

June 22, 2020

Via Electronic Filing

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


Re: UM 2057 - St. Louis Solar, LLC v. Portland General Electric Company

Attention Filing Center:

Enclosed for filing today in the above-named docket is Portland General Electric Company's Response to St. Louis Solar's Motion to Dismiss or, in the Alternative, to Strike PGE's Counterclaims.

Thank you for your assistance.

Very truly yours,


Jeffrey S. Lovinger

Attachment
1012072

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2057

ST. LOUIS SOLAR, LLC,

Complainant,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

**PORTLAND GENERAL ELECTRIC
COMPANY’S RESPONSE TO
ST. LOUIS SOLAR’S MOTION TO
DISMISS OR, IN THE ALTERNATIVE,
TO STRIKE PGE’S
COUNTERCLAIMS**

Portland General Electric Company (“PGE”) respectfully requests that the Public Utility Commission of Oregon (“Commission”) deny St. Louis Solar, LLC’s (“St. Louis Solar”) motion to dismiss or, in the alternative, to strike PGE’s counterclaims.

I. INTRODUCTION

St. Louis Solar’s motion to dismiss or strike on the basis that the Commission lacks jurisdiction to award money damages should be denied because PGE does not seek money damages. Instead, PGE’s counterclaims seek interpretation of the two contracts that St. Louis Solar put at issue in this complaint proceeding: the Power Purchase Agreement (“PPA”) and the Interconnection Agreement (“IA”). It is clear in both parties’ pleadings that there is a dispute regarding the interpretation of the PPA and the IA. The Commission has repeatedly held that its complaint statute vests it with jurisdiction to hear claims seeking interpretation of Commission-approved contract provisions. Because PGE asserts entitlement to affirmative relief in the form of orders interpreting the agreements, it has properly pleaded its counterclaims. Contrary to St. Louis Solar’s assertion, PGE’s first counterclaim does not seek damages but instead requests “an order

of the Commission interpreting the PPA and concluding that PGE acted consistent with the PPA[.]”¹

II. BACKGROUND

St. Louis Solar owns and operates a 2.2 MW solar qualifying facility (“QF”).² St. Louis Solar and PGE entered into a standard PPA in June 2016.³ They entered into a standard IA in May 2018.⁴

The scheduled Commercial Operation Date (“COD”) under the PPA was February 10, 2019.⁵ St. Louis Solar did not meet this deadline. On February 11, 2019, PGE sent St. Louis Solar written notice of default under Section 2.2.2 and Section 9.2 of the PPA.⁶ The notice informed St. Louis Solar it had one year (until February 11, 2020) to achieve COD and cure the breach or PGE could terminate the PPA.⁷ The notice also informed St. Louis Solar that it would owe PGE lost energy value damages pursuant to Section 9.2 of the PPA until the breach was cured. On April 3, 2019, and April 25, 2019, PGE sent St. Louis Solar invoices for lost energy value damages in the amounts of \$12,569.94 and \$11,215.76 respectively.⁸ St. Louis Solar paid these amounts to PGE in April and May 2019.⁹

Under the IA, October 31, 2019, was the milestone date for PGE to place the interconnection in-service.¹⁰ However, St. Louis Solar failed to complete construction of its

¹ PGE’s Answer, Affirmative Defenses, and Counterclaim (“Answer”) ¶ 456 (May 26, 2020).

² Compl. at 1, ¶ 10 (Feb. 3, 2020); Answer at 1 and ¶ 10.

³ Compl. ¶ 13; Answer ¶ 13.

⁴ See Compl. ¶ 26; Answer ¶ 26.

⁵ The scheduled COD under Section 2.2.2 of the PPA was October 31, 2017. (Compl. ¶; Answer ¶15.) The parties amended the PPA on February 1, 2017, and modified the scheduled COD to March 31, 2018. (Compl. ¶¶ 21, 22; Answer ¶¶ 21, 22.) The parties amended the PPA a second time on November 16, 2018, and modified the scheduled COD to February 10, 2019. (Compl. ¶¶ 31, 33; Answer ¶¶ 31, 33.)

⁶ Compl. ¶ 47; Answer ¶¶ 47, 331; St. Louis Solar’s Reply to Answer and Affirmative Defenses, and Answer to PGE’s Counterclaims (“St. Louis Solar Reply”) ¶ 331 (Jun. 10, 2020).

⁷ Answer ¶ 331; St. Louis Solar Reply ¶ 331.

⁸ Compl. ¶¶ 51-52, 152-53; Answer at 2 and ¶¶ 51-52, 153-53.

⁹ See Compl. ¶¶ 152-53; Answer ¶¶ 152-53, 335; St. Louis Solar Reply ¶ 335.

¹⁰ See Compl. ¶ 30; Answer ¶ 30.

facility and its associated interconnection equipment until March 19, 2020.¹¹ As a result, PGE interconnected the facility a week later on March 26, 2020, approximately five months after the milestone for interconnection in the IA.¹² PGE's actions complied with its obligations under the IA and the delay in achieving the interconnection in-service milestone was caused by St. Louis Solar's failure to timely complete its work on the facility and its interconnection equipment.

PGE and St. Louis Solar twice agreed to amend the PPA to extend St. Louis Solar's date to cure its breach for failure to achieve scheduled COD.¹³ St. Louis Solar achieved COD on April 6, 2020,¹⁴ approximately 14 months after the date specified in the PPA.

On February 3, 2020, St. Louis Solar filed a complaint against PGE asserting nine claims for relief and 22 prayers for relief. Among other things, the complaint alleges that PGE prevented St. Louis Solar from timely interconnecting and thereby prevented St. Louis Solar from timely meeting its scheduled COD.¹⁵ St. Louis Solar asks the Commission to order PGE to reimburse the lost energy value damages St. Louis Solar paid PGE, plus interest.¹⁶ St. Louis Solar also asks the Commission to issue an order moving the start date of the 15-year fixed price period forward approximately three years and ten months from June 10, 2016, to April 6, 2020.¹⁷ Alternatively, St. Louis Solar asks the Commission to issue an order extending the 15 year fixed price period by approximately five months to account for the time between the in-service milestone in the IA (October 31, 2020) and the date the interconnection was placed in-service (April 6, 2020).¹⁸

¹¹ Answer ¶¶ 384, 432, 463.

¹² *Id.* at ¶¶ 386, 435, 464.

¹³ *Id.* at ¶¶ 369, 380; St. Louis Solar Reply ¶¶ 369, 380.

¹⁴ *See* Answer at 2 and ¶ 412.

¹⁵ Compl. ¶ 43.

¹⁶ *Id.* ¶¶ 317-18 (Prayer for Relief).

¹⁷ *Id.* ¶ 309 (Prayer for Relief).

¹⁸ *Id.* ¶ 311 (Prayer for Relief).

PGE filed an answer and counterclaims. In its answer, PGE alleges that St. Louis Solar caused its own delays.¹⁹ In PGE’s first counterclaim, PGE seeks an order “interpreting the PPA and concluding that PGE acted consistent with the PPA[.]”²⁰ In PGE’s second counterclaim, PGE seeks an order interpreting the IA and confirming that “PGE complied with its obligations under the IA[.]”²¹

III. LEGAL STANDARD

ORCP 21 A(8) provides for a motion to dismiss for “failure to state ultimate facts sufficient to constitute a claim.” On a motion to dismiss under ORCP 21 A(8), the court accepts “all well-pleaded allegations of the complaint [in this case the counterclaims] as true and give[s] [the non-movant] the benefit of all favorable inferences that may be drawn from the facts alleged.”²² “All pleadings shall be liberally construed with a view of substantial justice between the parties.”²³ In other words, when deciding St. Louis Solar’s motion to dismiss PGE’s counterclaims, the Commission must consider all well-pleaded allegations of PGE’s counterclaims as true and give PGE the benefit of all favorable inferences that may be drawn from PGE’s factual allegations.²⁴

A claim is not subject to a motion to dismiss for the sole reason that it has been defectively stated.²⁵ In general, if a claim is defectively stated but it is possible for the claimant to state a

¹⁹ Answer at 3-4, ¶ 98.

²⁰ *Id.* ¶ 456.

²¹ *Id.* ¶ 465.

²² *Scovill By & Through Hubbard v. City of Astoria*, 324 Or 159, 164 (1996) (quotation marks and citations omitted).

²³ ORCP 12 A.

²⁴ PGE’s factual allegations are primarily stated in paragraphs 304 through 386 of PGE’s Answer.

²⁵ *See, e.g., Suess Builders Co. v. City of Beaverton*, 294 Or 254, 263 (1982) (the court reversed dismissal of poorly pleaded claim).

claim, a court should allow the claimant to file an amended pleading.²⁶ A motion to make more definite and certain is the proper means to attack a claim for relief that is poorly stated.²⁷

ORCP 21 E provides that the Commission may strike any “redundant matter inserted in a pleading.”²⁸ Redundant material in a pleading may be stricken, but the entire pleading is not subject to dismissal.²⁹

IV. ARGUMENT

A. PGE PROPERLY PLEADED ITS COUNTERCLAIMS.

1. PGE’s counterclaims are proper because a claim can seek interpretation of a contract.

PGE properly pleaded its two counterclaims. A counterclaim is a claim asserted by a defendant against a plaintiff.³⁰ The Oregon Rules of Civil Procedure apply the same pleading standard to claims and counterclaims.³¹ A “claim” is “[t]he assertion of an existing right.”³²

A pleading that requests interpretation of a contract can properly be designated a counterclaim because the defendant “assert[s] . . . an existing right” to an order interpreting the contract. Every Commission order and Oregon court decision to have addressed the issue holds that a pleading requesting an order interpreting a contract properly pleads a claim.

For example, in Docket No. UM 1931 PGE filed a complaint seeking an interpretation of a PPA.³³ The defendants moved to dismiss for failure to state a claim arguing, among other things,

²⁶ ORCP 25 A; *see Dean v. Guard Publishing Co.*, 73 Or App 656, 660 (1985) (remarking that “a judge should seldom dismiss a complaint *with prejudice* on a defendant’s first pleading motion”) (emphasis in original); *see also Caldeen Construction LLC v. Kemp*, 248 Or App 82, 86 (2012) (noting that “when a defendant’s first responsive pleading is a successful ORCP 21 motion, the plaintiff, typically, is permitted to replead.”) (quotation marks and citation omitted).

²⁷ *See Murray v. Lamb*, 174 Or 239, 248 (1944); ORCP 21 D.

²⁸ ORCP 21 E(2).

²⁹ *Kirby v. Snow*, 252 Or 592, 596 (1969).

³⁰ ORCP 18 A, ORCP 22 A(1).

³¹ *See* ORCP 18 A (setting pleading standard for “a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim”).

³² *Nixon v. Cascade Health Servs., Inc.*, 205 Or App 232, 240 n.8 (2006) (quoting Black’s Law Dictionary 264 (8th ed. 1999)).

³³ *In the Matter of PGE v. Alfalfa Solar I LLC, et al.*, Docket No. UM 1931, Compl. (Jan. 25, 2018).

that interpreting a PPA was beyond the Commission’s authority when resolving a complaint.³⁴ The Commission rejected this argument, ruling that its complaint statute, ORS 756.500(3), vested it with authority to “interpret[] the language and intent of a particular contract[.]”³⁵ The Commission reached the same conclusion in Order No. 18-025 when it denied a motion to dismiss where a complaint sought interpretation of a PPA.³⁶

In analogous declaratory judgment actions, the Oregon Supreme Court has similarly held that Oregon trial courts, which like the Commission follow the Oregon Rules of Civil Procedure, “ha[ve] the power to construe the parties’ rights with respect to . . . contract[s].”³⁷ In *PacifiCorp v. Lakeview Power Co.*, the Oregon Court of Appeals heard an appeal from a jury trial in which the plaintiff sought interpretation of a PPA.³⁸ The Court of Appeals addressed the appeal on the merits without ever suggesting that the plaintiff’s pleading was deficient for failure to state a claim.³⁹

PGE properly pleaded two counterclaims because its counterclaims seek orders interpreting Commission-approved standard contracts. In PGE’s first counterclaim, PGE seeks an interpretation of the parties’ PPA.⁴⁰ In PGE’s second counterclaim, PGE seeks an interpretation of the parties’ interconnection agreement.⁴¹ In each, PGE asserts entitlement to an existing right. In the first counterclaim, PGE seeks an order “interpreting the PPA and concluding that PGE acted consistent with the PPA.”⁴² In the second counterclaim, PGE seeks an order confirming that “PGE

³⁴ Docket No. UM 1931, Defendant’s Motion to Dismiss at 10-26 (Feb. 22, 2018) (“Only contracts that regard a matter subject the Commission’s ongoing regulatory oversight are within the Commission’s jurisdiction.”).

³⁵ Docket No. UM 1931, Order No. 18-174 at 3-5 (May 23, 2008).

³⁶ *In the Matter of PGE v. Pacific Northwest Solar, LLC*, Docket No. UM 1894, Order No. 18-025 at 7 (Jan. 25, 2018).

³⁷ *Ken Leahy Const., Inc. v. Cascade Gen., Inc.*, 329 Or 566, 574 (1999) (citation omitted).

³⁸ *PacifiCorp v. Lakeview Power Co.*, 131 Or App 301, 303 (1994).

³⁹ *Id.*

⁴⁰ Answer ¶¶ 456-57.

⁴¹ *Id.* ¶ 465.

⁴² *Id.* ¶ 456.

complied with its obligations under the IA.”⁴³ Consistent with the body of Commission orders and case law cited above, PGE properly pleaded these requests for contract interpretation as counterclaims.

2. PGE’s counterclaims are proper even though they do not allege wrongdoing.

St. Louis Solar contends that PGE cannot seek interpretation of a contract absent an allegation that St. Louis Solar engaged in “wrongdoing” that “harmed” PGE resulting in “damages.”⁴⁴ St. Louis Solar does not cite any statute, rule, or case for this narrow view of counterclaims, and it is simply not the law.⁴⁵ Neither ORCP 22 A’s description of a counterclaim nor ORS 756.500’s description of a complaint requires a plaintiff to plead that it was “harmed” by defendant’s “wrongdoing.”

To be sure, courts require “a justiciable controversy” before interpreting a contract.⁴⁶ A case is justiciable “where there is an actual and substantial controversy between parties having adverse legal interests.”⁴⁷ An actual and substantial controversy affects the “legal relationships of one or more of real parties in interest.”⁴⁸ St. Louis Solar’s motion does not challenge justiciability at all.

PGE has sufficiently alleged an actual and substantial controversy between it and St. Louis Solar. Here, PGE and St. Louis Solar are counterparties to two agreements, the PPA and the IA. A controversy has arisen between them regarding proper interpretation of those agreements. PGE

⁴³ *Id.* ¶ 465.

⁴⁴ St. Louis Solar’s Mot. to Dismiss or, in the Alternative, to Strike PGE’s Counterclaims (“Mot.”) at 8 (Jun. 5, 2020).

⁴⁵ *Id.* at 8-10. Footnote 32 of the motion to dismiss cites two foreign cases as alleged support for the proposition that PGE’s counterclaims are mistakenly designated defenses. These two cases are inapposite and do not support St. Louis Solar’s position as discussed on pages 9-11 of this response. In any event, St. Louis Solar has not cited the cases for the proposition that a claimant must allege “wrongdoing” by the responding party. St. Louis Solar has cited no caselaw in support of that proposition.

⁴⁶ *Goodman v. Micka*, 151 Or App 27, 30 (1997).

⁴⁷ *Id.* (quotation marks and citation omitted).

⁴⁸ *State Farm Fire & Cas. Co. v. Reuter*, 294 Or 446, 449 (1983).

contends that it complied with the terms of the IA and the PPA, properly collected damages due to construction delays, and is not required to extend the 15-year fixed price period.⁴⁹ St. Louis Solar disagrees on each of these points. This actual controversy between the parties presently affects their adverse legal rights, namely the length of the fixed price period in the PPA and PGE's right to retain the damages it collected from St. Louis Solar.

Contrary to St. Louis's motion, PGE does not need to go further and allege "wrongdoing" by St. Louis Solar that "harmed" PGE. The Commission has previously considered and rejected the argument that a utility must allege wrongdoing by the QF in order to state a claim (or in this case a counterclaim) seeking interpretation of an executed PURPA contract. In Docket No. UM 1931, PGE filed a complaint seeking interpretation of executed standard PPAs.⁵⁰ The defendants, the NewSun QFs, moved to dismiss arguing, among other things, that "PGE has not alleged any violation of any law or any conduct by the NewSun QFs that could form the grounds of a *complaint* against the NewSun QFs ... [t]here is no allegation of wrongful conduct by the NewSun QFs."⁵¹ The Commission rejected this argument and denied the motion to dismiss holding: "PGE has satisfied the standards for bringing a complaint ... PGE's complaint identified the nature of the dispute and the relief sought, it satisfies the requirements of ORS 756.500(3)."⁵²

3. PGE's counterclaims are not defenses.

PGE's counterclaims should not be treated as defenses pursuant to ORCP 19, because they are in fact counterclaims. A claim is "the assertion of an existing right" while a defense is "a

⁴⁹ Among other things, PGE contends the Commission lacks the authority to order PGE to modify the 15-year fixed-price period because Section 210(e) of PURPA prohibits a state utility commission from modifying an executed and effective PURPA contract. (Answer at ¶¶ 417-426, 457.)

⁵⁰ Docket No. UM 1931, Compl. ¶¶ 26-27 (Request for Relief) (Jan. 26, 2018) (available at <https://edocs.puc.state.or.us/efdocs/HAA/um1931haa115655.pdf>).

⁵¹ Docket No. UM 1931, Defendant's Motion to Dismiss at 16 (Feb. 22, 2018) (emphasis in original).

⁵² Order No. 18-174 at 5.

defendant's stated reason why the plaintiff or prosecutor has no valid case[.]”⁵³ As described above, PGE's counterclaims are counterclaims because they assert a right to affirmative relief in the form of orders interpreting the PPA and the IA.

St. Louis Solar contends that PGE's counterclaims are “at best defenses” because they contradict the factual and legal conclusions in St. Louis Solar's claims.⁵⁴ But ORCP 22 A(2) explicitly states that a counterclaim may “diminish or defeat the recovery sought by the opposing party.” Thus, the fact that PGE's counterclaims “diminish or defeat” St. Louis Solar's recovery does not convert them into defenses. Indeed, Oregon courts routinely resolve counterclaims seeking interpretations of contracts even where the counterclaims contradict plaintiffs' factual allegations and legal theories.⁵⁵

St. Louis Solar's out-of-state authority is inapposite. In *First National Bank of Elkhart, Indiana v. R & L Wood Products, Inc.*, an unpublished case, the purported counterclaim was a defense because it contained only factual allegations and requested no relief.⁵⁶ In *Alton Memorial Hospital v. Metropolitan Life Ins. Co.*, an employer sued its actuary for negligence in recommending imprudent changes to the retirement plan the employer offered its employees.⁵⁷ The actuary filed a counterclaim asserting that the employer owed it a fiduciary duty under the Employee Retirement Income Security Act (ERISA) and that the employer breached its duty when making the changes to the plan.⁵⁸ The district court dismissed the counterclaim *on the merits* (not because the counterclaims were mistakenly designated defenses), holding that the employer did

⁵³ *Nixon*, 205 Or App at 240 n.8 (quotation marks and citation omitted).

⁵⁴ Mot. at 1, 3-4, 9.

⁵⁵ See, e.g., *Grant Cty. Fed. Credit Union v. Hatch*, 98 Or App 1, 3 (1989 (affirming trial court's interpretation of promissory note in third-party defendant's counterclaim); *Gerber v. O'Donnell*, 81 Or App 262, 264 (1986) (affirming trial court's interpretation of partnership agreement in defendant's counterclaim).

⁵⁶ *First Nat. Bank of Elkhart, Indiana v. R & L Wood Products, Inc.*, 917 F2d 24 (6th Cir 1990) (per curiam).

⁵⁷ *Alton Mem'l Hosp. v. Metro. Life Ins. Co.*, 656 F2d 245, 250 (7th Cir 1981).

⁵⁸ *Id.* at 246-47.

not owe its actuary any fiduciary duties.⁵⁹ The Seventh Circuit affirmed.⁶⁰ In dicta, the court noted the actuary could raise its arguments regarding the employer's negligence in the affirmative defense of contributory negligence.⁶¹ In sum, St. Louis Solar's case law is inapposite. In one case, the counterclaim did not request any relief and in the other the court did not identify any pleading deficiency in the counterclaim but instead dismissed the counterclaim on the merits.

PGE's counterclaims are not "redundant" with its defenses, and the counterclaims should not be stricken as redundant.⁶² Without PGE's counterclaims, the Commission could dismiss the complaint without addressing PGE's proposed interpretation of the PPA and IA. For instance, in *Eden Gate, Inc. v. D & L Excavating & Trucking, Inc.* a landowner sued a contractor seeking an order declaring a contractor's construction lien invalid.⁶³ The contractor successfully defended the claim but did not file any counterclaims. In a subsequent action to enforce the lien, the contractor could not rely on the prior court's ruling declining to declare the lien invalid to support the proposition that the lien was valid. The Court of Appeals explained "a decision that one party does not qualify for a declaratory judgment stating a conclusion does not invariably imply that the opposite conclusion has been proved."⁶⁴ Here, a decision from the Commission that St. Louis Solar is not entitled to an order interpreting the PPA and IA in its favor would not necessarily prove that PGE's interpretation of those documents was correct.

The Commission's recent litigation history confirms the inefficiency that can result if the Commission dismisses PGE's counterclaims here. In *Bottlenose Solar LLC v. PGE*, Docket No. UM 1877 (and nine other related dockets), PGE and ten QFs spent 16 months litigating

⁵⁹ *Id.* at 248.

⁶⁰ *Id.* at 250.

⁶¹ *Id.*

⁶² Even if PGE's counterclaims are redundant of the defenses, there is no rule or other law that provides for dismissal of a counterclaim that is redundant with a defense.

⁶³ *Eden Gate, Inc. v. D & L Excavating & Trucking, Inc.*, 178 Or App 610, 615 (2002).

⁶⁴ *Id.* at 623.

whether and when the QFs formed legally enforceable obligations.⁶⁵ PGE did not file any counterclaims. On the eve of a decision on the parties' cross motions for summary judgment, the QFs moved to voluntarily withdraw the complaint.⁶⁶ A two-to-one majority of the Commission granted the motion, and the dissenting Commissioner observed that the dismissal would "subject [PGE] to another long and contentious litigation on the very issues which it had already likely successfully defended itself."⁶⁷ Here, PGE's counterclaims ensure that PGE will receive an interpretation of the PPA and IA regardless of the ultimate disposition of St. Louis Solar's claims. PGE's counterclaims avoid the result from *Bottlenose Solar*, where plaintiffs were allowed to voluntarily dismiss their complaints and prevent a ruling in favor of defendant; thus, PGE's counterclaims potentially prevent a needless second round of duplicative litigation.

B. PGE'S FIRST COUNTERCLAIM IS WITHIN THE COMMISSION'S JURISDICTION.

The Commission has jurisdiction over PGE's first counterclaim. The Commission's complaint statute, ORS 756.500, vests it with jurisdiction to interpret standard PPAs.⁶⁸ Here, PGE's first counterclaim seeks an order interpreting the PPA. Thus, the Commission has jurisdiction over the counterclaim.

St. Louis Solar incorrectly asserts that the first counterclaim seeks money damages without identifying anywhere in PGE's pleading where PGE seeks money damages.⁶⁹ St. Louis Solar then argues the Commission lacks jurisdiction over the first counterclaim because the counterclaim

⁶⁵ See *In the Matter of Bottlenose Solar LLC v. PGE*, Docket No. UM 1877 (docket available at <https://apps.puc.state.or.us/edockets/docket.asp?DocketID=20970>).

⁶⁶ Docket No. UM 1877, Complainant's Notice of Dismissal without Prejudice at 1 (Oct. 22, 2018) (available at <https://edocs.puc.state.or.us/efdocs/HNA/um1877hna1421.pdf>).

⁶⁷ Docket No. UM 1877, Order No. 19-001 at 8 (Jan. 2, 2019).

⁶⁸ Docket No. UM 1894, Order No. 18-025 at 4-5 (denying motion to dismiss asserting Commission lacked jurisdiction to interpret standard PPA); Docket UM 1931, Order No 18-174 at 4-5 (same).

⁶⁹ Mot. at 12 ("PGE's first counterclaim asks the Commission to award PGE monetary damages.").

seeks money damages.⁷⁰ Contrary to St. Louis Solar's statements, PGE's first counterclaim does not seek damages, which would be beyond the Commission's jurisdiction.

In its first counterclaim, PGE seeks "an order of the Commission interpreting the PPA and concluding that PGE acted consistent with the PPA when it declared a breach of Section 2.2.2 on February 11, 2019, and when it invoiced and collected a total of \$23,785.70 in damages for that breach as provided for by Section 9.2 of the PPA."⁷¹ In its first counterclaim, PGE also seeks "an order that PGE is not required to agree to any further modification of the scheduled COD, the 15-year fixed prices period, or the termination date under the St. Louis Solar PPA."⁷² PGE does not ask the Commission to award any money damages to PGE. St. Louis Solar does not quote any paragraph of PGE's counterclaim purporting to demand money damages. No such paragraph exists. Because PGE's counterclaim seeks PPA interpretation and does not seek money damages, PGE's counterclaim is within the Commission's jurisdiction.

C. ALTERNATIVELY, THE COMMISSION SHOULD GRANT PGE LEAVE TO AMEND THE COUNTERCLAIMS.

If the Commission concludes that PGE inadequately pleaded its counterclaims, the Commission should grant PGE leave to amend. A claim is not subject to a motion to dismiss for the sole reason that it has been defectively stated.⁷³ Instead, a claimant should be given the opportunity to replead.⁷⁴ Here, if necessary, PGE can cure any pleading issues by amending its counterclaims to more clearly request non-monetary affirmative relief. PGE does not believe any such amendment is necessary because the counterclaims already clearly request orders interpreting the PPA and IA. However, if the Commission disagrees, it should grant PGE leave to amend.

⁷⁰ *Id.*

⁷¹ Answer ¶ 456.

⁷² *Id.* ¶ 457.

⁷³ *See, e.g., Suess Builders Co.*, 294 Or at 263 (the court reversed dismissal of poorly pleaded claim).

⁷⁴ *See Caldeen Construction LLC*, 248 Or App at 86 (noting that "when a defendant's first responsive pleading is a successful ORCP 21 motion, 'the plaintiff, typically, is permitted to replead.'").

V. CONCLUSION

PGE's first and second counterclaims state valid claims for relief with regard to an actual case or controversy. PGE's first and second counterclaims do not seek the award of money damages. The Commission has the jurisdiction to interpret the PPA and the IA and to adjudicate PGE's counterclaims. The Commission should deny St. Louis Solar's motion to dismiss or, in the alternative, to strike PGE's counterclaims.

Dated: June 22, 2020.

Respectfully submitted,

MARKOWITZ HERBOLD PC

s/ Jeffrey S. Lovinger

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