

October 26, 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 Comments on St. Louis Solar, LLC's Second Amended Complaint.

Thank you for your assistance.

Very truly yours,



Jeffrey S. Lovinger

Attachment
1063711

**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 COMMENTS ON ST.
LOUIS SOLAR LLC’S SECOND
AMENDED COMPLAINT**

I. INTRODUCTION

Portland General Electric Company (“PGE”) comments on the draft Second Amended Complaint as authorized by the Administrative Law Judge’s (“ALJ”) rulings dated October 5, 2020, and October 9, 2020. PGE respectfully requests that the ALJ strike the provisions of the draft Second Amended Complaint that violate the limits imposed by the ALJ’s October 5, 2020, ruling (“Ruling”). Specifically, PGE requests that the ALJ strike Paragraph 367, Paragraph 377, and the Introduction to the Second Amended Complaint. Alternatively, PGE requests that the ALJ deny leave to file the Second Amended Complaint and direct St. Louis Solar LLC (“St. Louis Solar”) to file a Third Amended Complaint that complies with the Ruling.

II. BACKGROUND

The Ruling denied St. Louis Solar’s request for leave to file its First Amended Complaint. The Ruling stated:

In directing St. Louis to amend its complaint, I did not intend to provide St. Louis with the opportunity to amend its complaint beyond the narrow parameters of updating the factual allegations to reflect events occurring between the filing of

the original complaint and PGE's answer and any directly consequential changes in the requests for relief.¹

The Ruling also stated:

[T]he complainant was not directed to make any revisions with respect to revisiting issues or amending arguments or requests for relief beyond addressing changes in facts in the time period between the filing of the complaint and answer, and to indicate any associated relief that may be requested directly related to events within that time frame.²

The Ruling directed St. Louis Solar to submit a draft Second Amended Complaint that complied with the limitations imposed by the Ruling and authorized PGE to file comments on the draft Second Amended Complaint. St. Louis Solar filed a draft Second Amended Complaint on October 19, 2020.

III. DISCUSSION

A. Paragraph 367 violates the Ruling.

Paragraph 367 is a request for relief. St. Louis Solar has proposed the following revisions:

~~309.367.~~ _____ Alternatively, requiring PGE to extend the COD and fixed-price period under the PPA to reflect the delay from the date that ~~PGE represented that~~ St. Louis Solar was constructed and could have achieved commercial operations (i.e., January 23, 2019) likely to achieve commercial operations to when the interconnection ~~was~~ actually finalized (i.e., an extension of approximately 14.5 months).³

These changes are not consistent with the Ruling. The Ruling states that the only changes to the original complaint that are authorized are: (1) updating factual allegations to reflect events occurring between the filing of the original complaint and PGE's answer; and (2) any directly consequential changes to the requests for relief.

¹ Docket No. UM 2057, ALJ Ruling at 5 (Oct. 5, 2020) ("Ruling").

² *Id.*

³ Docket No. UM 2057, St. Louis Solar's Motion for Leave to File Second Amended Complaint, Attachment A (Second Amended Complaint Redline) ("Second Amended Complaint") ¶ 367 (Oct. 19, 2020).

The original language of Paragraph 367 sought an order “requiring PGE to extend the COD and fixed-price period under the PPA to reflect the delay from the date PGE represented that St. Louis Solar was likely to achieve commercial operations to when the interconnection is actually finalized.”⁴ Under the original request, the start date for measuring the delay period was an unspecified date that was allegedly identified by PGE as the date St. Louis Solar was likely to achieved commercial operation.

In the modified request for relief, St. Louis Solar has changed the start date of the delay period to the date the project was allegedly constructed and allegedly could have achieved commercial operation – January 23, 2019.

This material change in the request for relief is not the direct consequence of any new factual allegation from the period between the filing of the original complaint (February 3, 2020), and the filing of PGE’s answer (May 26, 2020). Instead, the revised request for relief in Paragraph 367 is based on a fact (completion of the facility) that allegedly occurred on January 23, 2019. St Louis Solar could have asserted this request for relief in the original complaint but did not. Asserting the request for relief at this time as part of the Second Amended Complaint is inconsistent with the limits imposed by the Ruling.

Because Paragraph 367 is inconsistent with the ruling, the ALJ should strike Paragraph 367. Alternatively, the ALJ should strike all revisions made to Paragraph 367. Alternatively, the ALJ should deny leave to file the Second Amended Complaint and direct St. Louis Solar to file a draft Third Amended Complaint that complies with the Ruling.

⁴ *Id.* (with proposed revisions removed) (emphasis added); Complaint ¶ 310 (Feb. 3, 2020) (emphasis added).

B. Paragraph 377 violates the Ruling.

Paragraph 377 of the Second Amended Complaint proposes the following new request for relief:

377. Ordering PGE to refund St. Louis Solar for any costs for interconnection service that were wrongly incurred due to PGE's mistakes or misdeeds.⁵

Paragraph 377 violates the Ruling because it is a new request for relief that is not limited to the direct consequences of new factual allegations that occurred between the filing of the original complaint and the filing of PGE's answer.⁶ Paragraph 377 seeks refund of costs incurred because of PGE's alleged mistakes or misdeeds regardless of when those alleged mistakes or misdeeds occurred. This means that Paragraph 377 seeks refund of costs for alleged mistakes or misdeeds that occurred before the filing of the original complaint on February 3, 2020, or after the filing of the answer on May 26, 2020. This violates the express limits of the Ruling.

Because the new request for relief in Paragraph 377 violates the Ruling, PGE requests that the ALJ strike Paragraph 377. Alternatively, PGE requests that the ALJ deny the motion for leave to file the Second Amended Complaint and direct St. Louis Solar to file a Third Amended Complaint that complies with the Ruling.

C. The Introduction violates the Ruling.

St. Louis Solar has extensively revised the Introduction to the Second Amended Complaint.⁷ Most of these revisions do more than: (1) update factual allegations to reflect events that occurred between the filing of the original complaint and PGE's answer; or (2) modify requests for relief as a direct consequence of such updated facts. Instead, the Introduction

⁵ Second Amended Complaint ¶ 377.

⁶ See Ruling at 5.

⁷ See Second Amended Complaint at 2-12.

revisits issues and amends arguments outside of the time period between the filing of the original complaint and PGE's answer. As a result, the Introduction is inconsistent with the Ruling and should be stricken. Alternatively, the motion for leave to file the Second Amended Complaint should be denied and St. Louis Solar should be directed to file a Third Amended Complaint that complies with the Ruling.

The revisions to the Introduction are too extensive to review in detail. Below, PGE describes three sets of revisions to the Introduction that are indicative of how the Introduction violates the limits imposed by the Ruling.

1. The second and third paragraphs of the Introduction violate the Ruling.

The second and third paragraphs of the Introduction are the first example of how the revised Introduction violates the Ruling. In the original complaint, the second paragraph of the Introduction stated:

PGE has refused to amend the PPA in light of significant delays that PGE caused to St. Louis Solar's interconnection. These delays have forced St. Louis Solar to default on the PPA by not achieving its Commercial Operation Date ("COD"). Because of PGE's continuing delays, St. Louis Solar has been unable to cure the default. In addition, during the time that St. Louis Solar has been unable to sell power because the interconnection is incomplete, PGE has charged St. Louis Solar for alleged damages. On February 11, 2020, the cure period for St. Louis Solar will end, and PGE could terminate the PPA. If PGE terminates the PPA, St. Louis Solar will suffer catastrophic losses and not be able to operate its facility or sell its net output. St. Louis Solar has been working in good faith with PGE to avoid this filing. However, PGE has refused to provide adequate relief, so St. Louis Solar comes now before the Commission.⁸

In compliance with the Ruling, St. Louis Solar should have limited any modification of this paragraph to changes necessary to reflect updated factual allegations from the period February 3,

⁸ Complaint at 1-2.

2020, to May 26, 2020, or to revise requests for relief based on such updated facts. This would have involved deleting three sentences as follows:

PGE has refused to amend the PPA in light of significant delays that PGE caused to St. Louis Solar's interconnection. These delays have forced St. Louis Solar to default on the PPA by not achieving its Commercial Operation Date ("COD"). ~~Because of PGE's continuing delays, St. Louis Solar has been unable to cure the default.~~ In addition, during the time that St. Louis Solar has been unable to sell power because the interconnection is incomplete, PGE has charged St. Louis Solar for alleged damages. ~~On February 11, 2020, the cure period for St. Louis Solar will end, and PGE could terminate the PPA. If PGE terminates the PPA, St. Louis Solar will suffer catastrophic losses and not be able to operate its facility or sell its net output.~~ St. Louis Solar has been working in good faith with PGE to avoid this filing. However, PGE has refused to provide adequate relief, so St. Louis Solar comes now before the Commission.

In addition, St. Louis Solar could have added a sentence indicating that the interconnection was completed in March 2020, and that St. Louis Solar achieved COD and cured its default under the PPA on April 6, 2020. However, instead of limiting itself to these revisions to update the Introduction to reflect events that occurred between February 3, 2020, and March 26, 2020, St. Louis Solar deleted the second paragraph of the Introduction and replaced it with two new paragraphs.⁹ The new paragraphs are not limited to stating updated facts from February 3, 2020, to March 26, 2020, and are not limited to revising requests for relief to reflect such updated facts.

2. Subsection A of the Introduction violates the Ruling.

In subsection A to the Introduction, St. Louis Solar deleted several paragraphs from the original complaint and inserted several new paragraphs.¹⁰ The new paragraphs all address St. Louis Solar's allegations that it lost the ability to sell net output because the interconnection was not completed by one of several alternative dates, all of which occurred before the original

⁹ Second Amended Complaint at 2-3.

¹⁰ *Id.* at 4-7.

complaint was filed on February 3, 2020.¹¹ The revisions to subsection A simply revisit or amend arguments that St. Louis Solar already made in the original complaint or that are based on facts that predate the original complaint. As such, the revisions to subsection A to the Introduction are outside the scope authorized by the Ruling.

3. Subsection B of the Introduction violates the Ruling.

A third example of how the Introduction violates the Ruling is provided by new subsection B of the Introduction, which states:

B. Refund for the Alleged Delay Damages

PGE billed St. Louis Solar for alleged delay damages on the basis that St. Louis Solar came online late. In fact, St. Louis Solar completed its project and missed its scheduled COD only because of PGE's delays. It was unreasonable for PGE to bill St. Louis Solar when PGE was the cause of the delays. St. Louis Solar seeks a refund of the amounts paid.¹²

This is new language added to the Second Amended Complaint. The new language does not comply with the Ruling because it does not update factual allegations to reflect events occurring between the filing of the original complaint and PGE's answer. Rather, subsection B revisits or amends issues and arguments raised in the original complaint and occurring before the filing of the original complaint (delay damages were billed in April 2019). New subsection B is another example of how the Introduction does not comply with the limitations imposed by the Ruling.

4. The Introduction should be stricken or the motion for leave to amend should be denied.

PGE respectfully requests that the ALJ strike the Introduction to the Second Amended Complaint because the Introduction has been extensively revised and most of those revisions are inconsistent with the Ruling. Striking the Introduction will resolve the violation of the Ruling

¹¹ *Id.* (arguing that the project should have been interconnected and St. Louis Solar should have been allowed to begin commercial operation by October 31, 2017, or by January 23, 2019, or by October 31, 2019).

¹² *Id.* at 7.

and will not prejudice St. Louis Solar because the Introduction is an unnecessary element of the complaint. Striking the Introduction will not alter any of the factual allegations in the numbered paragraphs of the Second Amended Complaint and will not alter any of the requests for relief contained in the numbered paragraphs of the Second Amended Complaint. Alternatively, PGE requests that the ALJ deny the motion for leave to file the Second Amended Complaint and direct St. Louis Solar to file a Third Amended Complaint that complies with the Ruling.

IV. CONCLUSION

Three elements of the Second Amended Complaint violate the Ruling. Those elements are: Paragraph 367, Paragraph 377, and the Introduction. These elements prejudice PGE by making changes to the complaint beyond those authorized by the Ruling. PGE identified these violations to St. Louis Solar before it filed its Second Amended Complaint. St. Louis Solar elected not to address the violations.¹³ PGE respectfully requests that the ALJ strike Paragraph 367, Paragraph 377, and the Introduction because they violate the limits imposed by the Ruling. Alternatively, PGE requests that the ALJ deny leave to file the Second Amended Complaint and direct St. Louis Solar to file a Third Amended Complaint that complies with the Ruling.

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¹³ St. Louis Solar did make changes to the draft Second Amended Complaint to address a fourth element of the original draft that PGE identified as a violation of the Ruling.

Dated: October 26, 2020.

Respectfully submitted,

MARKOWITZ HERBOLD PC

s/ Jeffrey S. Lovinger

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