BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2009

MADRAS PV1, LLC, Complainant, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	MADRAS SOLAR'S RESPONSE TO PGE'S MOTION TO AMEND ANSWER AND COUNTERCLAIM AND REQUEST FOR IMPOSITION OF PENALTIES FOR VIOLATION OF COMMISSION ORDER UNDER ORS 756.990

I. INTRODUCTION

Pursuant to OAR 860-001-0420, OAR 860-001-000 and ORCP 23 Madras PV1, LLC ("Madras Solar") hereby responds to PGE's Motion to Amend Answer and Counterclaim ("PGE's Motion"). PGE's Motion fails the Commission's four-part test for determining whether to grant a motion for leave to amend a pleading and is completely outside the scope of an ORCP 23B amendment to "conform" the pleadings to the evidence tried by consent. PGE's proposed amendment also violates the Commission's prescribed dispute resolution process for disputes over interconnection issues between a utility and a qualifying facility ("QF") and should be rejected.

PGE's Motion violates the Commission's four-part test, because it significantly changes the nature of the case at a late stage in the proceeding and is prejudicial to Madras Solar. PGE's proposed amendment adds a new claim for relief with a new element of damage that is significantly beyond the Commission's contemplated scope for

proceedings to resolve disputes over negotiated power purchase agreements ("PPAs"). PGE's proposed amendment would adjudicate *all* issues related to the validity of PGE's two different System Impact Studies and the Facilities Study, and require that Madras Solar pay for *all* the approximately $24 million in costs identified in the Facilities Study. This would radically alter the scope of issues to be resolved by Madras Solar's original complaint.

This amendment comes after Madras Solar has submitted the bulk of its testimony, and would significantly diminish the value of the work product that Madras Solar has put into this case thus far. Moreover, Madras Solar would be significantly prejudiced by the introduction of this new claim, particularly at such a late stage in this proceeding when there is little opportunity to investigate and respond. The Facilities Study that PGE seeks to have the Commission address in this PPA complaint case was only provided to Madras Solar on December 5, 2019, which was one month after Madras Solar's last round of testimony on November 5, 2019. Madras Solar is diligently working to resolve any concerns regarding the Facilities Study, but Madras Solar first identified the majority of its long list of concerns regarding the Facilities Study *one* business day ago. Madras Solar has had no opportunity to submit any discovery or testimony or otherwise investigate many aspects of the Facilities Study in this proceeding. Madras Solar objects to addressing, and is not prepared at this time to address, the merits of the Facilities Study in this proceeding.

Madras Solar has a right to have its PPA dispute resolved in a speedy manner, and that right would also be prejudiced, should this case be delayed to address all the issues

related to the Facilities Study. At this point, Madras Solar is not yet clear what issues regarding the Facilities Study will remain in dispute; however, Madras Solar's due process rights, at a minimum, would require that it be allowed to conduct discovery and submit testimony on the Facilities Study, which would likely delay the final outcome of this proceeding (the exact extent of delay, if any, depends on how many issues remain at the conclusion of the interconnection process).[1] This case was filed April 22, 2019, and PGE and Madras Solar agreed to the current schedule, which will already result in a final order sometime after July 2020. The further delay (and additional costs) that would likely be necessitated by granting PGE's Motion would result in a late final order.

In light of the Commission's established process for resolving utility-QF disputes in the interconnection process, PGE should not be permitted to violate a Commission rule and bypass that process. As such, PGE's Motion for leave to amend its answer and counterclaim should be denied. Instead, the Commission should conclude that PGE's attempt to amend its complaint is a direct violation of the dispute resolution procedures in the QF Large Generator Interconnection Procedures ("QF-LGIP") that warrants the imposition of penalties under ORS 756.990.

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[1] Of course, if PGE makes all the corrections requested by Madras Solar in the interconnection process, then there would be no need for additional testimony or to adjudicate the reasonableness of the Facilities Study. Given that PGE's position has changed and it is no longer simply refusing to accept any net output at Madras Solar's point of delivery, or impose over $340 million in completely unnecessary network upgrades, it is possible that PGE, if it is acting in good faith and has not already made up its mind on some matters which it was just made aware of a business day ago, could agree to make additional (and much smaller) changes to the Facilities Study.

II. DISCUSSION

A. The Commission Applies a Four-Part Test to Determine Whether it is Appropriate to Grant Leave to Amend a Pleading

The Commission applies a four part test in determining whether to grant a motion for leave to amend a pleading. The Commission considers: "1) the proposed amendment's nature and relationship to the existing pleadings; 2) prejudice to the opposing party; 3) timing; and 4) the merit of the proposed amendment."[2] Each of these factors affect the Commission's weighing of the other factors. In weighing the first factor, the Commission considers whether the amendment will introduce a new element of damage and whether it could ultimately impact the cause of action.[3]

In determining whether there is prejudice to the objecting party under the second factor, the Commission will also consider the first (nature and relationship to the complaint) and third (timing) factors. The Commission weighs the timing of the proposed amendment, including whether the case has progressed significantly,[4] and whether any delay results in the "effective diminishment in value of the [objecting party's] work product."[5] In a recent case, a QF sought to amend its complaint prior to any testimony being submitted and before motions for summary judgment were fully

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2 *Nw. Pub. Commc'ns Council v. Quest Corp.,* Docket No. DR 26, Order No. 09-155 at 8 (May 4, 2009); *see also Bottlenose Solar, LLC et al. v. Portland Gen. Elec. Co.*, Docket No. UM 1877 et al., Order No. 18-348 at 4 (Sept. 24, 2018).

3 Docket No. UM 1877 et al., Order No. 18-348 at 5.

4 *Waconda Solar, LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1971, ALJ Ruling at 2 (July 31, 2019).

5 Docket No. UM 1877 et al., Order No. 18-348 at 5.

briefed, but followed the administrative law judge's ("ALJ") direction and waited to file its amended complaint after motions for summary judgment were fully briefed.[6] The amended complaint only added a few additional facts and alternative claim for relief.[7] In this circumstance, the Commission refused to allow amendment because "[t]he delay and effective diminishment in value of the defendant's work product in moving for summary judgment is thus prejudicial to the defendant."[8] Further, there may be prejudice where the fundamental questions at issue in the proceeding are substantively changed.[9] Under either ORCP 23A or ORCP 23B, prejudice alone is sufficient justification for denying a motion for leave to amend.[10]

The timing of the proposed amendment under the third factor is particularly important in light of the substance of the proposed amendment. For example, an amendment made after some or all of the evidence has been submitted may be permitted

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6 *Bottlenose Solar, LLC v. Portland Gen. Elec. Co.*, Docket No. UM 1877, Motion for Leave to File First Amended Complaint at Attachment A (First Amended Complaint) (April 20, 2018).

7 *Id.*

8 Docket No. UM 1877 et al., Order No. 18-348 at 5.

9 *See* Docket No. UM 1971, ALJ Ruling at 2 (July 31, 2019) ("I find no prejudice. . . as the fundamental questions at issue in this proceeding are not substantively changes by the amendment, and more importantly this complaint has not progressed significantly").

10 ORCP 23B ("and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining an action or defense upon the merits"); *Reeves v. Reeves,* 203 Or App 80, 85 (2005) ("[A]n amendment should normally be allowed unless the other party is prejudiced."), *rev. denied*, 340 Ore. 308 (2006).

where the amendment simply amounts to a change in "semantics"[11] or an expansion on an existing claim.[12] In other late-stage amendments, the addition of a new theory of recovery on an existing claim may be allowed so long as there is no prejudice;[13] however, where a proposed amendment changes a claim to an entirely different legal claim, the amendment should be disallowed, even where no prejudice is alleged.[14] A party is "entitled to rely on the theory pleaded by [the other party] to frame the issues to be tried."[15]

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11 *Barton v. Tra-Mo, Inc.*, 69 Or App 295, 303-304 (1983) (where motion made at the close of plaintiff's case-in-chief, amendment should have been allowed to allege breach of warranty by "model" instead of by "sample" where at all times the parties knew what items were being characterized as samples or models and the amendment would not have enlarged the issues or added a new claim), *modified*, 73 Or App 804, 806 (1985) ("After reexamining the record, we agree that our statement of the facts was inaccurate in that respect. However, that factual inaccuracy does not affect the analysis or the result we reached in our previous opinion."), *rev. denied*, 290 Or 732 (1985).

12 *Holmes v. Or. Ass'n. of Credit Mgmt.,* 52 Or App 551, 557-558 (1981)(where motion made at the close of plaintiff's case, amendment should have been allowed where the requested amendment neither enlarged the issues nor added a new claim for relief, but which expanded the claim with additional acts that were already in evidence and which defendant neither objected to nor alleged any prejudice), *rev. denied*, 271 Or 771 (1981).

13 *Reeves*, 203 Or App at 84-85 (where motion made during trial it was not an abuse of discretion to allow amendment where defendant cannot show prejudice and the amendment "added a theory of recovery to his already existing claims.")

14 *Id*. (discussing *Navas v. City Of Springfield*, 122 Or App 196 (1993) (trial court abused its discretion in allowing amendment made before the bench trial began to change claim to a breach of contract claim rather than a claim for equitable relief)).

15 *Navas*, 122 Or App at 201.

Finally, in analyzing the fourth factor, the merit of the proposed amendment, the Commission will consider whether the moving party has supported its new allegations with any declarations or other evidence to help support the amendment.[16]

B. PGE's Proposed Amendment Significantly Changes the Nature of This Case at a Late Stage in the Proceeding and is Prejudicial to Madras Solar

Here, PGE's proposed amendment fails the Commission's four-part test because it adds an entirely new claim, it does so at a late-stage in the proceeding where Madras Solar has completed the bulk of its testimony, and PGE offers little additional evidence to support its proposed amendment.

1. PGE's Proposed Amendment Expands the Scope of this Proceeding

First, PGE's proposed amendment expands the scope of this proceeding well beyond its current scope and beyond the scope contemplated by the Commission's rules for negotiated PPA dispute resolution. The complaint was filed pursuant to the Commission-mandated process for resolving disputes for negotiated PPAs under OAR 860-029-0100, which requires that the complaint include:

> (a) A statement that the Qualifying Facility provided written comments to the utility on the draft power purchase agreement at least 60 calendar days before the filing of the complaint.
> (b) A statement of the attempts at negotiation or other methods of informal dispute resolution undertaken by the negotiating parties.
> (c) A statement of the specific unresolved terms and conditions.
> (d) A description of each party's position on the unresolved provisions.
> (e) A proposed agreement encompassing all matters, including those on which the parties have reached agreement and those that are in dispute.[17]

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16 Docket No. UM 1877 et al., Order No. 18-348 at 5.
17 OAR 860-029-0100(5).

Along with the complaint, the QF is also required to submit written direct testimony that includes all information upon which the complainant bases its claims.[18] In its response to be filed 10 days later, the utility is required to submit its own direct testimony and must address each item in detail raised in the complaint and describe its position on the unresolved provisions, and may present additional issues for resolution.[19] In resolving the issues, the Commission will determine whether each term or provision proposed by each of the parties is just, fair, and reasonable, and it may reject any proposed term and prescribe a just and reasonable term.[20] "The Commission's review is limited to the open issues identified in the complaint and in the response."[21]

PGE's amendment adds a new claim that is completely unrelated to the PPA dispute. PGE initially responded to Madras Solar's proposed PPA terms by proposing additional PPA terms.[22] This was appropriate and contemplated by the Commission's dispute resolution rules detailed above. However, PGE's new claim for relief goes beyond the PPA terms and asks the Commission to "conclude that PGE properly performed Madras's System Impact Re-Study and Facilities Study" and that "Madras is obligated to pay for the costs identified in the Facilities Study."[23] While there are some limited issues related to the interconnection that may impact the PPA dispute, PGE's proposed

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18 OAR 860-029-0100(6).
19 OAR 860-029-0100(7), (8).
20 OAR 860-029-0100(11).
21 *Id.*
22 PGE's Answer and Counterclaim at ¶¶ 166-172.
23 PGE's Motion to Amend Answer and Counterclaim, Attachment 1 at ¶¶ 177, 178 (PGE's Proposed First Amended Answer and Counterclaim).

amendment introduces a new element of damage (Madras Solar's responsibility for interconnection costs) and ultimately changes the cause of action from simply what PPA terms are reasonable and appropriate to also include a request for relief under the interconnection process.[24] As such, because the nature and relationship of the amendment to the existing pleadings dramatically expands the scope, the first factor weighs against amendment.

2. PGE's Proposed Amendment Prejudices Madras Solar

Second, Madras Solar will be prejudiced by PGE's proposed amendment, because this case has progressed significantly, and it will effectively diminish the value of Madras Solar's work product. Madras Solar filed this Complaint to seek resolution under the Commission's process for adjudication of PPA disputes. Madras Solar asked the Commission to make a reasonableness finding on a handful of PPA terms on which the parties have reached an impasse in their negotiations. PGE responded with its proposed PPA provisions and proposed a few additional PPA terms. Two of the disputed PPA terms may be affected by the interconnection process: 1) the avoided cost price (depending on whether PGE delayed the process through its interconnection process); and 2) whether it is reasonable to require that an interconnection agreement be executed by September 2020. PGE's proposed amendment expands this to at least nine complex issues

[24] While Madras Solar recognizes that the ALJ found that some issues related to the interconnection may be appropriately resolved in this case, it is not clear whether that extends to the entire universe of interconnection issues, and Madras Solar has sought clarity on this point. *See* Madras Solar's Motion for Clarification.

related to PGE's performance of the Facilities Study as identified in Madras Solar's Facilities Study comments submitted to PGE on January 17 and attached to Madras Solar's Motion for Clarification, filed the same day.

PGE's proposed amendment substantively changes the fundamental questions at issue in this case after Madras Solar has already submitted its direct testimony and reply testimony. Madras Solar expended considerable time and energy early on in this dispute resolution process in order to queue-up the PPA issues for a speedy Commission resolution in compliance with Commission rules. This effort included submitting direct testimony with its Complaint and reply testimony. By expanding the scope of this proceeding to the breadth of interconnection issues PGE proposes, Madras Solar's efforts early in this process will be diminished and the PPA issues will be swallowed up by the numerous and complex interconnection issues. Further, Madras Solar only has one round of surrebuttal testimony due in this case, which is not likely to be adequate to address the plethora of interconnection issues that PGE's next round of testimony is likely to raise if it actually intends to justify the reasonableness of the highly flawed Facilities Study. As such the resolution of this case will likely need to be pushed out, and Madras Solar will be prejudiced if it cannot obtain a speedy resolution of its PPA complaint in compliance with the Commission's rules. Therefore, Madras Solar will be prejudiced by the amendment. As such, the second factor weighs against amendment.

3. PGE's Proposed Amendment Comes Late in This Proceeding

Third, the timing of PGE's proposed amendment also weighs against amendment because it comes at a late stage in the proceeding and introduces an entirely different legal

claim. As just discussed, PGE's proposed amendment comes after Madras Solar has presented its direct and reply testimony, which is not much different than a motion made during trial after the plaintiff has presented its case. While, Madras Solar has an additional round of surrebuttal testimony here, it has already prosecuted its case with two separate rounds of testimony in reliance upon the theory of relief PGE initially specified in its counterclaim. If PGE had filed its amended counterclaim earlier (putting aside that that would have been impossible since the Facilities Study was not yet issued), and had the ALJ granted the amendment earlier, then Madras Solar could have presented completely difference evidence. Madras Solar should be entitled to rely upon that theory of relief and, therefore, the timing factor weighs against amendment.

4. PGE's Proposed Amendment Has Little Merit

Finally, PGE provides little additional evidence or declarations in the record to support the merit of its proposed amendment, so this factor also weighs against amendment. Under Oregon law, a counterclaim should "state ultimate facts sufficient to constitute a claim."[25] First, it's not clear under what authority PGE seeks to have the commission declare that it properly performed its interconnection studies given that PGE has not filed any testimony on the Facilities Study let alone presented any evidence regarding its reasonableness, and PGE has not addressed Madras Solar's separate comments in the interconnection dispute resolution process. Second, PGE does not

[25] ORCP 21A.

allege ultimate facts constituting a claim. PGE only alleges the following additional facts:

- That it "provided. . . a System Impact Re-Study,"
- That it "provided. . . a Facilities Study,"
- That there was a meeting "to discuss the Facilities Study,"
- That "Ecoplexus conveyed in person and in writing that it disagrees with the Facilities Study results," and
- That "[b]eginning with [the] Facilities Study, PGET has studied NRIS only consistent with the QF-LGIP."[26]

PGE also simply attaches the Facilities Study.[27]

Notably, PGE makes no factual allegations to support its claims that it properly performed the System Impact Re-Study, that it properly performed the Facilities Study, or that Madras Solar is obligated to pay the costs in the Facilities Study. In addition, unless PGE makes revisions or provides adequate explanations in the QF-LGIP process, Madras Solar has raised at least nine separate Facilities Study issues, and PGE has not (nor could it) have declared its position on these issues. Further, under the Commission's standard for analyzing the fourth factor, PGE has not supported its new allegations with any declarations or other evidence to help support the amendment other than by attaching the

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[26] PGE's Motion to Amend Answer and Counterclaim, Attachment 1 at ¶¶ 154-158 (PGE's Proposed First Amended Answer and Counterclaim).

[27] PGE's Motion to Amend Answer and Counterclaim, Attachment 1 at Attachment C to First Amended Answer and Counterclaim (Madras Solar Facilities Study).

Facilities Study. As such, this factor, in conjunction with the other three factors, weighs in favor of denying the proposed amendment. PGE's motion should be denied and the Commission/ALJ should clarify that the only issues related to interconnection that will be addressed in this case are those that impact the proposed PPA terms.

C. PGE's Proposed Amended Counterclaim Goes Beyond What is Permissible Under ORCP 23B

PGE's proposed amended counterclaim raises issues on which no evidence has been submitted in this case and will result in the introduction of objectionable evidence. ORCP 23B permits amendment of the pleadings when it is necessary to conform them to the evidence "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties."[28] This is usually an after-the-fact amendment made in response to an objection that evidence already submitted is outside the scope of the pleadings.[29] A failure to object to the introduction of such evidence weighs in favor of finding that the issue was tried by implied consent of the parties.[30] Further, when issues are tried by express or implied consent, amendment is actually not necessary because ORCP 23B directs that the issues "shall be treated in all respects as if they had been raised in the pleadings."[31] However, a party's objection is evidence that it does not consent to trial on the purported amendment.[32]

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28 ORCP 23B.
29 *See Navas,* 122 Or App at 201.
30 *Id.*
31 ORCP 23B.
32 *Navas*, 122 Or App at 201.

What PGE attempts to do with its proposed amendment is enlarge the issues and add new claims for relief. PGE's amended counterclaim asks "that the Commission confirm the validity of PGE's [System Impact Re-Study ("SIS")] and Facilities Study,"[33] yet PGE acknowledges that the Facilities Study had only been issued "immediately prior to the ALJ's Ruling" and that the only interconnection-related evidence in the record is related to the SIS.[34] PGE's proposed amendment, therefore, goes beyond simply conforming the pleading to the evidence already in the record, or issues tried by express or implied consent. Madras Solar does not consent to litigating the entire universe of interconnection issues in this case, but only those issues which impact the PPA terms. Therefore, PGE's motion to amend under ORCP 23B should be denied, and, as articulated above, PGE also does not meet the Commission's four-part test for any amendment.

D. PGE Should Not Be Permitted to Litigate Interconnection Issues Outside the QF-LGIP Process

This Commission established a dispute resolution process for resolving disputes between utilities and QFs over their large generator interconnection requirements.[35] This process, described in Madras Solar's Motion for Clarification, generally involves providing a written notice of dispute to the other party, each party designating a senior

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33 PGE Motion to Amend Answer and Counterclaim at 2.

34 *Id.* at 1-2.

35 *Re Commission Investigation into Interconnection of PURPA Qualifying Facilities with Nameplate Capacity Larger Than 20 Megawatts to a Pub. Util. Transmission or Distribution System,* Docket No. UM 1401, Order No. 10-132 at Appendix A § 13.5 (Apr. 7, 2010).

representative from each to negotiate the dispute for 30 calendar days, and, upon the conclusion of which, the parties may agree to pursue arbitration or any other legal remedy.[36]

Under that process, the parties have the option to have their dispute resolved by the Commission, but they can also seek arbitration or other remedies available at law or equity. The Commission "believe[d] it [was] important to provide the parties the option of utilizing the commission as a dispute resolution body for reasons of both efficiency and consistency."[37] The Commission made this statement in its decision to adopt the recommendation of the Oregon Department of Energy to adopt the same dispute resolution procedures for large QFs as it already has in rules for small QFs, as doing so would provide consistency across all QFs.[38] The Commission added dispute resolution before the Commission "as an *option* for the parties" but noted that it "does not replace the existing procedures for third-party, external arbitration of disputes."[39] However, before going into arbitration or exercising other rights before the Commission or elsewhere, the parties must first engage in informal dispute resolution. Therefore, while Commission resolution of disputes may be an option, the parties have not even reached the point in the process where that option might be selected.

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36 *Id.*
37 Docket No. UM 1401, Order No. 10-132 at 7.
38 *Id.*
39 *Id.* (emphasis added).

PGE's proposed amendment attempts to resolve these interconnection disputes in violation of that Commission order and prescribed process. As such, the Commission should find PGE in violation of that Order, reject PGE's request to amend its counterclaim, and impose penalties under ORS 759.990.

E. If the Commission Allows PGE's Proposed Amendment, Madras Solar Should be Permitted Time to Investigate and Respond

Should the Commission grant PGE's motion, the Commission should allow Madras Solar a reasonable time to investigate and respond to PGE's amended complaint and additional rounds of testimony so that Madras Solar can adequately respond to any additional factual statements PGE makes in its next set of testimony. As discussed above and in Madras Solar's Motion for Clarification, PGE's proposed amendments dramatically expand the scope of this docket, and will prejudice Madras Solar's efforts thus far in the case. Madras Solar is entitled to a speedy resolution of its PPA dispute and only interconnection issues that affect the PPA terms, and extending this case will still cause prejudice to Madras Solar. However, Madras Solar will likely be even more prejudiced if the Commission grants PGE's motion but does not permit Madras Solar additional time to investigate and respond to the new allegations.

As a reminder, a core issue in this complaint is whether Madras Solar must execute an interconnection agreement with PGE by September 2020 or be in default of its PPA. The current schedule allows for a final order by September 2020, and, if PGE is allowed to amend its complaint and delay the case, then Madras Solar will not have

obtained certainty regarding this proposed interconnection milestone prior to the date upon which the milestone may pass.

III. CONCLUSION

For the reasons articulated above, PGE's motion to amend its answer and counterclaim should be rejected.

Dated this 21st day of January 2020.

Respectfully submitted,

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