BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	)	**DEFENDANTS' MOTION TO STRIKE TESTIMONY AND EXHIBITS** **EXPEDITED PROCESSING REQUESTED**

INTRODUCTION AND SUMMARY OF MOTION

Pursuant to OAR 860-001-0420, defendants Alfalfa Solar I LLC, Dayton Solar I LLC, Fort Rock Solar I LLC, Fort Rock Solar II LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, Riley Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, and Wasco Solar I LLC (collectively, the "Defendants" or the "NewSun Parties"), hereby move the Public Utility Commission of Oregon ("Commission" or "OPUC") to strike certain portions of the opening testimony and exhibits filed by Portland General Electric Company ("PGE") on December 7, 2018. Specifically, the NewSun Parties move to strike the following testimony and exhibits:

- The testimony and exhibit of Ryin Khandoker (PGE/300-PGE/301), which consists entirely of irrelevant allegations regarding the financial impact to PGE if the NewSun Parties' interpretation of the parties' power purchase agreements ("PPA") were to prevail. This type of argument and testimony is irrelevant to the meaning of the PPAs, and the Commission is affirmatively preempted by the

Public Utility Regulatory Policies Act of 1978 ("PURPA") and related state law from considering such evidence. It should therefore be stricken from the record.

- The portions of the testimony of Robert Macfarlane (PGE/100) that provide legal conclusions, including interpretations of executed PPAs, PGE's standard contract forms and rate schedules, as well as numerous Commission orders. As explained below, Mr. Macfarlane is not qualified to provide such legal testimony, and PGE will have adequate opportunity to make such arguments through legal briefing.
- The portions of the testimony of Bruce True (PGE/200) that repeat the legal conclusions and interpretations of Mr. Macfarlane.

Exhibit A to this motion identifies the specific portions of testimony and exhibits that should be stricken.

REQUEST FOR EXPEDITED PROCESSING

The NewSun Parties request expedited processing of this motion with PGE's response due within seven days and a reply due within five days of the response. Counsel for NewSun Parties conferred with counsel for other parties regarding expedited processing and made a good faith effort to reach agreement with other parties. Complainant PGE states that it opposes expedited processing. Intervenors Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, and Renewable Energy Coalition do not oppose expedited processing.

The NewSun Parties intend to file their responsive testimony by the deadline set for their testimony on December 28, 2018, regardless of whether this motion is resolved by that time. However, the NewSun Parties request expedited processing and resolution of this motion to ensure that the resolution of this dispute is not further protracted and delayed.

The need for prompt resolution of this dispute is becoming increasingly critical. Further delays in this proceeding could quite literally result in PGE "running out the clock" on the NewSun Parties by maintaining a constant cloud of litigation and unresolved contractual meaning during the critical period where financing and construction would ordinarily be occurring. As PGE itself appears to acknowledge in its testimony, it is already nearly impossible for the NewSun Parties to meet the contractual obligations to complete development and bring solar facilities into operation by the scheduled commercial operation dates in the PPAs during the first half of next year.

Therefore, while the NewSun Parties request expedited processing, there should be no changes to the procedural schedule for testimony and merits briefing regardless of when the issues raised in this motion are resolved.

ARGUMENT

This dispute is a declaratory judgment action regarding the meaning of disputed terms of fully executed contracts. The purpose of testimony is to provide *relevant evidence*, which is defined as "evidence tending to make the existence of any *fact* at issue in the proceedings more or less probable than it would be without the evidence." OAR 860-004-0450(1)(a); *see also* OAR 860-001-0480(10) ("written testimony is subject to rules of admissibility"); *Am. Can Co. v. Lobdell*, 55 Or App 451, 466, 638 P 2d 1152 (1982) (upholding Commission's exclusion of irrelevant evidence). Where this proceeding is set to be resolved on summary judgment, portions of inadmissible evidentiary submissions should be stricken from the summary judgment record. *See East County Recycling, Inc. v. Pneumatic Const., Inc.*, 214 Or App 573, 580-84, 167 P 3d 464 (2007).

As explained below, the entirety of Ryin Khandoker's testimony and exhibit is an irrelevant appeal to the financial harm that will fall on PGE if the NewSun Parties prevail, and substantial portions of Robert Macfarlane's testimony consist of inadmissible legal conclusions and interpretations of law. Neither of these categories of testimony and exhibits speaks to any potentially relevant facts at issue in this case. These inadmissible portions of PGE's opening testimony and exhibits should be stricken from the record to reduce the burden on the Commissioners and the parties.

1. Ryin Khandoker's Testimony and Exhibit Introduces Irrelevant Issues that Are Barred from Consideration By Law

This dispute must be resolved under the rules of contract interpretation, and ratemaking considerations and the financial impact on PGE may not serve as the underlying motivation for the Commission's decision. Yet the thrust of Mr. Khandoker's testimony is that the Commission should adopt PGE's interpretation of the PPAs to protect PGE and its ratepayers from excessive power supply costs. *See, e.g.*, PGE/300, Khandoker/1 (stating, "The purpose of my testimony is to provide the Commission with an estimate of the difference in economic impact on PGE's customers of these competing interpretations of the NewSun PPAs."). This testimony is an irrelevant and impermissible appeal to ratemaking considerations, and Mr. Khandoker's testimony and exhibit must therefore be stricken from the record.

This Commission itself recently resolved a PURPA contract dispute by examining the "language of a provision of a contract . . . in accordance with the standards for analysis prescribed under Oregon law." *Portland General Elec. Co. v. Pacific Northwest Solar, LLC*, Docket No. UM 1894, Order No. 18-284, at 5 (Aug. 2, 2018). Moreover, the PPAs at issue expressly provide: "This Agreement shall be interpreted and enforced in accordance with the laws of the state of Oregon . . . ." *See* PGE/101, Macfarlane/16. The standards for contract

interpretation under Oregon law look to: (i) the text and context of the disputed terms of the contract, (ii) extrinsic evidence, and (iii) maxims of contract interpretation. *Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997). The fact that the outcome will financially benefit one party or the other, and the magnitude of such impact, is not relevant to the interpretation of the contract under any of Oregon's three steps of contract interpretation.[1]

Moreover, such evidence of financial impact is highly inappropriate in the case of a dispute over a PURPA contract before a state regulatory body. Federal and state law bar the Commission from considering the impact on PGE's rates in reaching its decision in this case. This is necessary to protect qualifying facilities ("QF") from the re-opening of the contract rates and to avoid subjecting QFs or their PPAs to ongoing ratemaking considerations, which would undermine the financial viability of qualifying facilities. *See, e.g.*, 16 USC § 824a-3(e)(1);18 CFR § 292.602(c)(1); *Independent Energy Producers Assoc., Inc. v. California Public Utilities Commission*, 36 F3d 848, 857-58 (9th Cir. 1994). Under PURPA, once the rates are set in an executed contract, the contract's interpretation is governed by contract law, not financial impact to the purchasing utility. *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F3d 129, 139 (3d Cir 1998).

The Commission's decision may not be motivated by PGE's allegations of financial impact. In *Independent Energy Producers Assoc.*, the Ninth Circuit overturned a California Public Utilities Commission ("CPUC") decision where the "underlying motivation behind the CPUC program is to lower the rates set in appellees' standard offer contracts because they are

[1] PGE contends that an examination of the regulatory history or regulatory context may be necessary to interpret the contracts at issue and that standards of statutory analysis, in particular with regard to consideration of legislative history, should guide this examination. Even if PGE is correct, the testimony offered by Mr. Khandoker is irrelevant as it is in no way probative of the Commission's intent in issuing any order or approving any contract form.

higher than the Utilities' current avoided costs." *Id.* at 858. Federal courts have even enjoined ongoing state commission proceedings that entertain such attempts to re-evaluate the contractual rates due to changed circumstances after execution. *See Freehold Cogeneration Assoc., L.P v. Bd. of Reg. Com'rs of State of N.J.*, 44 F3d 1178, 1189 & 1193-94 (3rd Cir 1995) (explaining, "we cannot disregard the impact on cogeneration financing if a purchase power agreement is at any time in the future subject to the arbitrary reconsideration by a state utility regulatory body").

The Oregon Court of Appeals has also recognized this limitation on this very Commission's regulatory authority, holding "[c]ourts uniformly have held that state regulators cannot intervene in the public interest and modify the prices fixed by a cogeneration contract because PURPA does not provide for such authority . . . , and to imply that authority would undermine the long-term cogeneration contracts that Congress sought to encourage." *Oregon Trail Electric Consumers Cooperative, Inc. v. Co-Gen Company*, 168 Or App 466, 482, 7 P3d 594 (2000). In resolving the dispute over the meaning of a PURPA PPA, the court applied normal rules of common law contract construction and explained, "the action requires a declaration of the parties' rights under the contract . . . ." 168 Or App at 473.

In deferring to this Commission, the United States District Court understood the Commission would be applying common law contract interpretation principles – *not* ratemaking considerations such as the forecasted financial impacts of the parties' competing interpretations of the PPAs. Judge Michael Simon explained: "PURPA's ban on executed PPA modification by state agencies does not necessarily deprive those agencies of authority to interpret terms in executed PPAs using traditional common law interpretive methods." *Alfalfa Solar I LLC v. Portland Gen. Elec. Co.*, No 3:18-CV-40-SI, slip op. at 13, 2018 WL 2452947 (D Or May 31, 2018). The impact on the purchasing utility's customers is simply irrelevant under rules of

contract interpretation.

Accordingly, the Commission should strike the entirety of Mr. Khandoker's testimony and his exhibit. The sole purpose of the testimony is "to provide the Commission with an estimate of the difference in economic impact on PGE's customers of these competing interpretations of the NewSun PPAs." PGE/300, Khandoker/1. No part of the testimony informs any of the three steps of contract interpretation under Oregon law. Instead, Mr. Khandoker invites the Commission to illegally act out of motivation to protect PGE's ratepayers. The testimony is inappropriate and inadmissible.

2. Robert Macfarlane's Testimony Includes Numerous Inadmissible Legal Interpretations

It is well-settled that testimony regarding legal conclusions or interpretations of law is inadmissible, especially when the witness is not an attorney. Mr. Macfarlane is not an attorney and his testimony includes numerous inadmissible legal conclusions and interpretations of law. *See, e.g.*, PGE/100, Macfarlane/3:16-18 (stating, "I discuss the language of the NewSun PPA and how that language limits the availability of fixed prices to the first 15 years after the execution of the contract."). This testimony should be stricken from the record.

Legal conclusions of a witness or affiant are generally inadmissible. *See Spectra Novae, Ltd. v. Waker Associates, Inc.*, 140 Or App 54, 58-59, 914 P2d 693 (1996). A witness's testimony is inadmissible if it has "to draw a mixed legal and factual conclusion." *Olson v. Coats*, 78 Or App 368, 370, 717 P2d 176 (1986). An affidavit is inadequate if it consists "of numbered paragraphs containing statements that frequently blend factual allegations with legal conclusions." *Jeffries v. Mills*, 165 Or App 103, 106-07, 995 P2d 1180 (2000). Furthermore, "[d]etermination of the effect of the terms of an agreement . . . is generally regarded as a

question of law" and thus not a proper subject of testimony by a fact witness. *Spectra Novae*, 140 Or App at 59.

Indeed, PGE itself recently persuaded Administrative Law Judge ("ALJ") Allan Arlow to strike legal conclusions from testimony proffered by PGE's opponent in another ongoing PURPA dispute. *See Blue Marmot V LLC et al. v. Portland Gen. Elec. Co.*, OPUC Docket No. UM 1829 et al., ALJ Ruling (Dec. 13, 2017). PGE argued that "legal arguments and conclusions should not be presented via witness testimony, especially of non-attorneys. . . ." *Id.* at 2. PGE pointed to, among other things, OAR 860-001-0450(l)(a), "stating that the purpose of testimony is to provide 'relevant evidence' which means that it tends to make the existence of any fact at issue more or less probable than without the evidence." *Id.*

In *Blue Marmot*, ALJ Arlow explained:

> [I]it is important to distinguish between the witness' understanding of the law and the witness' interpretation and application of the law to the facts purported to being offered in testimony. The former relates to the witness' state of mind in developing testimony (which may have some limited evidentiary value and be admissible in an administrative proceeding), while the latter would constitute legal analysis or argument and be inadmissible.

Id. (citing Fed R Evid 702; Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U Kan L Rev 325 (1992)). Accordingly, the testimony providing a "legal conclusion" or an "interpretation of law" was stricken. *Id.* at 4-5.

In this case, Mr. Macfarlane has offered extensive testimony that provides his legal conclusions and interpretations of the executed PPAs, PGE's contract form and schedules, and numerous Commission orders. For example, Mr. Macfarlane summarizes the second section of his testimony as discussing "the language of the NewSun PPA and how that language limits the availability of fixed prices to the first 15 years after the execution of the contract." PGE/100, Macfarlane/3:16-18. That section of testimony offers numerous such legal interpretations of

different passages of the contracts at issue to reach Mr. Macfarlane's legal conclusion that "[t]he NewSun PPAs require PGE to pay fixed prices for any net output delivered to PGE during the first 15 years of the contract term (which begins at contract execution)." PGE/100, Macfarlane/4-8. Likewise, the third section of Mr. Macfarlane's testimony offers further legal interpretations of the underlying orders by the Commission and the versions of PGE's standard contract form in effect since 2005. *See* PGE/100, Macfarlane/8-27. Exhibit A to this motion lists all passages where Mr. Macfarlane offers his interpretation of a contract, Commission order, or other legal document.[2]

The inadmissibility of Mr. Macfarlane's legal conclusions is indisputable. Mr. Macfarlane is not an attorney. He is a rate analyst with an undergraduate degree with a "focus in Finance." PGE/100, Macfarlane/32. Therefore, he lacks the qualifications to the provide such legal conclusions and contractual interpretations, even if such legal argument could be permissibly provided through written testimony when the schedule calls for three rounds of legal briefing. As PGE argued in the *Blue Marmot* proceeding, "These legal issues can and should be addressed in depth in the parties' . . . briefing, and at oral argument if scheduled by the Commission. It is not appropriate, however, for the parties to present their legal arguments and conclusions through witness testimony." *PGE's Motion to Strike*, Docket No. UM 1829 et al., at 3 (Oct. 25, 2017).

In sum, the Commission should strike the portions of the Mr. Macfarlane's testimony listed in Exhibit A as impermissible legal conclusions and interpretations.

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[2] The NewSun Parties have not sought to strike passages where Mr. Macfarlane merely lays a foundation for admission of documents as exhibits or that states matters within Mr. Macfarlane's personal knowledge, such as his purported intent when he allegedly wrote Schedule 201. ALJ Arlow previously ruled in *Blue Marmot* that a lay witness's understanding could have some limited evidentiary value in an administrative proceeding, and therefore the NewSun Parties do not move to strike these limited portions of Mr. Macfarlane's testimony.

3. Bruce True's Testimony Repeats the Inadmissible Legal Conclusions of Mr. Macfarlane and Should be Stricken

PGE's third witness, Bruce True, repeats the inadmissible legal conclusions of Mr. Macfarlane. Like Mr. Macfarlane, Mr. True is not an attorney and is therefore not qualified to speak to such legal matters. Therefore, the portions of Mr. True's testimony (PGE/200) listed in Exhibit A should be stricken.

CONCLUSION

For the reasons explained herein, the Commission should strike the testimony and exhibits listed in Exhibit A.

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EXHIBIT A

PGE/100 – Opening Testimony of Robert Macfarlane

PGE/100, Macfarlane/2 – strike line 2 through the word “operation” on line 4

PGE/100, Macfarlane/2 – strike line 4 beginning with the word “which” through line 7 ending with the word “term”

PGE/100, Macfarlane/2 – strike line 10 through line 19

PGE/100, Macfarlane/3 – strike line 4 through line 10 ending with the word “execution”

PGE/100, Macfarlane/3 – strike line 15 beginning with the word “and” through line 16 ending with the word “contract”

PGE/100, Macfarlane/4 – strike line 5 through line 11

PGE/100, Macfarlane/5 – strike line 4 through line 7

PGE/100, Macfarlane/6 – strike line 6 through line 24 ending with the word “operation”

PGE/100, Macfarlane/7 – strike line 1 beginning with the words “The Seller” through line 2 ending with the words “20 years.”

PGE/100, Macfarlane/7-8 – strike line 5 on page 7 through line 13 on page 8

PGE/100, Macfarlane/8-9 – strike line 21 on page 8 beginning with the words “In August” through line 2 on page 9

PGE/100, Macfarlane/9 – strike line 7 beginning with the words “These forms” through line 9

PGE/100, Macfarlane/9 – strike line 16 beginning with the words “My testimony” through line 20

PGE/100, Macfarlane/9 – strike the words “*for the first time*” on line 22

PGE/100, Macfarlane/10 – strike the words “change its approach and” on line 1

PGE/100, Macfarlane/11-12 – strike from line 1 on page 11 through line 20 on page 12

PGE/100, Macfarlane/14 – strike line 6 though line 10

PGE/100, Macfarlane/14-15 – strike from line 17 on page 14 beginning with the words "PGE's 2005" through line 10 on page 15

PGE/100, Macfarlane/15-16 – strike from line 27 on page 15 through line 10 on page 16

PGE/100, Macfarlane/16 – strike the words "and a different approach" on lines 11 through 12

PGE/100, Macfarlane/17 – strike the words "with their different approaches" on line 5

PGE/100, Macfarlane/18 – strike from line 1 beginning with the word "However" through line 4

PGE/100, Macfarlane/18 – strike from line 9 beginning with the words "The revised" through line 15

PGE/100, Macfarlane/18 – strike from line 19 beginning with words "The second" through line 22

PGE/100, Macfarlane/19 – strike line 5 through line 19

PGE/100, Macfarlane/20 – strike the heading at the top of the page

PGE/100, Macfarlane/20 – strike from line 8 beginning with the words "But none" through line 11

PGE/100, Macfarlane/22 – strike from line 3 through line 7

PGE/100, Macfarlane/23 – strike line 1 through line 10

PGE/100, Macfarlane/24 – strike from line 2 beginning with the words "both of" through line 3 ending with words "contract term."

PGE/100, Macfarlane/24-25 – strike line 10 on page 24 through line 7 on page 25

PGE/100, Macfarlane/25 – strike the word "Yes." on line 10

PGE/100, Macfarlane/25 – strike from line 14 beginning with the words "an order" through line 19 ending with the words "approved stipulation"

PGE/100, Macfarlane/26 – strike line 11 through line 15

PGE/100, Macfarlane/26 – strike the words "for the first time" on lines 18-19 and the words "rather than from contract execution" on line 20

PGE/100, Macfarlane/27 – strike from line 4 through line 12 ending with the word “Yes.”

PGE/100, Macfarlane/27 – strike from line 15 beginning with the words “The 2015 Contract” through line 19

PGE/100, Macfarlane/28-29 – strike from line 1 on page 28 through line 16 on page 29

PGE/100, Macfarlane/29-30 – strike from line 20 on page 29 beginning with the words “and which limit” through line 16 on line 30

PGE/100, Macfarlane/31 – strike from line 4 beginning with the word “Also” through line 6

PGE/100, Macfarlane/31-32 – strike from line 12 on page 31 beginning with the word “which” through line 6 on page 32

PGE/200 – Opening Testimony of Bruce True

PGE/200, True/2 – strike from line 7 beginning with the words “This position” through line 13

PGE/100, True/4 – strike line 5 with the words “As explained” through line 8

PGE/100, True/4 – strike lines 13 to 22

PGE/300-PGE/301 – Opening Testimony of Ryin Khandoker

Strike the entirety of PGE/300 and PGE/301