

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

Docket No. UM 2057

ST. LOUIS SOLAR, LLC,

Complainant,

v.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

ST. LOUIS SOLAR’S REPLY IN
SUPPORT OF ITS MOTION TO
DISMISS OR, IN THE
ALTERNATIVE, TO STRIKE PGE’S
COUNTERCLAIMS

I. INTRODUCTION

St. Louis Solar, LLC (“St. Louis Solar”) submits this reply in support of its motion to dismiss or, in the alternative, to strike Portland General Electric Company’s (“PGE’s”) counterclaims. St. Louis Solar moves to dismiss PGE’s first counterclaim for lack of jurisdiction and to dismiss both counterclaims for failing to state ultimate facts sufficient to constitute a claim. Alternatively, St. Louis Solar moves to strike PGE’s counterclaims as frivolous or sham pleadings. St. Louis Solar respectfully requests that the Commission dismiss, or, in the alternative, strike PGE’s counterclaims.

In addition, St. Louis Solar requests that the Commission to clarify whether it is willing to exercise jurisdiction over damages, which it will need to do if it wishes to adjudicate PGE’s first counterclaim. St. Louis Solar has various claims for damages but did not include them in its complaint because it understood that the Commission could not, or would not, hear such claims. PGE asks the Commission to hear a claim for

contractual damages under PGE’s standard power purchase agreement (“PPA”). St. Louis Solar requests clarity as to whether the Commission is also willing to hear other claims for contractual damages, such as those arising from standard interconnection agreements (“IAs”), or to hear claims for statutory damages and attorneys’ fees. This clarity is important to guide St. Louis Solar in both preserving its rights by filing all of the claims that it needs to file while also not wasting the Commission’s time by filing claims that the Commission cannot, or will not, oversee.

II. LEGAL STANDARD

The Commission has adopted Oregon Administrative Rules (“OARs”) to govern practice and procedure before the Commission.¹ In addition, the Commission has adopted the Oregon Rules of Civil Procedure (“ORCP”) in contested cases where the ORCPs are not inconsistent with its rules, an order, or a ruling.²

A motion to dismiss may assert, as defenses, a “lack of jurisdiction over the subject matter” as well as “failure to state ultimate facts sufficient to constitute a claim,” among others.³ In addition, any claim or portions of a claim may be stricken if it is “sham, frivolous, irrelevant, or redundant” matter.⁴

¹ OAR 860-001-0000(1).

² *Id.*

³ ORCP 21A(1), (8).

⁴ ORCP 21E.

III. THE COMMISSION SHOULD DISMISS OR STRIKE PGE'S DAMAGES COUNTERCLAIM FOR LACK OF JURISDICTION

St. Louis Solar moves to dismiss PGE's damages counterclaim for lack of jurisdiction.⁵ PGE responds that it has not brought a damages counterclaim,⁶ but adjudicating PGE's first counterclaim would require the Commission to exercise jurisdiction over damages. The Commission's longstanding precedent holds that it does not have jurisdiction over damages.⁷ Under this precedent, the Commission must dismiss PGE's damages counterclaim for lack of jurisdiction.

PGE notes that the motion to dismiss did not point to specific language demonstrating that PGE's first counterclaim is a damages counterclaim. For the avoidance of any doubt or confusion, the relevant paragraphs from PGE's first counterclaim and prayer for relief are quoted below in full, with the damages text in italics:

⁵ St. Louis Solar's Motion to Dismiss or, in the Alternative, to Strike PGE's Counterclaims at 10-11 (June 5, 2020) [hereinafter St. Louis Solar's Motion to Dismiss].

⁶ PGE's Response to St. Louis Solar's Motion to Dismiss or, in the Alternative, to Strike PGE's Counterclaims at 1-2, 11-12 (June 22, 2020) [hereinafter PGE's Response].

⁷ *T.G. v. Qwest*, Docket No. UCR 188, Order No. 18-212 (June 6, 2018) (granting Qwest's motion to dismiss claims for damages because "[t]he Commission has only those powers granted to it by statute. There is no statute granting the Commission authority to order a utility company to pay damages . . . That kind of dispute normally is handled through mediation, arbitration, or the judicial system") (quoting *Schaefer v. CenturyTel of Or., Inc.*, Docket No. UC 569, Order No. 01-157 (Feb. 8, 2001)); *see also Sheppard v. U.S. W. Commc'n, Inc.*, Docket No. UC 477, Order No. 99-749 (Dec. 12, 18 1999); *Sage v. U.S. W. Commc'n*, Docket No. UC 368, Order No. 98-473 (Nov. 18, 1998); *Mattox v. PGE*, Docket No. UC 36, Order No. 85-196 (March 7, 1985).

D. PGE’s First Claim for Relief – St. Louis Solar Breached the PPA.

451. PGE re-alleges all of the preceding paragraphs.

452. St. Louis Solar was in breach of Section 2.2.2 of the PPA from February 11, 2019, until April 6, 2020.

453. *PGE was within its rights under Section 9.2 of the PPA to charge St. Louis Solar damages in the amount of \$12,569.94 on April 3, 2019, and in the amount of \$11,215.76 on April 25, 2019.*

454. St. Louis Solar admitted its breach *by paying the damages invoices without objection.*

455. *There is no basis to require PGE to reimburse these damages to St. Louis Solar.*

456. PGE is entitled to relief in the form of 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.*

457. PGE respectfully requests that the Commission enter 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.

...

467. Grant PGE’s Counterclaims and issue an order holding: (A) that St Louis Solar breached the PPA; (B) *that PGE is entitled to the \$23,785.70 in damages collected because of that breach;* (C) that PGE is not required to agree to extend the COD, extend the Termination Date, or extend the 15-year fixed-price period under the PPA; and (D) that PGE complied with its obligations under the IA and the Commission’s rules when PGE completed placed the St. Louis Solar interconnection in-service on March 26, 2020.⁸

⁸ PGE’s Answer, Affirmative Defenses, and Counterclaim at PP. 451-457, 467 (May 26, 2020).

PGE's Response says that it only seeks an interpretation of the PPA,⁹ but its counterclaim asks the Commission to adjudicate over damages. Specifically, PGE asks the Commission to find: 1) that PGE was entitled to collect damages under the PPA; 2) that PGE correctly calculated that it was entitled to at least \$23,785.70 in damages; and 3) that PGE is entitled to retain the \$23,785.70 as damages.¹⁰ The Commission cannot issue these findings without asserting jurisdiction over damages claims.

The Commission has found that it has concurrent jurisdiction to interpret the standard PPA, but the Commission has consistently declined to exercise jurisdiction over damages.¹¹ If the Commission does not have jurisdiction over damages, it cannot adjudicate a damages counterclaim.¹² At minimum, the Commission should refuse to decide whether PGE was correct to invoice specific numerical amounts, limit its review to whether a breach of contract occurred or not, and leave the questions of whether and how much damages were owed to a trial court.¹³ The Commission should dismiss or strike the portions of PGE's counterclaim on damages.

⁹ PGE's Response at 1-2, 11-12.

¹⁰ PGE's Answer, Affirmative Defenses, and Counterclaim at PP. 451-457, 467.

¹¹ *See, e.g., B.R. v. PGE*, Docket No. UCR 181, Order No. 17-257 at 11 (July 13, 2017) ("Although we have authority to order refunds where appropriate, we lack jurisdiction to grant money damages.").

¹² *E.g., T.G. v. Qwest*, Docket No. UCR 188, Order No. 18-212 (June 6, 2018) (granting Qwest's motion to dismiss claims for damages because "[t]he Commission has only those powers granted to it by statute. There is no statute granting the Commission authority to order a utility company to pay damages . . . That kind of dispute normally is handled through mediation, arbitration, or the judicial system") (quoting *Schaefer v. CenturyTel of Or., Inc.*, Docket No. UC 569, Order No. 01-157 (Feb. 8, 2001)).

¹³ This limited reading is consistent with Commission precedent. *See, e.g., Electric Lightwave v. U.S. West Comm'ns*, Docket No. UC 377, Order No. 99-285 at 6-7

For the avoidance of any doubt and for purposes of argument in this motion, St. Louis Solar assumes that the Commission does *not* exercise jurisdiction over damages and chooses to strike PGE’s first counterclaim to read as follows:

D. PGE’s First Claim for Relief – St. Louis Solar Breached the PPA.

451. PGE re-alleges all of the preceding paragraphs.

452. St. Louis Solar was in breach of Section 2.2.2 of the PPA from February 11, 2019, until April 6, 2020.

453. St. Louis Solar admitted its breach.

454. PGE is entitled to relief in the form of 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.

455. PGE respectfully requests that the Commission enter 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.

...

465. Grant PGE’s Counterclaims and issue an order holding: (A) that St Louis Solar breached the PPA; (B) that PGE is not required to agree to extend the COD, extend the Termination Date, or extend the 15-year fixed-price period under the PPA; and (C) that PGE complied with its obligations under the IA and the Commission’s rules when PGE completed placed the St. Louis Solar interconnection in-service on March 26, 2020.¹⁴

(Apr. 26, 1999) (“[W]hile the Commission generally has no jurisdiction to award monetary damages, it does have authority to enforce interconnection agreements, and a decision on the merits in ELI’s favor would at the very least allow ELI to petition a court of competent jurisdiction for a monetary judgment based on the Commission’s decision.”).

¹⁴ PGE’s Answer, Affirmative Defenses, and Counterclaim at PP. 451-457, 467. St. Louis Solar reserves its right to deny any of these statements in the event that PGE’s Counterclaim is rewritten as indicated.

Alternatively, if the Commission reverses its precedent and exercises jurisdiction over damages, it should state all of the types of damages claims it is willing to adjudicate over. St. Louis Solar has multiple claims for contractual damages, statutory damages, and attorneys' fees, but it understood Commission precedent to mean it had to go to court for relief of these claims.¹⁵ Notably, these claims include a claim that PGE improperly calculated damages under the PPA's terms. St. Louis Solar does not wish to be precluded from litigating its damages claims because it followed Commission precedent and did not bring them before the Commission.

IV. THE COMMISSION SHOULD STRIKE PPA'S COUNTERCLAIMS AS SHAM OR FRIVOLOUS PLEADINGS

Because PGE's counterclaims are either sham or frivolous pleadings, the Commission should strike them. Before discussing the elements of a sham or frivolous pleading, it may be helpful to review why PGE filed its counterclaims.

According to PGE's response, PGE wants an order that it acted consistently with the terms of its standard contracts.¹⁶ PGE cites a court case, *Eden Gate v. D & L Excavating & Trucking*, as evidence that a ruling against St. Louis Solar will not necessarily give PGE the ruling that it needs.¹⁷ The procedure of that case and the decision are relevant here. The plaintiff, Eden Gate, sought a declaratory judgment but

¹⁵ *Id.* St. Louis Solar has asserted claims for refunds, not damages, because refunds are well within the Commission's jurisdiction. *See, e.g., B.R. v. PGE*, Docket No. UCR 181, Order No. 17-257 at 11 (July 13, 2017) ("Although we have authority to order refunds where appropriate, we lack jurisdiction to grant money damages.").

¹⁶ PGE's Response at 10-11.

¹⁷ *Eden Gate, Inc. v. D & L Excavating & Trucking, Inc.*, 178 Or App 610 (2002).

was denied.¹⁸ The defendant tried to assert the denial of declaratory judgment as preclusive in a subsequent motion for summary judgment against Eden Gate, but the court refused to do so.¹⁹ The court noted that declaratory relief is discretionary and that a motion for summary judgment requires viewing facts in the favor of the non-movant, Eden Gate; therefore, preclusion was not appropriate. The result in *Eden Gate* was specific to its procedural posture. The same result is not guaranteed here.

PGE's counterclaims ask the Commission to find that PGE acted consistently with the terms of PGE's standard PPA and standard IA.²⁰ If the Commission issues an order on the merits against St. Louis Solar, it will *necessarily* be because the Commission determined that PGE complied with the terms of its standard contracts, as PGE requests. If the Commission does not reach the merits, it will be because either: 1) St. Louis Solar voluntarily dismissed its complaint; or 2) the Commission resolved the dispute without reaching the merits. These would be efficient outcomes insofar as the Commission's resources are involved.

PGE disagrees that a voluntary dismissal would be an efficient result, but the Commission has already ruled against PGE on this specific point. Under ORCP 54A, a complainant may voluntarily dismiss a complaint before trial so long as no counterclaim has been pleaded.²¹ PGE notes that this occurred recently in the case *Bottlenose Solar v.*

¹⁸ *Id.* at 623.

¹⁹ *Id.*

²⁰ PGE's Response at 6-7.

²¹ ORCP 54A. Specifically, the plaintiff must serve notice at least five days prior to trial.

PGE.²² In that case, PGE (the defendant) opposed dismissal, but the Commission ruled that the complainant was allowed to dismiss because PGE had not filed any counterclaims.²³ PGE argued that the Commission had discretion to deny dismissal; nevertheless, the Commission granted dismissal.²⁴

Ultimately, the question before the Commission is whether it is appropriate for PGE to file sham or frivolous counterclaims *in order to prevent* voluntary dismissals. The answer is no. Filing counterclaims solely for procedural benefits is an inappropriate course of action.

PGE may also be filing counterclaims in an inappropriate effort to shift the burden of proof. The procedural schedule is not yet set for this case. As complainant, St. Louis Solar has the burden of proof and should be entitled to have the first and last word on its pleadings. Yet PGE might try to argue that having counterclaims entitles it to also have the first and last word, at least on its counterclaims.²⁵ Recall that PGE's counterclaims do not raise any issues that are not already squarely raised by St. Louis Solar's complaint or by PGE's affirmative defenses. The issues are already raised and cannot be separated. As a practical matter, both parties cannot have the last word. If PGE has the last word on issues that St. Louis Solar raised, then St. Louis Solar will not

²² PGE's Response at 10-11; Docket No. UM 1877, Order No. 19-001 at 4-5 (Jan. 2, 2019).

²³ Docket No. UM 1877, Order No. 19-001 at 3-5.

²⁴ *Id.*

²⁵ St. Louis Solar reserves its right to disagree and to oppose any schedule taking this approach.

have an adequate opportunity to carry its burden of proof. This would be an unfair and inequitable result.²⁶

The Commission can prevent this outcome by striking PGE’s counterclaims as sham or frivolous pleadings. St. Louis Solar raised this in its Motion, but PGE did not respond.²⁷

ORCP 21E states that a court may order stricken “any sham, frivolous, or irrelevant pleading or defense.”²⁸ A sham pleading is one that is factually false, whereas a frivolous pleading may have true allegations but is legally insufficient in substance or fails to raise any issue in the proceeding.²⁹

1. PGE’s First Counterclaim is a Frivolous Pleading

PGE’s first counterclaim seeks a Commission order interpreting the PPA, finding that St. Louis Solar breached the PPA, and finding that PGE is not required to agree to amend the PPA. While PGE may be entitled to seek a Commission order interpreting the PPA, PGE’s requested findings are legally insufficient.

²⁶ The Commission is not being asked to decide the scheduling issues in this Motion to Dismiss, but one of the reasons that PGE may have made counterclaims that essentially repeat St. Louis Solar’s claims is to have the ability to prevent St. Louis Solar from having the last word, as is its right as the complainant in this case.

²⁷ St. Louis Solar’s Motion to Dismiss at 5, 10.

²⁸ ORCP 21E(1).

²⁹ See generally *In re Marriage of Ross*, 240 Or App 435, 440 (2011) (discussing the two terms’ 150 years of history). The court noted that there may be significant overlap between a motion to strike as frivolous and a motion to dismiss for failure to state a claim. *Id.*

First, PGE alleges that St. Louis Solar breached the PPA. St. Louis Solar has specifically alleged that PGE *prevented* St. Louis Solar from performing under the PPA.³⁰ In its Answer, PGE acknowledges that PGE did not complete interconnection before the scheduled commercial operation date (“COD”), that St. Louis Solar’s alleged default occurred for failing to meet the COD, and that PGE would not agree to extend the COD.³¹ Performance under the PPA was impossible for St. Louis Solar. PGE’s allegations demonstrate that on their face. Thus, PGE’s counterclaim of breach is frivolous.

Further, PGE asks for a finding that PGE is not obligated to agree to amend the PPA. Such a finding could significantly hamper the duty of good faith and fair dealing that PGE has acknowledged it has under all contracts.³² A Commission interpretation of the PPA should uphold PGE’s duty of good faith and fair dealing and find that PGE’s duty may obligate PGE to agree to amendments. PGE’s request otherwise is contradictory to its obligations under this duty. As such, PGE’s counterclaim is frivolous on this point as well.

³⁰ Complaint at PP. 41-43.

³¹ PGE’s Answer at PP. 47, 49.

³² *Patú Wind Farm v. PGE*, Docket No. UM 1566, Order No. 14-287 at 12 (Aug. 13, 2014), *rehearing denied*, Order No. 14-425 (Dec. 8, 2014); *Sandy River Solar v. PGE*, Docket No. UM 1967, Order No. 19-218 at 4 (June 24, 2019).

2. PGE's Second Counterclaim is a Sham Pleading

To show PGE's second counterclaim is a sham, St. Louis Solar must show that it is factually false. PGE's second counterclaim seeks a Commission order that PGE complied with the standard IA terms. By PGE's own statements, PGE did not do so.

PGE asserted that PGE did not meet the deadlines under the standard IA because St. Louis Solar did not complete its facility until March 2020.³³ St. Louis Solar disagrees with that argument, but PGE's Answer shows that PGE did not meet the deadlines under the standard IA because of PGE's own actions. The two relevant deadlines were September 27, 2019 and October 31, 2019.³⁴ Specifically, PGE admits that it did not have documents required to complete interconnection until approximately October 7, 2019, did not complete required work until at least November 13, 2019, and did not visit the St. Louis Solar project site to complete interconnection until at least November 25, 2020. Even if St. Louis Solar did not complete required work on time, PGE's allegations demonstrate that PGE would not have been aware of that fact until *at least two months after* PGE was obligated to perform under the IA.

PGE has not showed that it complied with the terms of the IA. Viewed most favorably, PGE has alleged that, after November 25, 2019, it could not complete interconnection until at least March 19, 2020, the date on which PGE alleges that St. Louis Solar completed prerequisite work.³⁵ PGE has also acknowledged that the

³³ PGE's Answer at 462-463.

³⁴ *Id.*

³⁵ *See id.* at 463

deadlines it needed to meet preceded November 25, 2019.³⁶ As a result, PGE’s allegations that PGE complied with the terms of the IA are false on their face. PGE’s second counterclaim is a sham and should be stricken.

V. THE COMMISSION SHOULD DISMISS PPA’S COUNTERCLAIMS FOR FAILURE TO STATE A CLAIM

PGE asserts that it can assert as a claim the right to a Commission interpretation of a standard contract. The Commission ruled in *PGE v. Alfalfa Solar* that PGE could bring a complaint before the Commission so long as PGE “identifies the nature of the dispute and the relief sought.”³⁷ St. Louis Solar disagrees that PGE has done so, as is discussed in St. Louis Solar’s motion, but does not repeat its arguments here. Here, St. Louis Solar simply addresses PGE’s Response.

First, PGE cites a case where the defendant waived its defense that the pleading was insufficiently pled.³⁸ This case is not persuasive on the issue of whether or not PGE’s counterclaims were properly pled.

Second, PGE cites declaratory judgment court cases as support.³⁹ These cases are also not persuasive. Courts have jurisdiction to award declaratory judgements due to a special statute, ORS 028.010.⁴⁰ The Commission has limited jurisdiction to issue

³⁶ *Id.* at 462-463.

³⁷ *PGE v. Alfalfa Solar*, Docket No. UM 1931, Order No. 18-174 at 5 (May 23, 2018).

³⁸ PGE’s Response at 6; *PacifiCorp v. Lakeview Power Co.*, 131 Or App 301 (1994) (not mentioning any motion to dismiss for the waivable defense of failure to state a claim); *see* ORCP 21G(3).

³⁹ PGE’s Response at 5-6.

⁴⁰ ORS 028.010 (“Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further

declaratory rulings under ORS 757.450.⁴¹ The Commission ruled in *PGE v. Alfalfa Solar* that ORS 757.450 does not provide jurisdiction to interpret a contract and issue a ruling.⁴² If PGE is bringing its counterclaims as a request for a declaratory ruling, then it should be dismissed or stricken.

Finally, PGE claims that *PGE v. Alfalfa Solar* is binding on the issue of what PGE must allege. However, that case is distinguishable. In *PGE v. Alfalfa Solar*, PGE asked the Commission to hear its complaint because the defendant had filed against PGE before a court.⁴³ Here, St. Louis Solar has already brought a complaint before the Commission for adjudication. The dispute is properly before the Commission. The Commission does not need to find that PGE satisfied any procedural requirements in order to have jurisdiction to act in this case. If the Commission wants to adjudicate this case, it may do so, even without hearing PGE's counterclaims.

VI. CONCLUSION

For the reasons articulated above, the Commission should grant St. Louis Solar's motion to dismiss or, in the alternative, to strike all of PGE's counterclaims. In addition, the Commission should issue an order confirming that Commission does not have jurisdiction over damages or attorneys' fees.

relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a judgment.")

⁴¹ See also Docket No. UM 1931, Defendants' Motion to Dismiss at 16-19.

⁴² Docket No. UM 1931, Order No. 18-174 at 5.

⁴³ *Id.*

Dated this June 29th of 2020.

Respectfully submitted,

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