

**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 PROPOSED
PROCEDURAL SCHEDULE

I. INTRODUCTION

St. Louis Solar, LLC (“St. Louis Solar”) submits this filing in advance of the prehearing conference scheduled for July 15, 2020. St. Louis Solar and Portland General Electric Company (“PGE”) worked in good faith to develop an agreed-upon schedule until June 29, 2020 but were unable to do so. On June 29, 2020, PGE filed its proposed schedules, which PGE asserted were consistent with the Oregon Rules of Civil Procedure (“ORCPs”) and reflected PGE’s due process rights.¹ St. Louis Solar disagrees. In this filing, St. Louis Solar explains its disagreement and provides its proposed procedural schedule, which is consistent with the Commission’s rules, the ORCPs, and both parties’ due process rights.

St. Louis Solar focuses its discussion on differences between its proposed schedule and PGE’s proposed alternative schedule, because there are fewer issues to resolve between those two proposals. In the alternative, St. Louis Solar could accept PGE’s third proposal to defer

¹ PGE, PGE’s Letter Regarding Proposed Schedule (June 29, 2020).

setting a schedule until after the Commission issues a decision on St. Louis Solar's Motion to Dismiss, or in the Alternative to Strike, PGE's Counterclaims ("Motion to Dismiss").

There are three issues to resolve before establishing a procedural schedule in this case. Two issues are fundamental, as they arise from a dispute between the parties over whether sequential or simultaneous filing is appropriate for either or both: (1) testimony or (2) legal briefing.

PGE proposes simultaneous filing, based on the premise that PGE's filing of counterclaims justifies changes to the customary sequential filing. Even assuming for the sake of argument that PGE's counterclaims are not dismissed or stricken, St. Louis Solar disagrees. The Commission's rules, the ORCPs, Commission precedent, or court precedent do not provide any indication that the filing of counterclaims requires or even justifies a change to the customary sequential filing approach. Indeed, PGE cites none. Further, sequential filing does not violate PGE's due process rights, as PGE claims—again, without support. St. Louis Solar is willing to pursue simultaneous testimony so long as its right of rebuttal is preserved, but St. Louis Solar is not willing to forfeit its right to sequential legal briefing.

The third issue is comparatively minor: St. Louis Solar's schedule proposes removing PGE's footnote regarding possible modifications of the schedule, because the footnote is unnecessary and misleading.

In this filing, St. Louis Solar provides: 1) its proposed schedule; and 2) an explanation of St. Louis Solar's position on each of the three issues that need to be resolved.

II. ST. LOUIS SOLAR'S PROPOSED SCHEDULE

St. Louis Solar proposes the following procedural schedule, with redlines to indicate the differences from PGE's proposed alternative procedural schedule:

Event	Date
Commission decision on St. Louis Solar’s Motion to Dismiss	July 29, 2020
PGE files amended answer/counterclaims if needed	August 12, 2020
Simultaneous Opening Testimony	October 16, 2020 <u>October 2, 2020</u>
Simultaneous Response Testimony	November 13, 2020 <u>October 30, 2020</u>
Simultaneous Reply Testimony	December 4, 2020 <u>November 20, 2020</u>
<u>St. Louis Solar Rebuttal Testimony</u>	<u>December 8, 2020</u>
Simultaneous Pre-hearing Briefs	December 18, 2020
All Parties’ Cross Examination Statements	January 8, 2021
Evidentiary Hearing	Week of January 11, 2021
Simultaneous <u>St. Louis Solar</u> Opening Briefs	February 5, 2021
Simultaneous <u>PGE</u> Post-Hearing Response Briefs	February 19, 2021
Simultaneous <u>St. Louis Solar</u> Post-Hearing Reply Briefs	February 26, 2021
Decision	March 26, 2021
<p>* PGE anticipates filing a dispositive motion or motions under ORCP 21-B or ORCP 47. When it does so, PGE anticipates the procedural schedule will need to be modified to provide for resolution of PGE’s dispositive motion(s) prior to continuing with the remainder of the procedural schedule (if any claims survive the dispositive motions). PGE reserves the right to file motions consistent with ORCP 21 and ORCP 47. PGE acknowledges that St. Louis Solar also has the right to file motions consistent with</p>	

As indicated by the redlines above, St. Louis Solar's proposed schedule differs from PGE's proposed alternative schedule in three ways: 1) the inclusion of rebuttal testimony for St. Louis Solar, which requires modifying the schedule; 2) the use of sequential legal briefing rather than simultaneous briefing; and 3) the removal of PGE's footnote regarding dispositive motions.

III. EXPLANATION OF ST. LOUIS SOLAR'S PROPOSED SCHEDULE

St. Louis Solar addresses each of the three differences between its proposed schedule and PGE's proposed alternative schedule below.

A. St. Louis Solar Prefers Sequential Testimony, But Is Willing to Compromise on Simultaneous Testimony So Long as It Receives Rebuttal Testimony

The first issue involves how evidence will be presented. The Commission has stated: "The order of presenting evidence is determined by the ALJ. The burden of presenting evidence to support an allegation rests with the person raising the allegation."² Further, the Commission has recognized that contested case proceedings need to provide the party with the burden of proof: 1) "a fair opportunity to present evidence and argument on the issues raised"; and 2) an opportunity to "respond to all evidence and argument offered by other parties."³ In other words, the party with the burden of proof should receive the opportunity to respond to *all* evidence raised by other parties.

In this case, St. Louis Solar wishes to retain its right to respond and rebut all evidence raised by PGE. St. Louis Solar is the plaintiff and has the burden of proof on all allegations relevant to its seven claims for relief.

² *E.g.*, Prehearing Conference Memorandum and Ruling, Attach. at 1 (quoting the Commission's standard notice of contested case rights); *see also* ORS 183.413, 183.450.

³ *In re Update of Internal Operating Guidelines*, Docket No. UM 2055, Order No. 20-065 at 30-31 (Mar. 3, 2020).

Assuming for the sake of argument that PGE's counterclaims are *not* dismissed, PGE may also have some burden of proof to bear. However, PGE's counterclaims can be read as reiterating St. Louis Solar's claims for relief, and a party should not be able to deprive another party of its traditional right to the last word by simply restating the plaintiff's claims for relief. St. Louis Solar has raised claims that PGE breached two contracts between the parties (among other claims), and PGE has raised counterclaims that PGE did *not* breach either of the two contracts. St. Louis Solar has the burden of proving breach. St. Louis Solar should receive the opportunity to rebut all evidence raised by PGE to the contrary. For this purpose, St. Louis Solar requests the opportunity to file testimony to rebut any evidence raised which relates to St. Louis Solar's claims for relief. If the ALJ disagrees with St. Louis Solar, then at most, PGE's burden will extend only to PGE's two counterclaims, both of which are intrinsically tied to St. Louis Solar claims.

As a practical matter, incorporating rebuttal testimony into the schedule requires changing other dates. One option would be to delay all future dates. Instead, St. Louis Solar proposes to accelerate the schedule from the preceding dates, specifically the dates for earlier rounds of testimony. St. Louis Solar notes that this approach can only be adopted now, when the schedule is set. If rebuttal testimony is not incorporated into the schedule, the only option in the future will be to delay the proceeding. St. Louis Solar requests that St. Louis Solar's right to rebuttal testimony be preserved and incorporated in the schedule through accelerating the timeline for earlier rounds of testimony.

B. St. Louis Solar is Entitled to Sequential Legal Briefing

As the plaintiff, St. Louis Solar is entitled to file the first and last legal brief. The Commission follows the ORCPs where they do not contradict the Commission’s own rules.⁴ The Commission’s rules are silent on the order of legal briefing, thus any ORCPs on legal briefing govern. The relevant ORCP is ORCP 58, which sets forth the order for a proceeding. Specifically, ORCP 58(B)(3) through (6) set forth the order for a non-jury trial. ORCP58(B)(6) states that “[w]hen the evidence is concluded . . . the plaintiff shall commence and conclude the argument.”⁵ In other words, the plaintiff has the right to file both the first and last legal brief. Simultaneous briefing does not preserve this right, therefore St. Louis Solar requests sequential legal briefing.

PGE asserts that its counterclaims entitle it to simultaneous briefing, but this is not the case. First, ORCP 58(B) provides the plaintiff the right to the first and last legal brief *regardless* of whether a counterclaim is filed or not. PGE does not discuss any ORCPs, but its position appears to assume that any ORCP must fail to consider the possibility that a counterclaim would be filed. On the contrary, ORCP 58(B)(3) contemplates that a counterclaim may be filed. Nevertheless, ORCP 58(B)(6) provides the plaintiff with the right to the first and last legal brief. The appropriate inference is that the drafters of ORCP 58(B) made a decision *not* to change the plaintiff’s right to sequential briefing in the event that a counterclaim is filed.

Second, Oregon courts have recognized that ORCP 58(B) provides plaintiffs the right to the first and last legal brief even on issues for which the plaintiff does not have the burden of proof. In *State v. McNeely*, the trial court allowed the state to make legal argument against a

⁴ OAR 860-001-0000(1).

⁵ ORCP 58B(6).

criminal defendant on an issue for which the state did not have the burden of proof.⁶ On appeal, the Oregon Supreme Court ruled that ORCP 58(B) does not limit the plaintiff's right to present legal argument and explicitly rejected the argument that the burden of proof should affect the plaintiff's right to file the first and last legal brief.⁷ Even if PGE's counterclaims provide it the burden of proof on some issues, that does not change St. Louis Solar's right to sequential briefing.

Third, upholding ORCP 58(B) does not violate the defendant's due process rights, as PGE appears to claim. Oregon courts have found this to be true even in *criminal* cases, where a party's due process rights tend to be more strongly protected than in a civil case.⁸ It is startling to St. Louis Solar that PGE would assert that its due process rights entitle it to greater protection than Oregon courts give to criminal defendants on death row.⁹

St. Louis Solar is entitled to "commence and conclude" legal argument. Therefore, it is entitled to sequential, not simultaneous, legal briefing.

C. PGE's Unnecessary and Misleading Footnote on Dispositive Motions Should Be Deleted

Finally, St. Louis Solar requests the PGE's footnote on dispositive motions not be included in the procedural schedule. Some background on the parties' discussion of dispositive motions may be useful here. PGE has said that it intends to file a dispositive motion on some or

⁶ *State v. McNeely*, 330 Or 457, 466-68 (2000).

⁷ *Id.*; see also *State v. Ramsey*, 215 Or App 434, 448 (2007) (ORCP 58 B(6) . . . indicates that the plaintiff shall both 'commence' and 'conclude' the arguments to the jury. . . . That rule applies regardless of which party (if any) bears the burden of proof or persuasion").

⁸ *State v. McNeely*, 330 Or 457, 467-68 (2000); *State v. Ramsey*, 215 Or App 434, 448 (2007).

⁹ *E.g.*, *State v. McNeely*, 330 Or 457, 467-68 (2000) (upholding a sentence of death over defendant's claims that its due process rights were violated by plaintiff's rebuttal legal argument).

all issues; it is unclear which ones. St. Louis Solar cannot agree at this time to simultaneous cross-motions, particularly when it continues to be unclear which issues PGE thinks may or may not be ripe for summary judgment.

Further, St. Louis Solar requires limited discovery for some of its claims, making the filing of dispositive motions on all issues impossible. In short, the parties cannot agree to simultaneous cross-motions, and they disagree whether the filing of dispositive motions is appropriate at this stage. St. Louis Solar requests that a procedural schedule be set based on the available information and *not* on speculative filings that could end up being stricken or dismissed.

In addition, PGE's footnote on dispositive motions is more misleading than it is helpful. If PGE files a dispositive motion that is not dismissed, that could require modifications to the procedural schedule. However, there are numerous things that could require modifications to the procedural schedule. It is not a useful practice to list *all* possible causes of schedule modifications, and it is potentially misleading to list *some* but not other possible causes.

The parties might be able to agree that the procedural schedule adopted, whatever it may be, could potentially need modifications. In St. Louis Solar's opinion, this agreement is better left unsaid. St. Louis Solar requests that PGE's footnote on dispositive motions therefore be omitted from the procedural schedule.

IV. CONCLUSION

St. Louis Solar submits this filing in advance of the prehearing conference scheduled for July 15, 2020. St. Louis Solar hopes that the proposed procedural schedule and explanation of St. Louis Solar's positions will help inform the discussion and lead to a productive result.

Dated this 14th of July 2020.

Respectfully submitted,



Irion A. Sanger
Joni Sliger
Sanger Law, PC
1041 SE 58th Place
Portland, OR 97215
Telephone: 503-756-7533
Fax: 503-334-2235
irion@sanger-law.com

Of Attorneys for St. Louis Solar