties from a piecemeal process, and continuous motions practice. It probably goes without saying that PGE's resources are vast in comparison to Sandy River's in terms of its ability to absorb legal and administrative costs, and that PGE's efforts to outlast Sandy River would be an inappropriate use of the Commission's resources. The best way to help reduce the parties' costs is not through PGE's motions, but is to allow the parties to engage in the testimony process, and then engage in the briefing stage to present the case for the Commission's decision under its normal process.

H. The Motion for Partial Summary Judgement Should Not Be Entertained At This Time

The ALJ has the authority to regulate the course of this contested case in an effort to protect the parties' rights, ensure an efficient administration of the case, and avoid prolonged and unnecessary process.⁵⁴ In furtherance of these authorities, the ALJ should

⁵³ PGE's Motion to Stay Discovery at 4.

⁵⁴ See OAR 860-001-0090(1)(a) and (m) (delegating Commission's authority to ALJ to regulate the course of contested case proceedings, and to take any actions consistent with the duty of the ALJ).

not allow PGE's motion to stay, or its motion for partial summary judgment to derail the efficient administration of this case. Neither the Commission nor the ALJ is required to consider PGE's motion on the terms that PGE demands, and should instead allow the case to proceed as scheduled.

Sandy River is aware of cases in which motions for summary judgment were either deemed to be an inappropriate procedural method for resolving a case, or determined to be more appropriately determined over a longer time period. These cases are informative on options for how the ALJ can administer this case. For example, in UM 1931, defendants filed a motion for summary disposition on July 2, 2018, seeking an order of the Commission resolving legal matters in that case.⁵⁵ On that same day, defendants requested an expedited briefing schedule to allow for a decision on the motion.⁵⁶ PGE responded by requesting that a traditional schedule for testimony and briefing prevail instead, and that if the motion for summary judgment were litigated, that it receive additional time to complete discovery and prepare its response to the motion for summary judgment.⁵⁷ Defendants then sought to stay the discovery in the case, pending resolution of their motion for summary judgment.⁵⁸ Various motions to compel, and comments on the schedule ensued, and on August 23, 2018, the ALJ in the case issued a Ruling denying the request to resolve the case through summary disposition, and instead

⁵⁵ See *PGE v. Alfalfa Solar I LLC*, Docket No. UM 1931, Defendants' Motion for Summary Disposition (July 2, 2018).

⁵⁶ See Docket No. UM 1931, Defendants' Motion for Oral Argument and For Expedited Process on Motion for Summary Disposition (July 2, 2018).

⁵⁷ Docket No. UM 1931, PGE's Comments Regarding Procedural Schedule (July 3, 2018).

⁵⁸ Docket No. UM 1931, Defendants' Motion for Protective Order Staying Discovery (July 5, 2018).

ordered that the parties develop a schedule that allowed for an exploration of facts and legal briefing on the issues.⁵⁹ In that case, subsequent motions for summary judgment were filed, in accordance with an established schedule, after the development and filing of testimony, and a briefing schedule was established to brief the legal issues raised in the motions for summary judgment. This case represents an instance where the ALJ refused to stop a proceeding pending a motion for summary judgment, and instead allowed the case to proceed under a normal approach, until a later date when the briefing could address legal issues within the context of a factual record.

Bottlenose Solar, UM 1877 et al., gives an example of a different approach and the problems that ensue when PGE unilaterally seeks to resolve issues in a case over the objection of a qualifying facility. In that case, PGE filed a motion for summary judgement on January 24, 2018. On the same day, PGE filed a motion to stay discovery and the procedural schedule in the case.⁶⁰ After receiving numerous comments and other motions, over the objection of the qualifying facilities, the ALJ in that case halted discovery and set a schedule for litigating the motion for summary judgment that went through April 13, 2018,⁶¹ giving the parties a longer time period to respond to the assertions made in the motion. In that case, discovery was halted, and the motion for summary judgement remained pending until the case was resolved through the complainants' dismissal of their complaints. This case represents an instance where the ALJ stayed a case pending a motion for summary judgement, and the case was essentially

⁵⁹ Docket No. UM 1931, ALJ Ruling at 6 (Aug. 23, 2018).

⁶⁰ *Bottlenose Solar LLC v. Portland General Electric*, Docket No. UM 1877, PGE's Motion to Stay Discovery and Procedural Schedule (Jan. 24, 2018).

⁶¹ Docket No. UM 1877, ALJ Prehearing Conference Report (Feb. 13, 2018).

stalemated for the better part of a year. Sandy River cannot wait even a fraction of that time.

In Sandy River's case, if the ALJ were to halt the proceeding pending resolution of PGE's motion for partial summary judgment, Sandy River's ability to meet its deadlines could be severely compromised, and its requested relief will not come soon enough to benefit the project if ultimately granted. Sandy River asserts that it would be appropriate in this case to instead deny PGE's requested stay, and deny PGE's request to take up summary judgment at this point. Because there is outstanding discovery, the development of testimony has not concluded, and there are outstanding questions of fact relevant to the Commission's determination, it is more appropriate to resolve the legal and factual issues through the Commission's normal process and established schedule. In the alternative, if the ALJ or Commission were inclined to consider the motion for partial summary judgment, that should be heard on a schedule that comes after the development of testimony in the case.

I. Sandy River Requests More Time to Respond to the Motion for Partial Summary Judgment if the ALJ Decides to Entertain It

PGE's motion for partial summary judgment and for a stay is taking resources from Sandy River that should be spent on discovery at this point in the proceeding, and from PGE's work on its responsive testimony. The Commission should assist Sandy River and prevent PGE from using its motions as an opportunity to outlast Sandy River in this litigation. Sandy River notes that it is dealing with the following issues in this case, all of which strain its resources:

- Needing to file motions to compel due to PGE's refusal to provide interconnection studies and agreements of other projects;

- Filing this Response to PGE's motion to stay;
- Filing a Response to PGE's motion for partial summary judgment;
- Responding to PGE threats to terminate Sandy River's position in its interconnection queue because of Sandy River's complaint regarding the interconnection process.⁶²

Sandy River is genuinely frustrated with these actions by PGE, and asks that the ALJ assist it in at least giving it more time to respond to the motion for partial summary judgment if the ALJ or Commission decides to entertain the Motion and decide it at this time. Sandy River's resources are heavily being tapped and it believes PGE is intending for that result.

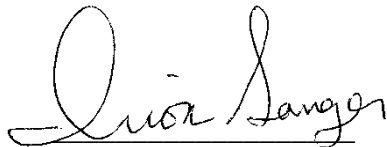
IV. CONCLUSION

For all of the reasons described above, PGE's motion for stay should be denied. Instead, this case should proceed under the schedule set by the ALJ, which relies upon the Commission's normal processes for resolution of the issues raised in the complaint.

⁶² Sandy River is still determining how to respond to a letter recently sent to it from PGE on this topic.

Dated this 6th day of March 2019.

Respectfully submitted,

A handwritten signature in black ink that reads "Irion Sanger". The signature is written in a cursive style with a large initial "I" and a long, sweeping underline.

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