

September 10, 2020

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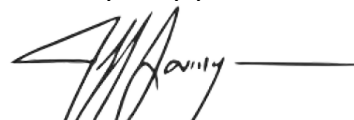
Re: UM 2057 - St. Louis Solar, LLC v. Portland General Electric Company

Attention Filing Center:

Enclosed for filing today in the above-named docket is Portland General Electric Company's Response Opposing St. Louis Solar, LLC's Motion for Leave to Amend Complaint.

Thank you for your assistance.

Very truly yours,


Jeffrey S. Lovinger

Attachment
1044415

**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 OPPOSING
ST. LOUIS SOLAR, LLC’S MOTION
FOR LEAVE TO AMEND
COMPLAINT**

Defendant Portland General Electric Company (“PGE”) respectfully requests that the Public Utility Commission of Oregon (“Commission”) deny the motion for leave to amend complaint (“Motion for Leave”) filed by complainant St. Louis Solar, LLC (“St. Louis Solar”), on August 26, 2020.

I. INTRODUCTION

In a prehearing conference, Administrative Law Judge (“ALJ”) Arlow encouraged St. Louis Solar to amend its complaint to streamline issues in light of recent factual developments in this case. Instead, St. Louis Solar seeks to make this case significantly more complex by amending its complaint to add new legal theories and hundreds of paragraphs of new factual allegations. Further, St. Louis Solar’s proposed amendments fail to meet the pleading requirements of the Oregon Rules of Civil Procedure because the new complaint does not separately state each claim and count, and it does not state what specific relief complainant seeks for each claim and count alleged. Accordingly, the Commission should deny St. Louis Solar’s Motion for Leave.

II. BACKGROUND

St. Louis Solar filed its original complaint on February 3, 2020. The original complaint is 40 pages long with 324 numbered paragraphs. The original complaint asserts eight claims for relief and 22 prayers for relief; the claims themselves often fail to allege what relief is sought and it is unclear which prayers for relief correspond to which claims. The original complaint alleges, among other things, that PGE unreasonably delayed the construction of interconnection facilities, that PGE declared a default under the power purchase agreement (“PPA”) because St. Louis Solar did not achieve commercial operation by the scheduled commercial operation date (“COD”), and that there was a risk PGE would terminate the PPA if St. Louis Solar did not achieve commercial operation within the one-year cure period. St. Louis Solar sought as relief, among other things, an order barring PGE from terminating the PPA due to delayed operations and an extension of the 15-year fixed price period to account for alleged delays in construction of the interconnection facilities. Some parts of the original complaint are moot because after St. Louis Solar filed its complaint, the parties continued working towards interconnection, St. Louis Solar in fact interconnected in April 2020, and PGE did not terminate the PPA despite St. Louis Solar missing the scheduled COD by over a year.

PGE answered the complaint in late May 2020. At a prehearing conference on July 15, 2020, ALJ Arlow encouraged St. Louis Solar to amend its complaint. It is PGE’s understanding that there are two purposes to be served by an amended complaint: (1) to modify the complaint to remove claims and allegations related to potential termination of the PPA that have been mooted by subsequent events; and (2) to simplify and streamline the complaint to make the complaint proceeding more efficient. In response, St. Louis Solar now moves to amend its complaint to *add* nearly 35 pages and over 260 paragraphs of new material to the complaint.

While the amended complaint does remove some allegations and requests for relief that are now moot, it also makes this proceeding more complex, not less. The amended complaint is 75 pages long and contains 588 number paragraphs (as compared to the original complaint which is 40 pages long and contains 324 numbered paragraphs).

III. LEGAL STANDARD

The Commission should grant leave to amend “when justice so requires.”¹ Four factors bear on the appropriate exercise of the Commission’s decision to grant leave to amend: (1) the nature of the proposed amendments and their relationship to the existing pleadings; (2) the prejudice, if any, to the opposing party; (3) the timing of the proposed amendments and related docketing concerns; and (4) the colorable merit of the proposed amendments.²

IV. ARGUMENT

A. **The Commission should deny leave to amend because the amendments complicate rather than streamline the issues in this case.**

As a result of the July 15, 2020, pre-hearing conference, PGE understood that St. Louis Solar was to amend its complaint: (1) to remove claims and allegations that became moot; and (2) to streamline and simplify the claims, allegations, and prayers for relief. St. Louis Solar’s proposed amended complaint completely ignores the second purpose. Instead, it needlessly complicates this proceeding, adding cost and prejudice to PGE, and making this a more difficult, complicated, and time-consuming docket for the Commission to resolve.

St. Louis Solar’s amended complaint adds needless complexity in the following ways:

1. The amended complaint nearly doubles the length of the complaint, from 40 to 75 pages.

¹ ORCP 23 A; *see also* OAR 860-001-0000(1) (applying Oregon Rules of Civil Procedure to Commission proceedings).

² *Ramsey v. Thompson*, 162 Or App 139, 145 (1999), *rev den*, 329 Or 589 (2000).

2. The amended complaint adds facts and legal theories that could have been asserted earlier, but were not, thereby causing PGE to re-investigate the same issues for the new allegations. St. Louis Solar’s proposed amendments cover issues that could have been raised in its initial complaint or at the very least could have been raised last spring after St. Louis Solar successfully interconnected.³
3. The amended complaint adds additional claims and theories of relief within existing claims, with the net result that certain supposedly separate claims are actually multiple different claims and counts. This is in violation of the Oregon Rules of Civil Procedure.⁴
4. The amended complaint increases the number of prayers for relief from 22 to 31, and continues to fail to explain which prayers for relief correspond to which claims and continues to fail to allege the relief sought within the claims, as required by the Rules.

For the parties to efficiently litigate this dispute, and for the Commission to efficiently manage and adjudicate this dispute, the complaint must be clear. The original complaint lacked clarity, and the proposed amended complaint makes the problem worse. The nature of the proposed amendments and their relationship to the existing pleadings, the timing of the proposed amendment, and its prejudicial impact on PGE all militate against granting the motion for leave to amend.

B. The Commission should deny leave to amend because the amended complaint fails to satisfy the pleading standards of the Oregon Rules of Civil Procedure.

The Commission should also deny leave to amend because the proposed amendment is improperly pleaded. The proposed amendments violate ORCP 18 C, which states “Each separate claim or defense must be separately stated. Within each claim alternative theories of recovery

³ See e.g., Proposed Amended Compl. ¶¶ 32-142 (discussing interconnection study process in 2017), ¶¶ 245-366 (discussing construction of interconnection facilities), attached to St. Louis Solar’s Mot. to for Leave to File First Amended Complaint (Aug. 26, 2020).

⁴ See *infra* Section IV(B) at pages 4-6.

must be identified as separate counts.”⁵ In an attempt to shoehorn its new legal theories into its existing eight claims, St. Louis Solar bundles together multiple claims and counts under a single claim heading. For example, St. Louis Solar’s Third Claim for Relief combines into one “claim” several distinct theories regarding interconnection delays and PGE’s alleged failure to construct interconnection facilities.⁶ Similarly, St. Louis Solar’s Fourth Claim for relief bundles together distinct theories regarding interconnection delays and unrelated theories regarding the form of PGE’s interconnection study agreements.⁷ Other claims for relief suffer from similar deficiencies (and the original complaint also suffers from this defect).⁸ To comply with Rule 18 C, St. Louis Solar’s amended complaint must separately state the different claims and must separately state the different counts in each claim (i.e. the alternative theories within each claim). It does not.

Further, St. Louis Solar’s claims fail to identify the relief requested. Each claim must contain “[a] demand of the relief which the party claims.”⁹ St. Louis Solar’s claims fail to include a demand for relief and instead conclude with a generic statement that St. Louis Solar is

⁵ *Navas v. City of Springfield*, 122 Or App 196, 201 (1993) (“Defendant is entitled to rely on the theory pleaded by plaintiff to frame the issues to be tried. The rule is that a complaint must separately state each claim and within each claim, it must identify alternative theories of recovery as separate counts.”).

⁶ Proposed Amended Compl. ¶¶ 475-98.

⁷ *Id.* ¶¶ 499-506.

⁸ *See also id.* ¶¶ 403-42 (First Claim for Relief combining distinct claims or alternative theories of recovery regarding alleged breach of Section 2.2.3 of the PPA during the second, third, and fourth PPA amendment negotiations, for failure to agree to extension of scheduled COD to any date within three years of the PPA Effective Date, and for alleged breach of the PPA by billing start-up lost energy damages); ¶¶ 443-74 (Second Claim for Relief combining distinct claims or alternative theories of recovery regarding alleged breach of interconnection agreement for: (a) failure meet milestones; (b) alleged failure to complete interconnection within a reasonable time; (c) billing for delay damages; (d) allegedly failing to procure and install a relay; and (e) by requiring St. Louis Solar to install fuses); ¶¶ 507-26 (Fifth Claim for Relief combining distinct claims or alternative theories of recovery regarding charges for interconnection facilities and delays in interconnection); ¶¶ 527-38 (Sixth Claim for Relief combining distinct claims or alternative theories of recovery regarding delays in interconnection, necessity of interconnection facilities, and refusal to permit St. Louis Solar construct the interconnection facilities); ¶¶ 539-46 (Seventh Claim for Relief combining distinct claims or alternative theories of recovery regarding charges for interconnection facilities and delays in interconnection); ¶¶ 547-57 (Eighth Claim for Relief combining distinct claims or alternative theories of recovery regarding charges for interconnection facilities and delays in interconnection).

⁹ ORCP 18 A (so stating).

“entitled to relief.” These claims are insufficient under ORCP 18 because they do not state the relief demanded. To be sure, St. Louis Solar’s complaint concludes with dozens of prayers for relief. However, “[t]he prayer is not a part of the cause of suit or action.”¹⁰ Accordingly, a demand for relief must appear in each claim.¹¹ Thus, at the very least, the Commission should deny the motion to amend and instruct St. Louis Solar to separately state its claims and include in each claim a demand for relief.

Where, as in the instant case, a complaint is complex and contains numerous claims and counts, it is particularly important for each claim and count to detail the specific relief sought so that PGE and the Commission can understand what St. Louis Solar seeks and why. Here St. Louis Solar has asserted eight claims for relief, many of which contain multiple unspecified counts but lack an allegation of the relief sought, and St. Louis Solar has asserted 31 prayers for relief without specifying which prayers are associated with which claims or counts. PGE anticipates it will file one or more dispositive motions against some or all of the claims and counts asserted by St. Louis Solar. In resolving PGE’s dispositive motion(s), it will be important for the parties and the Commission to clearly understand what specific relief is requested for each claim and count asserted by St. Louis Solar. As a result, the Commission should deny leave to amend the complaint because the proposed amended complaint does not clearly and separately state each claim and count and does not clearly state the specific relief requested for each claim and count.

¹⁰ *Int’l Health & Life Ins. Co. v. Lewis*, 271 Or 35, 39 (1975).

¹¹ *See id.* (rejecting demand for equitable relief that appeared in prayer but not body of complaint).

V. CONCLUSION

The Commission should deny St. Louis Solar’s motion to amend the complaint.

Dated: September 10, 2020.

Respectfully submitted,

MARKOWITZ HERBOLD PC

s/ Jeffrey S. Lovinger

Jeffrey S. Lovinger, OSB #960147
Anit Jindal, OSB #171086
Markowitz Herbold PC
1455 SW Broadway, Suite 1900
Portland, OR 97201
(503) 295-3085 (office)
(503) 323-9105 (fax)
JeffreyLovinger@MarkowitzHerbold.com
AnitJindal@MarkowitzHerbold.com

PORTLAND GENERAL ELECTRIC COMPANY

Donald Light, OSB #025415
Assistant General Counsel
121 SW Salmon Street, 1WTC1301
Portland, Oregon 97204
(503) 464-8315
Donald.Light@pgn.com

Attorneys for Portland General Electric Company

1039380