ORDER NO. 24-208

ENTERED Jul 8, 2024

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2322

In the Matter of PILOT ROCK SOLAR 1, LLC, an Oregon limited liability company; PILOT ROCK SOLAR 2, LLC, an Oregon limited liability company; TUTUILLA SOLAR, LLC, an Oregon limited liability company; BUCKAROO SOLAR 1, LLC, an Oregon limited liability company; and BUCKAROO SOLAR 2, LLC; an Oregon limited liability company; Complainants, vs. PACIFICORP, dba PACIFIC POWER, an Oregon corporation, Defendant, Pursuant to ORS 756.500.	ORDER

DISPOSITION: MOTION TO DISMISS DENIED

On May 17, 2024, the defendant, PacifiCorp, dba Pacific Power, filed a motion to dismiss certain claims in this proceeding. Because we conclude that those claims are justiciable, are not barred by claim preclusion, and involve factual issues better suited for resolution on the merits, we deny defendant's motion to dismiss.

I. BACKGROUND

On April 4, 2024, the complainants, Pilot Rock Solar 1, LLC (PRS1), Pilot Rock Solar 2, LLC (PRS2), Tutuilla Solar, LLC, Buckaroo Solar 1, LLC, and Buckaroo Solar 2, LLC, filed a complaint against defendant. Complainants seek modification of their interconnection agreements with defendant in several respects:

- **Direct Transfer Trip (DTT) –** Complainants argue that DTT is not necessary in complainants' interconnections or, at minimum, should be installed on the low side of the transformer rather than the high side.

- **Planned Duration of Construction –** Complainants argue that PacifiCorp's construction durations increased 400 percent from 2022 to 2023 and falls short of minimum acceptable standards of service.

- **Advance Payment Requirements –** Complainants argue that PacifiCorp's requirement of full prepayment six months before its scheduled start date amounts to an unreasonable, unauthorized charge.

- **Termination for Non-Payment –** Complainants argue that PacifiCorp's declarations of default for non-payment threatens to unreasonably deprive complainants of their rights under their interconnection agreements.

- **Change Line Extension –** Complainants seek to amend the point of interconnection and line extension requirements for PRS1 and PRS2 so that it is congruent with the line going to City of Pilot Rock industrial park.

- **Buckaroo 1 Battery Storage –** Complainants seek to amend the Buckaroo 1 interconnection agreement to include battery storage.

Defendant filed its answer, affirmative defenses, and counterclaims on May 17, 2024. On the same day, defendant filed a partial motion to dismiss, seeking to dismiss a number of claims in the complaint. This order concerns that motion.

Defendant seeks to dismiss four sets of claims:

1. First Claim for Relief, Count 1, and Second Claim for Relief, concerning DTT.

2. Third Claim for Relief, concerning cost allocation for a line extension to two of the complainants' projects.

3. First Claim for Relief, Count 3, concerning complainants' disputes over advance payment requirements.

4. Third Claim for Relief, concerning complainants' request to install a Battery Energy Storage System (BESS) at Buckaroo 1.

On June 3, 2024, complainants filed a response to defendant's motion to dismiss.

II. DISCUSSION

A. Direct Transfer Trip (First Claim for Relief, Count 1; Second Claim for Relief).

1. Positions of the Parties

The complaint seeks an order that DTT is unreasonable for all five of complainants' projects, including PRS1 and PRS2. Defendant argues that complainants already litigated the interconnection requirements for PRS1 and PRS2 in docket UM 2118 and therefore that principles of *res judicata* bar complainants from litigating over DTT in this proceeding. More specifically, defendant argues that complainants specifically challenged the DTT requirement in the prior case and then ultimately conceded it was reasonable. Complainants' reply brief in that case stated that it "dropped its objections to costly Direct Transfer Trip relay protection after PacifiCorp provided a reasoned justification."[1]

Defendant notes that the Commission did not address the issue of DTT in docket UM 2118, but states that claim preclusion does not "require the determination of the issue be essential to the final or end result reached in the action, claim or proceeding."[2] Instead, it requires only the "opportunity to litigate * * * whether or not it is used" and finality.[3] Because, defendant argues, complainants had the ability to litigate DTT in docket UM 2118, claim preclusion applies regardless of whether they availed themselves of that opportunity.

Complainants respond that three exceptions to claim preclusion apply. First, the legislature has the authority to create statutory exceptions to claim preclusion;[4] complainants argue that this exception should apply to tariffs approved by the Commission as well, including to interconnection agreements adopted by the Commission after a formal rulemaking. Section 8.10 of the PRS1 and PRS2 interconnection agreements provides:

> Either Party will have the right to make a unilateral filing with the Commission to modify this Agreement. This reservation of rights

[1] *In the Matter of the Complaint of Sunthurst Energy, LLC against PacifiCorp dba Pacific Power, Pursuant to ORS 756.500*, Docket No. UM 2118, Sunthurst Energy Reply Brief at 3 (Apr. 13, 2021).
[2] *Drews v. EBI Cos.,* 310 Or 134, 140, 795 P2d 531, 536 (1990),
[3] *Id.*
[4] *Evangelical Lutheran Soc. v. Bonham*, 176 Or App. 490 (2001), 32 P3d 899.

> provision will include[] but is not limited to modifications with respect to any rates terms and conditions, charges, classification of service, rule or regulation under tariff rates or any applicable State or Federal law or regulation. Each Party shall have the right to protest any such filing and to participate fully in any proceeding before the Commission in which such modifications may be considered.

Complainants argue that Section 8.10 demonstrates that the "Commission plainly intended for either Party to the interconnection agreement to have the unilateral right to seek modification *at any time*."[5]

Next, claim preclusion does not apply where the party asserting the second claim lacked actual or constructive knowledge of its availability when the party asserted the first claim.[6] Complainants assert that the world has changed in three material respects since they brought their original claim and thus that they lacked actual knowledge that the claim was a viable one at the time they brought UM 2118. The first way, they state, is that the Commission recently changed its rules to require defendant to use input data that accurately reflects export capability instead of its historic practice of using DC nameplate capacity;[7] the implication, complainants say, is that past studies using nameplate capacity cannot be relied on. Defendant, for its part, argues that this is a mischaracterization of docket AR 659.[8]

The second thing complainants point to is a "growing industry recognition that inverter-based generation does not cause harmful effects on feeders where there are no rotating generators on the same feeder," citing specifically to a California Public Utility Commission (CPUC) working group report on unintentional islanding.[9]

Third, complainants point to Oregon's recent adoption of IEEE 1547-2018 standards for interconnection which allow DTT to be installed on the low-side of the transformer in some cases instead of the high side, a less expensive form of protection.[10] Defendant

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[5] Complainants Response to Defendant's Motion to Dismiss at 8 (emphasis in original).
[6] *Soren-Hodges v. Blazer Homes, Inc*., 204 Or App 86 (2006), 129 P3d 196 ("we hold that claim preclusion cannot apply if the party asserting a second claim lacked actual or constructive knowledge of its availability when the party asserted the first claim. In that situation, the party cannot be said to have had the 'opportunity to litigate' the first claim. * * * Put another way, the second claim could not have been brought with the first claim if the plaintiff did not have actual or constructive knowledge, when the first claim was tried, that the second claim existed and could be joined.").
[7] *See In the Matter of Rulemaking to Update Division 82 Small Generator Interconnection Rules, and Division 39 Net Metering Rules*, Docket No. AR 659, Order No. 24-068, Appendix A at 14-15 (Mar. 8, 2024).
[8] Motion to Dismiss at 15, n 67.
[9] Complaint at Claim 1, Count 1.
[10] *Id.*

argues that IEEE 1547-2018 was actually adopted in 2018, and therefore predates the original complaint in docket UM 2118; complainants respond that the Commission still required compliance with the prior standard at that time, IEEE 1547--2003.[11]

For their third exception to claim preclusion, complainants state that IEEE 1547-2018 is an intervening change in law. The Commission entered Order No. 24-068 on March 8, 2024, which requires compliance with IEEE 1547-2018 effective June 1, 2024.

Complainants also argue that dismissing the DTT claims as to PRS1 and PRS2 would not serve the usual purpose of claim preclusion, judicial efficiency, because the issue would still be litigated as to complainants' other three projects, which involve similar issues and factual predicates.

Defendant replies, among other arguments, that the changed circumstances cited by complainants do not meet the standard for an exception to claim preclusion. Namely, it states that it has always used a small generator's AC output when studying the generator's interconnection; that a CPUC study does not demonstrate a changed industry consensus; and that IEEE 1547-2003 only applies to new interconnections, not existing ones.

2. Resolution

We find that claim preclusion does not bar complainants from contesting DTT requirements at PRS1 and PRS2. We view there to have been real potential for confusion in how PacifiCorp studied a small generator's interconnection, which might have legitimately influenced complainants' decision not to bring this claim in docket UM 2118. We also agree with complainants that there is limited opportunity for judicial efficiency here, where DTT will be litigated as to three other projects regardless. While we understand that each interconnection must be studied individually, we view it as likely that there are common issues of law and fact regarding DTT at each of the five project sites. Therefore, we deny defendant's motion to dismiss on this point.

B. Line Extension (Third Claim for Relief, Count 1)

1. Positions of the Parties

The interconnection agreements for complainants' projects require complainants to construct and pay for a line extension so that its projects can reach defendant's system.

[11] Complainants Response to Motion to Dismiss at 12.

Complainants seek to reconfigure the line for PRS1 and PRS2 so that it is shared with defendant's interconnection with a City of Pilot Rock industrial park and seek to apportion the costs among current and future anticipated users. Defendant argues that complainants raised this same argument in docket UM 2118, stating that the line extension would allow defendant to "serve new loads where it previously did not;"[12] ultimately, complainants dropped that argument, and the Commission did not issue a decision on it.

Complainants respond that they did not litigate that position in docket UM 2118, instead offering the testimony in question as an example of an uncompensated benefit to defendant's system. They also state that circumstances have changed since the time of docket UM 2118, because the City of Pilot Rock has since requested that PRS1 and PRS2 share a line extension with the industrial park to eliminate unsightly duplication of facilities.

Defendant also argues that complainants' claim regarding the line extension is based on a hypothetical and therefore not justiciable. Defendant argues that it is has no way of knowing whether customers will ultimately connect at the industrial park and therefore complainants' claim "depend[s] on the occurrence of future events that may or may not happen."[13]

Complainants respond that "[t]he Commission need not speculate when and how many users will share the line to order PacifiCorp to devise a method that allocates those line costs equitably."[14]

2. Resolution

We find that this claim is not barred by claim preclusion. We also find it to be justiciable. As to the first, complainants assert that the City of Pilot Rock requested that the line be reconfigured so that it is shared with a line connecting an industrial park. That constitutes a material change of circumstance that was not contemplated in our initial proceeding and may change the question of how the costs of the line are apportioned. As to the second, we find that the existence or lack of retail customers to share the costs is a factual matter that bears on the ultimate question of how costs are apportioned. Therefore, it is appropriate for our determination on the merits rather than a matter of justiciability.

[12] Docket No. UM 2118, Sunthurst/200, Beanland/30.
[13] Berg v. Hirschy, 206 Or App 472, 475, 136 P3d 1182, 1184 (2006) (citing *Hale v. Fireman's Fund Ins. Co. et al*, 209 Or 99, 103–04, 302 P2d 1010, 1012 (1956)).
[14] Complainants Response to Motion to Dismiss at 25.

C. Progress Payments (First Claim for Relief, Count 3).

1. Positions of the Parties

Complainants seek to make the final payments for several of their projects—Buckaroo 1, Tutuilla, and PRS2—after the projects have reached commercial operation. Complainants intend to make those payments from state-funded Community Renewable Energy Program grant awards which, by the terms of the program, can only be disbursed after a grantee achieves commercial operation. Defendant argues that this is contrary to the plain language of the Commission's rules and therefore that this claim should be dismissed.

There are two rules at issue. The first, OAR 860-082-0035(5)(a), provides for progress payments on a mutually agreeable schedule and states:

> If an applicant agrees to make progress payments on a schedule established by the applicant and the interconnecting public utility, then the public utility may require the applicant to pay a deposit of up to 25 percent of the estimated costs or $10,000, whichever is less. The public utility and the applicant must agree on progress billing, final billing, and payment schedules before the public utility begins work.

The second, OAR 860-082-0035(5)(b), states what happens if the applicant does not agree to make progress payments:

> If an applicant does not agree to make progress payments, then the public utility may require the applicant to pay a deposit of up to 100 percent of the estimated costs. If the actual costs are lower than the estimated costs, then the public utility must refund the unused portion of the deposit to the applicant within 20 business days after the actual costs are determined.

Defendant argues that neither of those rules provide for any funds to be paid after commercial operation date and therefore that the claim should be dismissed.

Complainants respond that this is a factual issue not suited for a motion to dismiss—namely, the Commission could choose to waive its rules if it decides the payment schedules within are unjust and unreasonable in this instance.

2. Resolution

We agree with complainants that the question of whether we should waive our rules is a factual issue suited for resolution on the merits. We require that the complaint plead issues with sufficient specificity to give defendant and the Commission notice of complainants' legal arguments and the factual predicate for those arguments. We do not require that every legal theory be spelled out in detail, and, in this case, we will not dismiss this claim due to failure to mention a waiver request in the complaint.

D. Battery Energy Storage System (Third Claim for Relief, Count 2)

1. Positions of the Parties

Complainants seek to amend the Buckaroo 1 interconnection agreement and power purchase agreement to allow Buckaroo 1 to incorporate a BESS and to receive additional compensation for its added value. Defendant states that it has instructed complainants that defendant must first undertake an assessment to determine if the addition of a BESS constitutes a material modification and that complainants have failed to provide the information necessary for defendant to perform this assessment. It continues:[15]

> However, the Commission's approved [community solar program power purchase agreement] and [community solar program] avoided cost prices do not contemplate the installation of BESS. Therefore, if Sunthurst wants to install BESS at Buckaroo 1, it will be required to terminate its existing PPA and either execute a standard QF PPA utilizing the recently approved solar-plus-storage avoided cost prices or negotiate a non-standard PPA and non-standard pricing that includes the BESS.

In their response, complainants point to this paragraph as evidence of a ripe factual dispute—they state that "PacifiCorp's conditions essentially reject solar plus storage for Community Solar."[16]

2. Resolution

While defendant states that it needs to study whether BESS constitutes a material modification, it also states that complainants will need to terminate its existing PPA if they want to install BESS at Buckaroo I. Thus, it appears that complainants and defendant have a live dispute over whether BESS is appropriate under a community solar

[15] Motion to Dismiss at 21.
[16] Complainants Response to Motion to Dismiss at 27.

program PPA or, conversely, whether termination and a new agreement is required under those circumstances. Therefore, this claim will not be dismissed.

III. ORDER

IT IS ORDERED that defendant's motion to dismiss is denied.

Made, entered, and effective Jul 8, 2024.

Megan W. Decker
Chair

Letha Tawney
Commissioner

Les Perkins
Commissioner