

July 14, 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 Motion to Strike or, in the Alternative, For Leave to File Sur-Reply to St. Louis Solar's Motion to Dismiss or, in the Alternative, to Strike PGE's Counterclaims.

Thank you for your assistance.

Very truly yours,


Jeffrey S. Lovinger

Attachment
1018600

**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 MOTION TO STRIKE
OR, IN THE ALTERNATIVE, FOR
LEAVE TO FILE SUR-REPLY TO
ST. LOUIS SOLAR’S MOTION TO
DISMISS OR, IN THE ALTERNATIVE,
TO STRIKE PGE’S
COUNTERCLAIMS**

I. INTRODUCTION

In its original motion to dismiss or strike, St. Louis Solar LLC (“St. Louis Solar”) argued that Portland General Electric Company (“PGE”) improperly pleaded affirmative defenses as counterclaims and that PGE asked the Public Utility Commission of Oregon (“Commission”) to exceed its jurisdiction and award damages. In its reply brief, St. Louis Solar largely abandons these arguments and asserts a series of new arguments attacking the legal sufficiency of PGE’s factual allegations, advancing policy arguments in favor of dismissal, and arguing that the Commission lacks jurisdiction to declare whether damages were properly collected even if the Commission does not itself award the damages.

Under established case law, St. Louis Solar may not make these new arguments in its reply brief. The Commission should strike the new arguments. Alternatively, the Commission should grant PGE leave to file a sur-reply. PGE has filed its sur-reply concurrently with this motion for leave. PGE provided St. Louis Solar with notice of its intent to file this motion and attempted to determine whether St. Louis Solar opposes the motion. PGE does not know whether St. Louis Solar opposes the motion.

II. LEGAL STANDARD

The Commission should not address new arguments which appear for the first time in a reply brief.¹ When presented with new arguments in a reply brief, the Commission should strike the portions of the brief making the new arguments. If the Commission chooses to address new arguments raised in a reply brief, it should grant the opposing party leave to file a sur-reply.²

III. ARGUMENT

In its reply, St. Louis Solar advances three new arguments attacking the legal sufficiency of PGE's counterclaims, two new policy arguments in favor of dismissal, and a new jurisdictional argument. The Commission should ignore the new arguments or grant PGE leave to respond to them.

On the legal sufficiency of the counterclaims, St. Louis Solar argues that: (1) performance under the PPA "was impossible;"³ (2) the duty of good faith and fair dealing required PGE to amend the PPA;⁴ and (3) PGE breached the interconnection agreement ("IA").⁵

St. Louis Solar cites two pages of its original motion for these arguments.⁶ But neither page contains those arguments. The first page quotes ORCP 21 E.⁷ The second page contains a single, conclusory sentence regarding sham and frivolous pleadings: "If PGE's allegations are

¹ *Johnson v. Best Overhead Door, LLC*, 238 Or App 559, 563 (2010).

² See, e.g., *Oregon Nat. Desert Ass'n v. Cain*, 17 F Supp 3d 1037, 1048 (D Or 2014) ("When a party has raised new arguments or presented new evidence in a reply to an opposition, the court may permit the other party to counter the new arguments or evidence.") (citing *Jordan v. Terhune*, No. CIV S-03-1820 LKK KJM P, 2009 WL 276764, at *3 (ED Cal Feb. 5, 2009)); see also *Sandy River, LLC v. PGE*, Docket No. UM 1967, ALJ Ruling at 2 (Apr. 26, 2019) (permitting sur-response where it would "aid the understanding of the issues in this docket") (available at <https://edocs.puc.state.or.us/efddocs/HDA/um1967hda142343.pdf>).

³ St. Louis Solar's Reply in Support of its Motion to Dismiss, or in the Alternative, to Strike PGE's Counterclaims ("Reply") at 8 (Jun. 29, 2020).

⁴ *Id.*

⁵ *Id.* at 12-13.

⁶ Reply at 10, n.27, citing St. Louis Solar's Motion to Dismiss, or in the Alternative, to Strike PGE's Counterclaims ("Mot.") at 5, 10 (Jun. 5, 2020).

⁷ Reply at 5, n.16.

neither counterclaims nor defenses, then they must be sham or frivolous pleadings.”⁸ Neither page mentions St. Louis Solar’s new arguments.

St. Louis Solar also advances two new policy reasons against PGE’s counterclaims: (1) even if properly pleaded, dismissing the counterclaims would be an “efficient” use of Commission resources;⁹ and (2) the counterclaims may deprive St. Louis Solar of the opportunity to have “the last word” in any hearing.¹⁰ These arguments attacking the counterclaims also did not appear in St. Louis Solar’s motion.

Finally, St. Louis Solar changes its jurisdictional argument for dismissal of PGE’s first counterclaim. In its motion, St. Louis Solar contended that PGE’s first counterclaim asked the Commission to “award” damages, which is beyond the Commission’s jurisdiction.¹¹ In the reply, St. Louis Solar abandons this argument. St. Louis Solar now argues that when issuing an order interpreting a PPA, the Commission must refrain from addressing “whether and how much damages were owed.”¹² This argument also did not appear in St. Louis Solar’s motion.

Because St. Louis Solar advances new arguments in its reply brief, the Commission should strike the following portions of the reply brief:

- Pages 4 to 6 (§ III.D);
- The only full paragraph on page 8 and the first sentence of the next paragraph;
- The paragraph that begins on page 9 and concludes on page 10;
- Pages 10 to 12 (§§ IV.1 and IV.2); and
- The paragraph that begins on page 12 and concludes on page 13.

⁸ Reply at 10, citing ORCP 21 E.

⁹ Reply at 8.

¹⁰ *Id.* at 9-10.

¹¹ Mot. at 11.

¹² Reply at 5.

Alternatively, the Commission should grant PGE leave to file the attached sur-reply, which responds to these new arguments.

IV. CONCLUSION

The Commission should strike the portions of St. Louis Solar's reply brief identified above. Alternatively, the Commission should grant PGE leave to file the attached sur-reply.

Dated: July 14, 2020.

Respectfully submitted,

MARKOWITZ HERBOLD PC

s/Jeffrey S. Lovinger

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