ORDER NO. 19-218

ENTERED Jun 24 2019

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1967

SANDY RIVER SOLAR, LLC. Complainant, vs. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	ORDER

DISPOSITION: MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTED

I. INTRODUCTION

We grant the motion by Portland General Electric Company (PGE) under OAR 860-001-0420 and Oregon Rules of Civil Procedure (ORCP) 47 for partial summary judgment against the second claim, and paragraphs 3 and 7 of the prayer for relief in the amended complaint of Sandy River Solar, LLC (Sandy River). Analyzing Sandy River's second claim, we interpret the only rule cited there, OAR 860-082-0060(8)(f), consistently with the methodology of the Oregon courts.[1] We conclude that PGE should prevail as a matter of law because the rule is not properly interpreted to provide the relief that Sandy River seeks—*i.e.*, we do not interpret OAR 860-082-0060(8)(f) as either requiring that PGE reasonably exercise its discretion to agree to, or indicating that we have the authority to direct PGE to, hire a third-party consultant to complete Sandy River's interconnection facilities and system upgrades. To the extent that Sandy River argues that we have alternate statutory or contractual authority to reach different conclusions, we find that Sandy River did not plead such claims anywhere in the Amended Complaint to date and, consequently, that they are not properly before us.

[1] *See State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009); *see also PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).

II. BACKGROUND

A. Procedural History

The dispute in the above-captioned docket involves an Amended Complaint filed by Sandy River on September 27, 2018, that centers on the Small Generator Interconnection Procedures in OAR 860-082-0060. Sandy River complains, in part, that PGE failed to act in a reliable, timely, or accurate manner with regard to Sandy River's interconnection request. Sandy River's second claim for relief asks us to require PGE to allow Sandy River to use a third-party consultant to complete interconnection facilities and system upgrades on PGE's distribution system. On February 20, 2019, Renewable Energy Coalition's (Coalition) January 29, 2019 petition to intervene was granted. On February 27, 2019, PGE filed a motion for partial summary judgment, and requested oral argument.[2] Sandy River and the Coalition filed responses on March 26. On April 4, 2019, PGE filed a reply. On April 8, 2019, Sandy River filed a sur-response, along with a motion to allow a sur-response.[3]

B. Motion for Summary Judgment

Pursuant to OAR 860-001-0420 and ORCP 47, PGE moves for summary judgment against Sandy River's second claim for relief,[4] and paragraphs 3[5] and 7[6] of Sandy River's prayer for relief. PGE asserts that our rules—OAR 860-082-0060(8)(f)[7] in particular—do not permit the relief that Sandy River seeks, and that Sandy River's second claim accordingly should be denied as a matter of law. PGE represents that its motion presents

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[2] After reviewing the parties' filings, we concluded that oral argument is not required.

[3] The motion to allow a sur-response (Apr 8, 2019) was granted by ruling on April 25, 2019.

[4] Citing OAR 860-082-0060(8)(f), Complainant's Second Claim for Relief (Amended Complaint, Sept 27, 2018) states:

> Sandy River Solar is entitled to relief because PGE unreasonably withheld its consent to allow Sandy River Solar to hire a third-party consultant to complete its interconnection facilities and system upgrades.

[5] Paragraph 3 of the Amended Complaint's Prayer for Relief asks us to enter an order:

> 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.

[6] Paragraph 7 of the Amended Complaint's Prayer for Relief asks us to enter an order:

> Requiring that PGE [] allow Sandy River Solar's [request] to hire a third-party consultant to complete its interconnection facilities and system upgrades.

[7] OAR 860-082-0060(8)(f) provides:

> 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.

the "core legal issue in the case" for resolution at a time when the dispute can be simplified, reducing discovery disputes and allowing settlement discussions regarding remaining subsidiary issues.[8]

C. Legal Standard for Summary Judgment

OAR 860-001-0000(1) indicates that the ORCP apply in our contested case proceedings unless inconsistent with the rules or orders of the Commission or a ruling of an administrative law judge. Under ORCP 47, a motion for summary judgment may be granted "if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law."[9] We apply the ORCP 47 standard when reviewing motions for summary judgment.[10] We can 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."[11] 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.[12] To defeat a motion, the nonmoving party must demonstrate that there is an issue of genuine dispute for a hearing on the merits.

III. PARTIES' POSITIONS

Discussion by parties focused on four issues, which we summarize in the four sections that follow: (A) the nature of the legal question(s) posed by Sandy River's second claim; (B) the facts and whether any factual disputes relevant to PGE's motion for partial summary judgment exist; (C) the statutory construction of OAR 860-082-0060(8); and (D) alternate grounds for PGE being held to a reasonableness standard when applying OAR 860-082-0060(8).

[8] PGE's Motion for Partial Summary Judgment, at 1 (Feb 27, 2019).
[9] ORCP 47C.
[10] *See, e.g., In the Matter of the Complaint of City of Portland against Portland General Electric, an Oregon corporation*, Docket No. UM 1262, Order No. 06-636 (Nov 17, 2006).
[11] ORCP 47C.
[12] *Id*.

A. Nature of the Legal Question(s) Posed by Sandy River's Second Claim

1. PGE's Position

PGE indicates that its motion for partial summary judgment requests that we deny Sandy River's second claim for relief, and paragraphs 3 and 7 of Sandy River's prayer for relief—and nothing else. PGE's motion asserts that the core legal question presented by Sandy River's complaint is whether the relief requested by Sandy River's second claim—*i.e.*, direction from us requiring PGE to allow Sandy River to hire a third-party consultant to complete interconnection facilities and system upgrades on PGE's distribution system—is permitted under OAR 860-082-0060(8)(f). The motion argues that this question must be answered in the negative, as a matter of law. PGE contends that the text, context, and history of the rule compels this answer, without any impediment from factual disputes.

2. Positions of Sandy River and the Coalition

Sandy River rejects PGE's characterization of the core legal question posed in the complaint, arguing that the complaint doesn't raise the question identified by PGE. Focusing on the second claim's language stating, "PGE unreasonably withheld its consent to allow Sandy River Solar to hire a third-party consultant,"[13] Sandy River contends that "PGE has a duty to approach Sandy River's request to use a third-party in good faith, to consider its request in a reasonable manner, and that PGE cannot unreasonably or perfunctorily refuse to allow an interconnection customer to use a third-party."[14] Sandy River argues that by mischaracterizing the second claim, PGE poses a hypothetical legal question and seeks summary judgment on an improper basis.

Even if we decide that OAR 860-082-0060(8)(f) does not provide an interconnection customer with a unilateral right to demand a third-party's assistance with interconnection, Sandy River argues that its second claim for relief, as actually stated, would still need litigation in order to consider whether PGE violated its duties as a public utility to exercise its discretion in a reasonable manner. Sandy River contends that we have the authority to correct unreasonable actions by a utility under general enabling statutes or contract law.

Sandy River also challenges PGE's implicit argument that we lack authority to direct PGE to allow Sandy River to use a third-party contractor to complete its interconnection

[13] Complainant's Response at 8 (Mar 26, 2019), citing First Amended Complaint at 20 (Sept 27, 2018).
[14] Complainant's Response at 8-9 (Mar 26, 2019), citing First Amended Complaint at 11 (Sept 27, 2018).

with the utility. PGE's narrow reading of our powers should be rejected, Sandy River advises, as we have broad statutory authority to protect customers from unjust and unreasonable exactions and practices.[15] Sandy River reminds us that being "vested with power and jurisdiction to supervise and regulate every public utility and telecommunications utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction," we have the authority to require PGE to allow third-party assistance with the construction of Sandy River's interconnection facilities without reliance on OAR 860-082-0060(f), if we find that the remedy will reasonably address Sandy River's harms.[16] As support for the proposition that we may direct PGE to allow Sandy River to hire a third-party contractor, Sandy River points to past precedent where we ordered utilities to allow third-party consultants to review their systems in order to make recommendations to the Commission.[17]

B. Presence of Material Factual Disputes

1. PGE's Position

As the question posed by Sandy River's second claim is purely legal, PGE argues we need not consider any facts to decide the motion for partial summary judgment. To the extent that we must consider basic facts underlying the dispute, they are undisputed, PGE alleges. PGE sets forth basic facts regarding Sandy River, its proposed project, and interconnection details in the motion.

2. Positions of Sandy River and the Coalition

Sandy River disagrees with PGE that the motion for partial summary judgment can be resolved without consideration of any facts. Sandy River contends, instead, that there are relevant facts in dispute, compelling dismissal of PGE's motion for partial summary judgment. For example, Sandy River explains, PGE makes the claim that there is no dispute that "PGE completed the interconnection study process required by the rules," but Sandy River contests whether the study performed was satisfactory in terms of its timeliness, clarity, and consistency with our rules.[18]

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[15] Complainant's Sur-Response, p. 19, citing ORS 756.040 (Apr 8, 2019).
[16] *Id*., citing ORS 756.040(2) (Apr 8, 2019).
[17] *Id*., citing *In Re NW Natural Investigation of Interstate Storage and Optimization Sharing*, Docket No. UM 1654, Order No. 15-066 (Mar. 5, 2015) (requiring utility and other parties to hire a third-party to review utility's system and operations, and requiring formation of committee to make such hire and supervise the process) (Apr 8, 2019).
[18] Complainant's Sur-Response, at 9, (Apr 8, 2019), quoting PGE's Reply at 1 (Apr 4, 2019).

Sandy River also explains that the reason why PGE contends there are no disputed facts relevant to the summary judgment is due to PGE's mischaracterization of complainant's second claim. Sandy River seeks to address PGE's shortcomings and unreasonableness during the interconnection process, and "explain how they translate into an appropriate remedy being the use of a third-party's assistance in constructing the facilities."[19] It is too early to grant a motion for summary judgment on this claim, the Coalition observes, because the factual record that PGE acted unreasonably is still being established. Testimony submitted at this point raises broad themes of factual dispute and if even some of the facts are construed in Sandy River's favor, Sandy River argues:

> [T]he Commission could conclude that [it] would be unreasonable for PGE to refuse to allow a third-party's assistance because, among other things, PGE cannot be relied upon to complete the work; 2) PGE may be using the interconnection process to try to inappropriately delay or avoid Sandy River's project altogether; 3) other utilities have found ways to efficiently allow a third-party's assistance; and 4) the use of a third-party would benefit both PGE and Sandy River.[20] The facts would also show that PGE flatly, without a good faith consideration, refused Sandy River's request. To rule in PGE's favor in summary judgment, the Commission would need to conclude that regardless of all those facts, PGE still has the unilateral right to refuse to allow Sandy River to hire a third-party consultant, and that the Commission lacks authority to order such a remedy.[21]

C. Statutory Construction of OAR 860-082-0060

OAR 860-082-0060(8)(f) provides:

> 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.

[19] Complainant's Sur-Response, at 4 (Apr 8, 2019).
[20] *Id*. at 5.
[21] *Id*. at 5-6.

1. PGE's Position

a. Text and Context

PGE's motion for summary judgment asks us to interpret OAR 860-082-0060(8)(f) under the Oregon courts' statutory construction methodology. PGE states:

> The touchstone of statutory interpretation is ascertaining the intent of the legislative or rulemaking body—here, the Commission.[22] The text and context of the rule are primary, because only the words actually chosen by the Commission can be given the effect of law.[23]

PGE argues that we chose the rule's language, including "may," and that "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."[24] PGE further argues that 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."[25] Due to PGE's responsibilities to other QFs, customers, and for the maintenance of safe and reliable systems for all, the permissive language is appropriate, PGE asserts.

Discussing context of the rule at length, PGE first observes that OAR 860-082-0060(8)(f) is an optional exception to the mandate in OAR 860-082-0035 that a public utility construct, own, operate, and maintain interconnection facilities and system upgrades. Pointing to the exception's use of the non-mandatory word "may," PGE asserts that the Commission gave permission to a utility to hire a third-party consultant on its own, or to agree to hire one at the request of a small generator, but did not subject either utility decision to a reasonableness standard.

As interpreting the language of a rule should harmonize its provisions, PGE observes that "may" should be construed to have the same meaning in both sentences of OAR 860-082-

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[22] PGE's Reply in Support of Motion for Partial Summary Judgment, at 5 (Apr 4, 2019), citing *Gaines*, 346 Or at 171-2.
[23] *Id*., citing *Faverty v. McDonald's Restaurants of Oregon, Inc.*, 133 Or App 514, 533 (1995), *rev dismissed on other grounds, appeal dismissed on other grounds*, 326 Or 530 (1996) ("Inchoate intentions are not law, only those intentions that are manifested in language that is enacted.") (internal citation omitted); *State v. Walker*, 356 Or 4, 13 (2014) ("We begin with the text and context of the statute, which are the best indications of the legislature's intent.")
[24] PGE's Motion for Partial Summary Judgment, at 10 (Feb 27, 2019).
[25] *Id*. at 11.

0060(8)(f). Sandy River's interpretation of OAR 860-082-0060(8)(f), however, creates internal conflict between the two sentences as "may" in the first sentence would not limit a utility's discretion to hire a third-party consultant but "may" in the second sentence would limit the discretion, PGE argues.[26]

If the Commission intended to limit a utility's discretion to hire a third-party consultant when requested by a small generator, the Commission would have used mandatory language, PGE observes, as the Commission did everywhere else in the pertinent rules. PGE notes, "[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."[27] PGE points to the customer option to build under the interconnection agreement for large generators (Standard Oregon Qualifying Facility Large Generator Interconnection Agreement (QF-LGIA)) where the Commission provided that an interconnection customer "may require" utilization of a third-party consultant, but provided conditions and restrictions.[28]

PGE also points out we used the permissive verb "may" in OAR 860-082-006(f), instead of the mandatory verb "must" used in every other sub-provision of OAR 860-082-0060(8).[29] PGE states:

> Because the Commission used "must" for the other provisions of the rule, it did not intend "may" to mean "must" in section (8)(f). The general assumption for purposes of statutory interpretation is that "when the legislature employs different terms within the same statute, it intends different meaning for those terms."[30]

Given that the Commission used "must" for all other provisions of the rule, PGE insists that we did not intend "may" to mean "must" in section (8)(f). "The general assumption for purposes of statutory interpretation is that 'when the legislature employs different

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[26] PGE's Motion for Partial Summary Judgment, at 16-17 (Feb 27, 2019), citing in fn. 64, 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.").

[27] *Id*. at 16, citing in fn. 62, *Emerald People's Utility Dist. V. Pac. Power & Light Co.*, 302 OR 256 (1986) (citations omitted).

[28] *Id*., quoting Order No. 10-132, Appendix A at 40 (QF-LGIP at Section 13.4).

[29] PGE's Reply in Support of Motion for Partial Summary Judgment, at 6-7 (Apr 4, 2019), quoting OAR 860-082-0060(8)(a) through OAR 860-082-0060(8)(h).

[30] *Id*. at 9, citing in fn. 24, *State v. Meek*, 266 Or App 550, 556 (2014) (internal quotations marks and citation omitted); *see also Baker v. Croslin*, 359 Or 147, 157-58 (2016) (alternative terms do not mean the same thing, unless there is evidence to the contrary).

terms within the same statute, it intends different meaning for those terms,'" PGE argues.[31]

PGE acknowledges the cases cited by Sandy River, including *Dilger*, about the interpretation of "may" in a rule or statute, but distinguishes them. In *Dilger*, PGE explains, the legal question addressed the discretion of a school to determine when to excuse students for religious instruction. The implication of First Amendment constitutional issues and a unique legislative history led the court to construe "may" to mean "shall" in the particular circumstances and with certain restrictions, PGE indicates. We are not faced with constitutional questions here, however, PGE observes, and the language is plain on its face with surrounding provisions demonstrating that the Commission understood the difference between 'must' and 'may, PGE states. As noted by the court in *Dilger*, "It is axiomatic that the courts cannot in the guise of construction supply an integral part of a statutory scheme omitted by the legislature," PGE declares.[32] PGE points to a case more on point: "[In] *Associated Oregon Veterans v. Department of Veterans Affairs,* [] the Oregon Court of Appeals distinguished *Dilger* and held that there was no reason to read a mandatory provision as permissive where the legislature used both mandatory and permissive language in the same statute."[33] Here, PGE argues, the Commission used both mandatory and permissive language in the same regulation and there is no reason to conclude that the permissive language "may" should be read as a mandatory "must." About the out-of-state cases cited by Sandy River, their only persuasive bearing is to support the importance of context when interpreting the meaning of a rule or statute, PGE states.

Addressing Sandy River's interpretation that OAR 860-082-0060(8)(f) contains an implied reasonableness requirement, PGE retorts that we know how to explicitly condition discretion for reasonableness but the Commission did not do so in sub-provision (8)(f) of OAR 860-082-0060. PGE points to other interconnection rules for small generators where the Commission used specific language (in bold) to expressly limit the utility exercise of discretion:

- 860-082-0025(1)(e)(A) states that a 'public utility **may not unreasonably refuse** to grant expedited review of an application to renew an existing small generator facility interconnection if there have been no changes to the small generator facility other than minor equipment modifications'

[31] *Id*.
[32] PGE's Reply in Support of Motion for Partial Summary Judgment, at 9-10 (Apr 4, 2019), citing *Dilger*, 222 Or 15 112 (internal citations omitted).
[33] *Id*. at 10, citing in fn. 31, *Associated Oregon Veterans v. Department of Veterans Affairs*, 70 Or App 70, 74 (1984).

- 860-082-0060(6) states that '**if a public utility reasonably concludes** that an adequate evaluation of an application requires a feasibility study, then the public utility must provide the applicant with an executable feasibility study agreement within five business days of the date of the scoping meeting'
- 860-082-0060(6)(d) states the 'public utility **must make reasonable, good-faith efforts** to follow the schedule set forth in the feasibility study agreement for completion of the study'
- 860-082-0060(8)(a) states that the facilities study agreement prepared by the public utility '**must include** a detailed scope for the system impact study, a **reasonable schedule** for completion of the study, and a **good-faith, non-binding estimate** of the costs to perform the study.'[34]

The Commission could have added language similar to these examples, PGE observes, to explicitly insert the reasonableness requirement that Sandy River tries to imply. For example, PGE suggests that the following language (in underlined italics) could have been, but was not, added to the end of the key sentence in OAR 860-082-0060(8)(f): "The public utility and 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, *and the utility may not unreasonably refuse to agree to such an arrangement.*"[35]

b. Historical Development

PGE asserts that the historical development of OAR 860-082-0060, as well as subsequent regulatory action regarding the underlying issue, supports its interpretation that the Commission did not intend, and parties did not understand, OAR 860-082-0060(8)(f) to require a utility to agree to involve a third-party contractor to facilitate an interconnection. The Commission adopted OAR 860-082-0060 pursuant to authority delegated to state regulatory agencies under the federal Public Utility Regulatory Policies Act of 1978 (PURPA) to create implementation rules, PGE explains.[36] In July of 2007, the Commission opened Docket AR 521 to adopt rules that would apply to the interconnection of small generators to a public utility's electrical system, PGE states.[37]

[34] *Id*. at 11-12.
[35] *Id*. at 12.
[36] 16 U.S.C. § 824a-3(a), (f)(1).
[37] PGE's Motion for Partial Summary Judgment, at. 3 (Feb 27, 2019), citing *In the Matter of a Rulemaking to Adopt Rules Related to Small Generator Interconnection*, Docket No. AR 521, Compl. (July 24, 2007).

Staff's initial proposal included a rule stating 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," PGE indicates.[38] Mr. John Lowe, then representing Sorenson Engineering, Inc., countered that an interconnection customer should be given "the option" to use third-party consultants during the interconnection process, PGE indicates.[39] Mr. Lowe proposed language, PGE states, to protect the public utility when an interconnection customer exercised the option to use a third-party consultant, stating: "[t]he 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."[40] The Energy Trust of Oregon, Inc. (ETO) similarly advocated giving an "option" to an interconnection customer to have system upgrades be performed by a third party.[41] PGE responded, at the time, to both recommendations that the proposed option would require the addition of significant language to protect the utility and its customers. Revised proposed rules did not adopt the language proposed by either Sorenson Engineering, Inc. or ETO, PGE indicates. Instead, the Commission retained the original permissive language.

Nevertheless, PGE observes, Sandy River and the Coalition try to imply a reasonableness balancing test with regard to the hiring of third-party consultants to facilitate interconnection that is not supported by the language, context, or history of OAR 860-082-0060(8)(f). The content of the written record in Docket AR 521 is not in dispute, PGE asserts; instead, Sandy River and the Coalition largely rely on testimony filed in this proceeding that concerns Mr. John Lowe's "personal understanding of the rule, and various unnamed parties' alleged understanding of the rule."[42] In addition to questioning the value of this testimony, PGE challenges the competence and admissibility of Mr. Lowe's statements.

PGE also contests that language in Order No. 09-196, entered in Docket AR 521, demonstrates our intent to impose a reasonableness balancing test on the utility discretion to involve a third-party contractor, as argued by Sandy River and the Coalition. After

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[38] *Id*. at 4, citing 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 860-08-055(6)(b) at 23 (Oct. , 2007)).
[39] *Id*. at 5, citing Honoré Decl., Ex. 3 at 5-6 (Docket No. AR 521, Comments of Sorenson Engineering, Inc. at 5-6 (Nov. 27, 2007)).
[40] *Id*., citing Honoré Decl., Ex. 3 at 6 (Docket No. AR 521, Comments of Sorenson Engineering, Inc. at 5-6 (Nov. 27, 2007)).
[41] *Id*., citing Honoré Decl., Ex. 4 at 3 (Docket No. AR 521, Comments of Sorenson Engineering, Inc. at 5-6 (Nov. 27, 2007)).
[42] PGE's Reply in Support of Motion for Partial Summary Judgment, at. 13 (Apr 4, 2019), citing Sandy River's Response at 17 n. 36, 20-21.

reiterating the language of the rule, the order states: "If the public utility, in its reasonable opinion, does not believe that a third-party contractor's work is adequate, then the public utility may rebuild the interconnection facilities, or system upgrades, or repeat the applicable study. The applicant must pay for both the third-party consultant's work and the public utility's work."[43] This provision does not affect the utility's decision to use a third-party consultant, PGE argues, but rather explains the utility's right to charge the applicant if the utility finds it necessary to rebuild facilities constructed by the applicant's third-party consultant. This standard corresponds to the mandate in OAR 860-082-0060(2), PGE indicates, that "[t]he applicant must pay the reasonable costs of any interconnection facilities or system upgrades necessitated by the interconnection."[44] As the applicant is only responsible for reasonable costs under OAR 860-082-0060(2), a utility must act reasonably if it rebuilds the third-party consultant's work, PGE states.

The Commission revisited the use of third-party consultants in the interconnection process in Docket UM 1610, PGE indicates. Staff's initial list of possible issues to be addressed in that docket included the question: "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?"[45] Parties provided comments about the issues deserving attention, PGE observes. Recognizing that the right did not exist in the adopted rule, the Coalition advocated for giving a QF the right to use third-party contractors, PGE indicates. To date, the language of the rule remains unchanged, PGE states.

2. Positions of Sandy River and the Coalition

a. Text

Sandy River and the Coalition challenge PGE's position that the language of OAR 860-082-0060(8)(f) imparts unfettered discretion to utilities. PGE wrongly assumes, Sandy River asserts, that the rule's word "may" allows a utility to ignore considerations of good faith and reasonableness when exercising discretion about hiring a third-party contractors to interconnect a small generator. The Coalition points out that the rule's use of the word "may" could simply reflect the inability to forecast if a utility or the parties will hire a

[43] In Re Rulemaking to Adopt Rules Related to Small Generator Interconnection, Docket No. AR 521, Order No. 09-196 at 4 (Jun 8, 2009).
[44] PGE's Reply (Apr 4, 2019), at 16-17.
[45] PGE's Motion for Partial Summary Judgement, at. 7 (Feb 27, 2019), citing *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).

third party contractor—they *may* (or may not) agree. For this reason, "may" in the text of the rule may have no significance regarding our intent that a utility and interconnection customer work in good faith towards reaching an agreement to hire a third-party contractor, the Coalition observes.

PGE also overlooks precedent, Sandy River asserts, including from Oregon courts, finding that the use of "may" in legislation (or a rule) does not necessarily mean the bestowal of unfettered discretion. Sandy River quotes the Oregon Supreme Court: "[a]s this court long has acknowledged under its case law, even use of the word "may"—often viewed as a purely discretionary term—can be read to indicate a mandatory requirement when to do so reflects the legislature's intent."[46] In that case, Sandy River further explains, a statute providing that school districts "may" release children from class under certain circumstances was interpreted to mean that children could insist on the right to be dismissed due for the purpose of consistency with the legislature's intent.[47] For this reason, Sandy River contends that when discerning the meaning of the rule, the rulemaking record must be reviewed in order to determine the intent and purpose of the rule.

b. Context

Sandy River rebuts PGE's contextual arguments. "PGE argues," Sandy River states, "that because the Commission's rules provide elsewhere that the utility itself 'may' use a contractor to construct facilities, this right of the utility trumps any right an interconnection [customer] would have to insist on using its own third-party, despite any reasonableness test."[48] "PGE's argument," Sandy River construes, "is that the Commission's rule somehow prioritizes one action PGE 'may' take (hiring its own contractor) over another action that it 'may' take (allowing an interconnection customer to hire a contractor), without any explanation of why that would be the case."[49] Sandy River counters:

> The more reasonable reading of the rule is that there are various approaches that may make sense in any given circumstance (i.e., PGE could do the work itself, it could hire a contractor, or it could allow the interconnection customer to hire a contractor), and that PGE's decisions

[46] Complainant's Response, at 18 (Mar 26, 2019), citing: *State v. Guzek*, 342 Or 345, 356 (2007) (citing Dilger v. Sch. Dist. 24 CJ, 222 Or 108 (1960).
[47] *Id*. at 19, citing in fn. 39 *See e.g., Dilger*, 222 Or at 117 ("If necessary to carry out the intention of the legislature it is proper to construe the word 'may' as meaning 'shall.'").
[48] Complainant's Sur-Response, at 11 (Apr 8, 2019).
[49] *Id*.

> with regard to how to proceed should be reasonable under the circumstances.[50]

Sandy River also addresses another argument by PGE "about how the Commission's other rules show that its discretion under OAR 860-082-0060(8)(f) is exempted from a reasonableness requirement."[51] "PGE asserts that because the rules regarding small generator interconnections use the word 'must' in other instances, the Commission clearly intended that the word 'may' is wholly permissive with respect to allowing interconnection customers to hire third-parties," Sandy River indicates.[52] Sandy River counters that it is not that PGE *must* allow interconnection customers to use a third-party contractor to construct interconnection facilities, but rather that PGE *may* do so, with the decision being bounded by reasonableness. PGE's argument does not, therefore, undermine Sandy River's position, the complainant contends, "because 'may' is the correct word to use when the use of third-parties is reasonable in some, but not all circumstances."[53]

Sandy River acknowledges PGE's argument that because the Commission used specific language elsewhere in the rules, but not in OAR 860-082-0060(8)(f), to constrain a utility's judgment by reasonableness or good faith, the Commission intended PGE's discretion to be free from any reasonableness standard. But by making this argument, Sandy River points out, "PGE expressly recognizes that the Commission, by statute, has the power and duty to impose a standard of reasonable conduct on a utility, but asserts that '[t]o the extent these statutes impose a standard of reasonable conduct on a utility, the Commission has already taken that into account in the formal rule making process."[54] Sandy River explains, "[i]n other words, PGE argues that the Commission has already embedded, in every specific rule, whether or not the utility's discretion under the rule is subject to a requirement to exercise that discretion in good faith, or reasonably under the circumstances."[55] Sandy River next exhorts that, "[t]he Commission should not find, on summary judgment in this case, that a utility's duty to act in good faith and reasonably exists only in those instances where the Commission's rules expressly state such a requirement."[56]

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[50] *Id*. at 11-12.
[51] *Id. at 12.*
[52] *Id*.
[53] *Id*.
[54] *Id*. at 13.
[55] *Id*.
[56] *Id*.

c. Historical Development

Sandy River and the Coalition contend that the intent of OAR 860-082-0060(8)(f) is clear from the discussion and record in the underlying rulemaking, AR 521. "The Commission's rule allowing for the use of third-party assistance with interconnection projects was intended to provide a remedy for interconnection customers experiencing delays or problems with the utility, and it was understood that a utility's consent to use third-parties would not be unreasonably withheld," Sandy River asserts.[57] Both the Coalition and Sandy River quote the recollections of Mr. Lowe, a witness for the Coalition in this proceeding, and an expert consultant for Sorenson Engineering in AR 521:

> My understanding is that the rules were intended to allow an interconnection customer to hire and pay for a third party contractor, as long as the public utility retained oversight and the ability to approve the contractor. The idea was that the utility could provide a list of acceptable contractors, or could veto a specific contractor, but not that the utility could unreasonably withhold its approval and decide simply not to allow an interconnection customer to hire any third party contractor.[58]

The vision, Sandy River observes, was that utilities would approach small generator requests to use third parties in a reasonable manner, withholding consent only for good reason. Mr. Lowe's recollections are quoted again:

> The understanding was that the utility's consent would not be unreasonably withheld, and I believe that most of the parties would be shocked that a utility would take the position that the rules provided it the unilateral right to simply reject an interconnection customer's ability to hire a third party consultant, regardless of the reasonableness of the request.[59]

The rulemaking record confirms Mr. Lowe's reading of the rule, Sandy River asserts. Sandy River points to ETO's recommendation that an interconnection customer should have the option to have needed system upgrades contracted to an independent consultant to speed up a timeline. ETO stated:

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[57] *Id*.
[58] *Id*. at 19, quoting REC/100, Lowe/3.
[59] Complainant's Response, at. 21 (Mar 26, 2019), quoting REC/100, Lowe/6.

> Small generators can't be held up if some other utility issue has diverted their internal staff. Certainly not when acceptable alternatives exist . . . consultants to speed or outsource work on interconnection. Small generators should also have this option to hurdle time constraints.[60]

The Renewable Northwest Project (now Renewable Northwest) also assessed the proposed rules as providing a useful remedy for aggrieved interconnection customers, noting that a solution to "dealing with backlogs of interconnection requests is to draft rules outlining under what situation it would be acceptable for interconnection customers to hire a private third-party contractor licensed to design, construct, and install the requisite system upgrades."[61]

Moreover, Sandy River and the Coalition assert that the Commission's order adopting the rule supports an interpretation of OAR 860-082-0060(8)(f) that utilities were expected to approach small generator requests to use third parties in a reasonable manner, and withholding consent only for good reason. Sandy River quotes Order No. 09-196 at length:

> During the rulemaking proceedings, *the participants agreed that a public utility and an applicant to interconnect a small generator facility could agree to allow the applicant to hire third-party contractors to complete any interconnection facilities and system upgrades required by the interconnection*, at the applicant's expense and subject to public utility oversight and approval. The small generators also requested that the rules provide the option for a public utility and an applicant to agree to allow the applicant to hire third-party contractors to complete any studies necessary for a Tier 4 review of an interconnection application. We agree with the small generators that it is appropriate to allow a public utility and an interconnection applicant to agree to allow the applicant to hire third-party contractors to complete any required studies during a Tier 4 review and have amended OAR 860-082-0060 to reflect this conclusion. *We clarify, however, that work conducted by third-party contractors is always subject to the public utility's review and approval*. If the public utility, *in its reasonable opinion*, does

[60] Small Generator Interconnection Rulemaking, Docket No. AR 521, Energy Trust of Oregon's Comments (Nov. 8, 2007) (appearing in the record at REC/101).
[61] Complainant's Response at 22 (Mar 26, 2019), citing Small Generator Interconnection Rulemaking, Docket No. AR 521, Renewable Northwest's Comments (Nov. 9, 2007) (appearing in the record as REC/102).

> not believe that a third-party contractor's work is adequate, then the public utility may rebuild the interconnection facilities or system upgrades, or repeat the applicable study. The applicant must pay for both the third-party consultant's work and the public utility's work.[62]

These statements show, Sandy River asserts, that the Commission intended to adopt a rule that addressed PGE's concerns, not with specific provisions for protections, but by allowing PGE to insist on reasonable protections by agreement with a customer with utility oversight required.

The Coalition rebuts PGE's characterization of certain statements the Coalition made in Docket UM 1610, in 2012. PGE argues that advocacy in that docket demonstrates the Coalition knew then that OAR 860-082-0060(8)(f) did not require PGE to agree to use third-parties contractors. The Coalition counters that past comments in UM 1610 merely demonstrate a continued commitment to addressing interconnection issues and seeking improvements to the rule regarding the use of third parties. The comments do not contradict the Coalition's position in this case that PGE must consider a small generator's request to use third parties to assist with an interconnection in good faith and with reasonableness.

The Coalition also refutes PGE's evidentiary objections to Mr. John Lowe's testimony, explaining that the testimony presents evidence about the underlying purpose of OAR 860-082-0060(8)(f) that is based on his personal experience. Hearsay may be admitted in administrative agency proceedings and given the appropriate weight, the Coalition indicates. Although PGE may disagree with Mr. Lowe's views, his testimony is relevant, competent, and admissible.

D. Alternate Grounds for Reasonableness Standard

1. General Enabling Statutes

a. PGE

Although PGE points out that Sandy River did not plead in the Amended Complaint that a general enabling statute embeds a reasonableness requirement in our regulations, PGE addresses the arguments that Sandy River makes in briefing that our general enabling statutes, ORS 756.040 and ORS 757.325, mean that we have the right and duty to require

[62] *Id*. at 24, quoting *In Re Rulemaking to Adopt Rules Related to Small Generator Interconnection*, Docket No. AR 521, Order No. 09-196 at 4 (emphasis added).

PGE to act in a reasonable manner in exercising its discretion here. PGE refutes that the general enabling statutes "impose an undefined reasonableness requirement or balancing test into every regulation enacted by the Commission."[63] PGE argues that "[t]o the extent these statutes impose a standard of reasonable conduct on a utility, the Commission has already taken that into account in the formal rule making process."[64] PGE explains that when the Commission uses the rulemaking process to enact a regulation under OAR Chapter 860, the Commission determines then whether to include a reasonableness balancing test in a regulation, and the Commission decided not to include a reasonableness balancing test in OAR 860-082-0060(8)(f) despite doing so in other related rules.

b. Sandy River

PGE's assertion that OAR 860-082-0060(f) does not contain any requirement for a utility to exercise discretion under the rule in good faith or a reasonable way, includes an implicit argument, Sandy River observes, that the Commission is without the power to otherwise allow Sandy River to utilize a third-party's assistance in constructing its interconnection facilities. "The Commission should reject such a narrow reading of its powers," Sandy River rejoins, as "the Commission is provided broad statutory authority to protect customers from unjust and unreasonable exactions and practices, and is "vested with power and jurisdiction to supervise and regulate every public utility and telecommunications utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction."[65] Sandy River contends that these powers give us the authority to require PGE to allow third-party assistance with the construction of Sandy River's interconnection facilities, even without reliance on OAR 860-082-0060(f), if we find that such a remedy is reasonable and would address Sandy River's harms. As an example, Sandy River explains that the Commission has "ordered utilities to allow third-parties to review their systems, and make recommendations to the Commission."[66]

2. Contractual Duties

a. PGE

PGE recognizes that it has two existing contracts with Sandy River: a Power Purchase Agreement (PPA) and a Facilities Study Agreement (FSA). PGE also generally agrees

[63] *Id*. at 21.
[64] *Id*.
[65] Complainant's Sur-Response (Apr 8, 2019), at 19.
[66] *Id*.

that a covenant of good faith and fair dealing is implied in formal contracts.[67] PGE observes, however, the motion for partial summary judgment addresses only Sandy River's allegation that PGE violated OAR 860-082-0060(8)(f). Sandy River did not sue PGE for a breach of either the PPA or the FSA, so contractual duties under those agreements are not at issue, PGE asserts.

b. Sandy River

As Sandy River's PPA with PGE obligates complainant to sell power to defendant, the PPA requires that an interconnection to PGE's system be made. Sandy River and PGE signed a FSA to conduct interconnection studies stating that "the applicant and PGE will perform the FSA consistent with OAR 860-082-0060(8)." In light of the language of the FSA and purpose of the underlying PPA, Sandy River argues it:

> [h]ad an objectively reasonable expectation that PGE would only reject third party requests under this rule for valid reasons, and that otherwise it would have an opportunity to work with PGE to agree to use a third-party to assist with the interconnection. Because Sandy River had an objectively reasonable expectation under the FSA, the implied duty of good faith applies and PGE must exercise its discretion subject to a standard of reasonableness.[68]

Sandy River discusses two cases to support the assertion that utilities have an obligation to work with their customers in good faith and to reasonably consider requests to take actions in furtherance of their relationship or obligations to each other. In *Electric Lightwave, Inc. v. US West Communications, Inc.*, Sandy River notes that although the Commission found no violation, the Commission indicated that a utility "does have a general duty to act in good faith" and to not act in a manner that is unreasonable when requested to negotiate a list of established facts for purposes of litigating a case.[69] In response to PGE's attempt to argue the irrelevance of the case because it involves counsel's duty to deal in good faith with an opposing party during litigation, Sandy River emphasizes that the Commission found the duty to act in good faith applied to the utility.

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[67] PGE's Reply at 18 (Apr 4, 2019), citing *Klamath Off-Project Water Users, Inc. v. PacifiCorp*, 237 Or App 434, 445 (2010) ("In general, ever contract has an obligation of good faith in its performance and enforcement under the common law.").
[68] Complainant's Response, at 13 (Mar 26, 2019).
[69] *Id*., citing *Electric Lightwave, Inc. v. US West Communications, Inc.*, Docket No. UC 377, Order No. 99-285 at 8 (1999).

Similarly, in *Xcel Energy Services, Inc. v. Southwest Power Pool, Inc.*, FERC ruled that although PURPA's regulations do not specifically require utilities to act as registrants for QFs, such agreements are "consistent with the PURPA purchase obligation, and we expect utilities, such as Xcel, that are requested to enter into such arrangements, will in good faith negotiate and enter into such arrangements," Sandy River asserts.[70] Sandy River takes exception with PGE's characterization of the case, and argues that the circumstances in *Xcel* are pertinent to this case because FERC determined that although the defendant utility had not agreed by contract to take the specific actions at issue, FERC found that a utility should take actions that are reasonable under the circumstances to implement a contract, specifically its obligations under PURPA, even though the actions were not required by statute or regulation, or the contract itself, if requested by the counterparty. That is exactly the circumstance presented here, according to Sandy River.

IV. RESOLUTION

A. Overview

In determining the scope of our review of PGE's motion for summary judgment, we consider the motion in context of the legal standard under ORCP 47. Under ORCP 47, a motion for summary judgment should be granted if the pleadings and the supporting evidentiary documents demonstrate that there is no genuine issue as to any material fact, and that the moving party—here, PGE—is entitled to prevail as a matter of law.

Looking first to PGE's motion for partial summary judgment, PGE asserts that the language of OAR 860-082-0060(8)(f)—*i.e.*, the rule cited by the second claim of Sandy River's complaint—does not require a utility to consent to a small generator's request to hire a third-party consultant to complete interconnection facilities and system upgrades, and does not authorize us to require a utility to do so. PGE contends that the text, context, and history of the rule compels this answer, without any impediment from factual disputes. PGE argues, therefore, that complainant's requested relief—*i.e.*, that the Commission direct PGE to consent—is unavailable as a matter of law, without the need to consider any facts.

Sandy River advances a more nuanced view of the impact of the rule. The Amended Complaint states, "PGE has an obligation to not unreasonably refuse to grant its consent to allow Sandy River Solar to hire a third-party consultant to complete the interconnection facilities and system upgrades."[71] Sandy River asserts that our analysis

[70] *Id*. at 13-14, citing *Xcel Energy Services, Inc. v. Southwest Power Pool, Inc.*, 118 FERC ¶ 61,232 at P. 27 (2007).
[71] *Id*., ¶120.

of the second claim and paragraphs 3 and 7 of the prayer for relief, for purposes of considering the motion for partial summary judgment, must involve a much greater inquiry than the interpretation of the text of OAR 860-082-0060(8)(f) alone. Arguing that a full statutory construction analysis of OAR 860-082-0060(8)(f) reveals that the underlying intent of the rule was to give a small generator an option to involve a third-party contractor to facilitate a difficult interconnection process, Sandy River contends that a utility is obliged to consider, in good faith, a request under the rule, and consent when reasonable, and that the Commission can direct PGE to do so when facts demonstrate the utility acted unreasonably. Sandy River claims that PGE violated OAR 860-082-0060(8)(f) by perfunctorily denying Sandy River's request to involve a third-party contractor without proper evaluation of the merits of the request, or consideration of the error, delays, and unreasonable actions by PGE that led Sandy River to make the request.

Although Sandy River posits that the legal theories of complainant and defendant are disparate, we find that the two theories are reconcilable as contrary interpretations of OAR 860-082-0060(8)(f). PGE's analysis construes "may," as used in both sentences of OAR 860-082-0060(8)(f), to mean that PGE is "allowed to"—thereby giving PGE full discretion to decide to hire a third-party contractor, whether at its motivation or the request of a small generator, and preventing us from finding PGE unreasonable and directing corrective action. Sandy River's analysis, however, infers conditions on the discretion based on the underlying intent of the rule, and leads Sandy River to conclude that the rule allows us to find PGE unreasonable and to direct PGE to correct the situation. When parties dispute the meaning of the language in a statute or a rule that we administer, we must undertake our own analysis of its construction, using the Oregon courts' methodology and the Oregon rules of statutory construction.

After construing the rule, we address Sandy River's argument that we must consider whether PGE violated any contractual or general statutory duties as a public utility to exercise its discretion as a reasonable manner.

B. Analysis of the Construction of OAR 860-082-0060(8)(f)

As we have previously observed, analysis of the construction of a statute or rule in Oregon involves three steps.[72] We previously summarized the steps, as follows:

[72] Order No. 14-254.

> First, courts examine the text and context of the statute.[73] Second, a party may proffer legislative history, and the court will consult the legislative history where it appears useful to the court's analysis.[74] Finally, if the legislature's intent remains unclear after examining text, context and legislative history, a court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.[75]

1. Text and Context

We first examine the text and context of OAR 860-082-0060(8)(f), which provides in pertinent part:

> 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.

There is disagreement among the parties about the meaning of the word "may" and whether it has a permissive meaning in OAR 860-082-0060(8)(f) or whether, rather than allowing utility discretion, it invokes possibility. While commonly used words should be interpreted as having "their plan, natural, and ordinary meaning,"[76] we recognize that there are multiple dictionary definitions for "may," including permission and possibility. Thus, we look next to the broader context of OAR 860-082-0060(8)(f) within the greater rule, with the understanding that ambiguity in isolation may be clarified by the whole.

The context provided by other subsections of OAR 860-082-0060(8) is persuasive. We find that the use of "may" in OAR 860-082-0060(8)(f), as opposed to use of "must" in all other subsections of OAR 860-082-0060(8) indicates we drew a knowing and purposeful distinction in subsection (f) from all of the other subsections. We find this conclusion is supported by comparing language in OAR 860-082-0060(8)(f) regarding the involvement of third-party consultants for interconnection work for small generators to that in the interconnection procedures for large generators. Because the rules set forth partial exceptions to the mandate in OAR 860-082-0035 that a public utility *construct*

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[73] *Id*. at 4, citing *State v. Gaines*, 346 Or 160, 171 (2009).
[74] *Id*., citing *State v. Gaines*, 346 Or 160, 171-172 (2009).
[75] *Id*., citing *State v. Gaines*, 346 Or 160, 172 (2009).
[76] *Id*, citing in fn. 8, *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 (1993); *see also State v. Murray*, 340 Or 599, 604 (2006) ("Absent a special definition, we ordinarily would resort to dictionary definitions, assuming that the legislature meant to use a word of common usage in its ordinary sense.").

interconnection facilities and system upgrades, we deem it important to be attentive to differences in the language used for other exceptions. The stronger language and explicit requirements that allow a large generator to require the use of a third-party contractor are, therefore, persuasive to us.

We also acknowledge the absence of reasonableness language in OAR 860-082-0060(8)(f), which contrasts with unequivocal language that we used in other subsections of OAR 860-082-0060 to require a public utility to act reasonably, or in good faith, or to not unreasonably refuse to act.

Taken together, analysis of the linguistic context of OAR 860-082-0060(8)(f) compels us to conclude that "may," as used in the rule, connotes permission and is best interpreted as giving PGE discretion to decide whether to hire a third-party contractor to facilitate the interconnection of a small generator, either on its own or in conjunction with a small generator.

Before concluding our construction analysis, however, we heed Sandy River's assertions that the meaning of "may," as used in OAR 860-082-0060(8)(f), must be discerned within the context of the reason why we adopted OAR 860-082-0060(8)(f). We adopted the rule, Sandy River contends, in order to give a small generator interconnection customer an option for assistance from a third-party consultant to complete an interconnection with a utility, particularly in the face of problems with a utility. By making this argument, Sandy River elevates the importance of the legislative history—or historical development—of the rule, which we are permitted to consider under *State v. Gaines*, and requires us to consider the intent underlying OAR 860-082-0060(8)(f) regardless of whether we deem the rule ambiguous based on its text and context.

2. Historical Development of OAR 860-082-0060(8)(f)

In *Gaines*, the Oregon Supreme Court indicated that legislative history with high probative quality could influence a court's understanding of a statute—or a rule—to be different than otherwise discerned by text and context.[77] Legislative history could expose a latent ambiguity, for example.[78] Sandy River's fundamental argument is that OAR 860-082-0060(8)(f) was intended to provide a remedy for interconnection customers experiencing delays or problems with the utility, and it was understood that a utility's consent to use third parties would not be unreasonably withheld. Although Sandy River does not make an argument in the language of *Gaines*, we discern that Sandy River seeks to identify a latent ambiguity in OAR 860-082-0060(8)(f) to the extent

[77] *Id*. at 172.
[78] *Id*.

that we intended a utility's discretion to decide whether to hire a third party be conditioned by a reasonableness standard because we wanted small generators experiencing interconnection difficulties created by a utility to have a remedy. Having identified this issue, we consider it, but look to *Gaines* for further guidance.

The Oregon Supreme Court advised that a party seeking to convince a court that a statute or rule has an alternate meaning than one that might be more apparent has a difficult task. The court, or administrative agency, receiving the legislative history is obligated to consider it "only for whatever it is worth—and what it is worth is for the court to decide," the Oregon Supreme Court indicated.[79]

Sandy River and the Coalition primarily do not rely on legislative history, but rather on the contemporary recollection of legislative history by Mr. Lowe, an expert consultant witness for Sorenson Engineering in AR 521, and now a witness for the Coalition in this docket. Mr. Lowe testifies about his understanding of the intent underlying OAR 860-082-0060(8)(f) and his memory of what the parties believed to be the purpose of the rule. He stated:

> My understanding is that the rules were intended to allow an interconnection customer to hire and pay for a third party contractor, as long as the public utility retained oversight and the ability to approve the contractor. The idea was that the utility could provide a list of acceptable contractors, or could veto a specific contractor, but not that the utility could unreasonably withhold its approval and decide simply not to allow an interconnection customer to hire any third party contractor.[80]

He also stated, "I believe most of the parties would be shocked that a utility would take the position that the rules provided it the unilateral right to simply reject an interconnection customer's ability to hire a third party consultant, regardless of the reasonableness of the request."[81] Sandy River and the Coalition contend that Mr. Lowe's recent testimony is validated by the rulemaking record, and statements by participants in AR 521, such as ETO and the Renewable Northwest Project (now Renewable Northwest), regarding recommendations that small generator interconnection customers have an option to contract with a third party to facilitate interconnection as a remedy to speed up the process. We note that PGE also referenced comments by participants in AR 521.

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[79] *Id*.
[80] Complainant's Response, p. 19, quoting REC/100, Lowe/3.
[81] *Id*.

After reviewing the full rulemaking record in Docket AR 521, we conclude that the parties in this docket appropriately highlighted the concerns and recommendations expressed in AR 521. We note PGE's evidentiary challenges to Mr. Lowe's testimony in this docket, and Sandy River's acknowledgement that to the extent that Mr. Lowe's testimony involves hearsay, it is admissible in our agency's proceedings but we may determine its weight.

Having full discretion to assess the probative weight and value of Mr. Lowe's testimony, we observe that, while welcoming his recollections of his and other parties' opinions about the reasons for needing the ability to involve third parties during the small generator interconnection process, his recollections do not persuade us to that our intent was different than the text and context of OAR 860-082-0060(8)(f) indicates.

We conclude that PGE should prevail as a matter of law with regard to the second claim because the rule is not properly interpreted to provide the relief that Sandy River seeks. We do not interpret OAR 860-082-0060(8)(f) as either requiring that PGE reasonably exercise its discretion to agree to, or indicating that we have the authority to direct PGE to, hire a third-party consultant to complete Sandy River's interconnection facilities and system upgrades. Based on our interpretation of OAR 860-082-0060(8)(f), we find that there is no genuine issue as to any material fact with regard to Sandy River's second claim.

C. Alternate Grounds

Before concluding our analysis of PGE's motion for partial summary judgment, we address Sandy River's arguments that we need not rely on OAR 860-082-0060(8)(f) alone to consider whether PGE has acted unreasonably, and if so, to direct PGE to take an alternative action. Sandy River contends that we may correct PGE's unreasonable actions under general enabling statutes or contractual law. As PGE observes, however, Sandy River did not plead a claim in the Amended Complaint based on either theory. Rather, these claims were raised in briefing, not in the amended complaint. As we must consider a motion for summary judgment under ORCP 47 and the pleadings before us, Sandy River's alternate grounds are not now properly before us.

Although we acknowledge that we have the authority to correct unreasonable actions by a utility in certain circumstances under either our general enabling statutes or contractual law, we note that the bar is high to apply these general obligations to circumstances in which we have addressed a utility's obligations more directly in specific rules. We may, however, change our rules. We have the authority to amend our rules or adopt new rules

that expand our oversight over interconnection issues, including imposing new limitations on utility discretion to refuse third party involvement, in a specific rule through future rulemakings. Although we conclude that OAR 860-082-0060(8)(f) as written does not include a reasonableness standard, we note that requirements regarding the use of third-party consultants in the interconnection process can be further considered in Docket UM 2000.

V. ORDER

IT IS ORDERED that the Motion for Partial Summary Judgment, filed by Portland General Electric Company, is granted.

Made, entered, and effective Jun 24 2019.

Megan W. Decker
Chair

Stephen M. Bloom
Commissioner

Letha Tawney
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.