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July 14, 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 Sur-Reply 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
1020728

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 SUR-REPLY TO ST. LOUIS SOLAR'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STRIKE PGE'S COUNTERCLAIMS**

I. INTRODUCTION

The motion to dismiss presents a simple question: whether the Oregon Rules of Civil Procedure permit Portland General Electric Company ("PGE") to bring counterclaims regarding the dispute raised in the complaint. The answer is obviously yes. ORCP 22 A(2) permits a defendant counterclaims even if the counterclaims "diminish or defeat the recovery sought by the opposing party." In its reply, St. Louis Solar, LLC ("St. Louis Solar") ignores ORCP 22 A(2). Instead, St. Louis Solar argues that PGE's counterclaims are "not needed" because they involve the same dispute described in the complaint and thus dismissing the counterclaims would be "efficient." St. Louis Solar's arguments are irrelevant under ORCP 21 A and Oregon case law concerning motions to dismiss. Under Rule 22 A(2), PGE is entitled to seek a decision on the merits of its counterclaims even though PGE's counterclaims and St. Louis Solar's claims cover related issues.

St. Louis Solar's reply also asserts new arguments regarding the sufficiency of PGE's factual allegations and the scope of the Commission's jurisdiction. These new arguments, like St. Louis Solar's entire motion, are without merit. For the reasons detailed in PGE's response and

this sur-reply, the Commission should deny St. Louis Solar's motion to dismiss, or in the alternative, to strike PGE's counterclaims.[1] Concurrent with this sur-reply, PGE has filed a motion to strike or, in the alternative, for leave to file sur-reply to St. Louis Solar's motion to dismiss.

II. ARGUMENT

A. PGE properly pleaded its counterclaims.

As explained in PGE's response, PGE properly pleaded counterclaims because its claims assert an existing right and there is adversity between the parties.[2] This is the relevant legal standard for pleading counterclaims, and PGE has met it.

1. PGE's counterclaims are not inefficient, and inefficiency is not a valid basis for dismissal.

Instead of applying the relevant legal standard, St. Louis Solar creates its own. Under St. Louis Solar's formulation raised for the first time in its reply, the Commission must dismiss a counterclaim if the counterclaim shares a common question with a claim such that a decision "on the merits" of the claim will "necessarily" decide the counterclaim.[3] St. Louis Solar does not cite a single case in support of its rule, because it is not the law. ORCP 22 A states that a counterclaim "may or may not diminish or defeat the recovery sought by the opposing party." Indeed, the very purpose of counterclaims is to litigate related claims in a single suit.[4] Counterclaims and claims

[1] In this sur-reply, PGE only responds to the new arguments in St. Louis Solar's reply. However, PGE disagrees with the reply in its entirety.
[2] PGE's Response to St. Louis Solar's Motion to Dismiss, or in the Alternative, to Strike PGE's Counterclaims ("Response") at 5-8 (Jun. 22, 2020).
[3] St. Louis Solar's Reply in Support of its Motion to Dismiss, or in the Alternative, to Strike PGE's Counterclaims ("Reply") at 8 (Jun. 29, 2020) (emphasis omitted).
[4] *Benton Cty. State Bank v. Nichols*, 153 Or 73, 78 (1936) (stating that purpose of counterclaim "is to enable parties to determine in a single action their claims against one another, so far as they arise out of the same transaction.").

often pose common questions, the answers to which would be dispositive to both.[5] St. Louis Solar's arguments are contrary to the text and purpose of ORCP 22 A.

In support of its standard, St. Louis Solar observes that dismissing PGE's counterclaims leaves open the possibility that litigation will end before the Commission addresses the merits of the parties' dispute.[6] St. Louis Solar contends that such a result would be an "efficient" use of the Commission's resources, even if PGE still hopes to obtain a Commission ruling on the merits.[7] St. Louis Solar is mistaken. If the Commission closes this docket before reaching a decision on the merits, the parties and the Commission will have spent valuable resources without resolving the dispute. To reach a resolution, PGE would then need to file a second suit of its own. For obvious reasons, a fruitless first suit followed by a duplicative second suit would be inefficient.[8]

St. Louis Solar reaches its contrary conclusion by misreading a recent Commission order. St. Louis Solar wrongly contends that in Order No. 19-001 the Commission determined that voluntary dismissal after months of litigation was "an efficient result."[9] In fact, Order No. 19-001 says the opposite. In Order No. 19-001, the Commission strictly applied ORCP 54 and permitted the plaintiffs to voluntarily dismiss their complaint after 16 months of litigation.[10] In doing so, however, the Commission stated that dismissing the complaint was inefficient. The Commission "acknowledge[d] the substantial work of the parties and the Commission" in litigating the dispute but determined that "efficiency considerations [we]re not significant enough" to justify overriding

[5] *See generally Mack Trucks, Inc. v. Taylor*, 227 Or 376, 387-88 (1961) ("The very fact that a claim and a counterclaim present important questions in common is a strong indication that, in all likelihood, both claims arose out of the same transaction.") (quotation marks and citation omitted).
[6] Reply at 8.
[7] *Id.*
[8] Of course, PGE reserves the right to voluntarily dismiss its counterclaims at a later stage in this proceeding if the parties settle or for other reasons.
[9] *See id.* at 8-9.
[10] *In the Matter of Bottlenose Solar LLC v. PGE*, Docket No. UM 1877, Order No. 19-001 at 1 (Jan. 2, 2019).

the rules regarding voluntary dismissal.[11] As Commissioner Bloom stated in his dissent, the order closing the dockets following withdrawal of plaintiffs' complaints "leaves in its wake sixteen months of wasted time and wasted ratepayer funds … reward[ing] the complainants with yet another opportunity to reprise their actions."[12] PGE's counterclaims allow PGE and the Commission to avoid that waste from happening again.

2. St. Louis Solar's desire to "hav[e] the last word" is not a valid basis for dismissal.

In an entirely new argument in its Reply, St. Louis Solar contends that counterclaims are inherently "inappropriate," "unfair," and "inequitable" because the existence of counterclaims creates the risk that a hypothetical scheduling order may deprive the plaintiff of getting "the last word."[13] St. Louis Solar's opinion about counterclaims are cursory, speculative, and irrelevant. For one, St. Louis Solar's argument is too cursory to address. St. Louis Solar states that it wants "the last word," but does not identify when it wants the last word (*e.g.*, dispositive motions, hearing, post-hearing briefs).

Regardless, St. Louis Solar's desire to "hav[e] the last word" has nothing to do with the relevant pleading standard for counterclaims under ORCP 22 A. The Commission can address the sequencing of proceedings in an appropriate scheduling order at the appropriate time. The desire to have the last word in briefing at a later stage in the proceeding is not a valid basis on which to seek dismissal of a counterclaim.

B. PGE's counterclaims are legally sufficient.

Contrary to St. Louis Solar's new arguments, PGE's first counterclaim is not frivolous and its second counterclaim is not a sham. When deciding a motion to strike a frivolous or sham

[11] *Id.* at 5.
[12] Order at 8.
[13] Reply at 9-10.

pleading, the Commission must "accept as true all well-pleaded allegations and any facts that might be adduced as proof of those allegations."[14] A frivolous plea, while true in its allegations, is completely insufficient in substance.[15] "A frivolous plea is one which does not raise any issue in the proceeding."[16] "A pleading may be stricken as sham when its allegations appear false on the face of the pleading."[17]

PGE's counterclaims are neither frivolous nor a sham. PGE alleges that St. Louis Solar delayed construction of its interconnection equipment and thereby delayed its own interconnection and ultimately its commercial operation. In its first counterclaim, PGE asserts that St. Louis Solar breached the PPA. In its second counterclaim, PGE asserts that PGE complied with the IA. PGE alleged sufficient facts to state these claims.

1. PGE's first counterclaim is not a frivolous pleading because it seeks resolution of a current dispute between the parties.

St. Louis Solar actually fails to even argue under the "frivolous" standard and instead just merely assumes that the Commission will make the rulings St. Louis Solar seeks in its claims and, thus, should deny PGE's related counterclaim. St. Louis Solar asks the Commission to rule, in response to St. Louis Solar's motion to strike or dismiss, that its performance was "impossible." But impossibility of performance is an affirmative defense; St. Louis Solar has the burden of proof and the burden of persuasion to establish that affirmative defense. It is not something that it can prevail upon at the pleading stage. And certainly St. Louis Solar's allegations and arguments that its performance was impossible does not make PGE's contrary allegations "frivolous"; the two

[14] *See Erwin v. Or. State Bar*, 149 Or App 99, 108 (1997) (applying standard when reviewing a motion to strike) (quotation marks and citation omitted).
[15] *See Andrysek v. Andrysek*, 280 Or 61, 69 n.8 (1977).
[16] *Kashmir Corp. v. Nelson*, 37 Or App 887, 892 (1978) (citations omitted).
[17] *Id.* (citation omitted).

competing and contrary sets of allegations do what pleadings are supposed to do – allege the current controversy.

St. Louis Solar next contends that PGE's first counterclaim is frivolous because, according to St. Louis Solar, PGE breached the duty of good faith and fair dealing by not amending the PPA. Again, St. Louis Solar is assuming a result (i.e., a ruling in its favor that PGE breached the duty) that it has not yet won. St. Louis Solar has the burden of proof and persuasion to win its claim that PGE breached the duty of good faith and fair dealing. St. Louis Solar cannot defeat PGE's counterclaim at the pleading stage by assuming that it will win its good faith argument at some later stage.

2. PGE's second counterclaim is not a sham and does not have "factually false" allegations.

In its second counterclaim, PGE requests an order confirming that it complied with its obligations under the IA.[18] In its Reply, St. Louis Solar contends for the first time that PGE's allegation that it complied with the IA is a sham because PGE did not meet certain construction milestones.[19] This new argument fails on its face. Contrary to St. Louis Solar's Reply argument, the construction milestones were not "deadlines [PGE] needed to meet" to comply with the IA.[20] The IA explicitly states "PGE does not guarantee completion of any project on a targeted date as the schedule is dependent on a number of variables . . . ."[21] Thus, PGE's claims that it complied with the IA are not "factually false" and are not a sham.

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[18] *Id*. ¶ 465.
[19] Reply at 12-13.
[20] *Id*.
[21] *See* Answer ¶¶ 28-30.

C. PGE's first counterclaim is within the Commission's jurisdiction.

PGE's first counterclaim is within the Commission's jurisdiction because the counterclaim does not seek an award of damages. In its motion, St. Louis Solar wrongly contended that "PGE's first counterclaim asks the Commission to award PGE monetary damages."[22] This was demonstrably false. PGE's first counterclaim alleges that PGE *already* collected damages under Section 9.2 of the PPA and asks the Commission to confirm that PGE did not breach the PPA by doing so.[23] PGE never asked the Commission to award damages, and St. Louis Solar's motion to the contrary was baseless.

In its reply, St. Louis Solar changes tack. It now contends that even though PGE does not ask for a damages award, deciding PGE's first counterclaim would require the Commission to "adjudicate over damages."[24] By this it means that by confirming that PGE did not breach the PPA by collecting damages, the Commission would necessarily decide "whether and how much damages were owed."[25] St. Louis Solar's proposed limitation on the Commission's jurisdiction is contrary to law and unworkable in practice.

First, St. Louis Solar's own authority confirms that a claim seeking interpretation of a contract is within the Commission's jurisdiction even if the decision will affect a later damages claim in court. In Order No. 99-285, which St. Louis Solar cites, the complainant sought to "enforce interconnection agreements" and the Commission denied a motion to dismiss but acknowledged that a decision on the merits would "allow [complainant] to petition a court of competent jurisdiction for a monetary judgment based on the Commission's decision."[26] Here too

[22] Mot. at 8.
[23] Answer ¶¶ 452-57.
[24] Reply at 5.
[25] *Id.*
[26] Reply at 5-6, n.13, quoting *Electric Lightwave v. U.S. West Comm'ns*, Docket No. UC 377, Order No. 99-285 at 6-7 (Apr. 26, 1999).

the Commission should deny the motion to dismiss because PGE seeks enforcement of a PPA not damages. It is irrelevant that the Commission's decision may later be the basis for a damages award in a court case.

Second, as applied to this case, St. Louis Solar's argument makes little sense. In its first counterclaim, PGE seeks an order confirming that it did not breach the PPA by collecting damages from St. Louis Solar. St. Louis Solar contends that the Commission can somehow decide that question without also addressing whether "damages were owed" in the first place. Of course, deciding whether "damages were owed" under the PPA is critical to deciding whether PGE breached the PPA by collecting damages. St. Louis Solar's position is contrary to law and unworkable.

In twenty-eight paragraphs of its own complaint, St. Louis Solar asserts that PGE improperly collected damages and that it calculated the wrong "amount" of damages.[27] St. Louis Solar cannot have it both ways, asserting that the Commission has jurisdiction to determine that PGE *improperly* collected damages but contending that the Commission lacks jurisdiction to determine that PGE *properly* collected damages.

Regardless, if the Commission credits St. Louis Solar's argument (which it should not), the Commission should then grant PGE leave to amend the counterclaims to remove references to specific damages amounts. St. Louis Solar's proposed revisions are overbroad, and PGE should have the opportunity to amend its own pleading in the first instance.

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[27] Complaint ¶¶ 162, 201-16, 288-89, 294-97, 314-18.

III. CONCLUSION

The Commission should deny St. Louis Solar's motion.

Dated: July 14, 2020.

Respectfully submitted,

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