BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	)	**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STRIKE TESTIMONY AND EXHIBITS**

INTRODUCTION AND SUMMARY

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 file a reply in support of the motion to strike certain portions of the opening testimony and exhibits filed by Portland General Electric Company ("PGE") on December 7, 2018. PGE has not explained the relevance or need for the portions of testimony and exhibits at issue, and therefore the Public Utility Commission of Oregon ("Commission" or "OPUC") should strike the testimony and exhibits listed in Exhibit A to the NewSun Parties' motion to strike.

ARGUMENT

A. Mr. Khandoker's Testimony Is Irrelevant and Improper.

PGE seeks to submit testimony from Ryin Khandoker as to the fiscal impact of the parties' differing interpretations of the NewSun Parties' Power Provider Agreements ("PPAs"). However, the fiscal impact of the parties' interpretations of the PPAs are not material to the issue before the Commission. Moreover, PGE's unconvincing arguments as to the relevance of the testimony and exhibit offered Mr. Khandoker's leave the NewSun Parties little choice but to conclude that PGE's actual purpose is to improperly inject irrelevant considerations into this proceeding in the belief that these considerations will bias the outcome in PGE's favor.

The issue before the Commission is what the PPAs mean, not the price tag attached to the parties' competing interpretations. As PGE alleged repeatedly in its Complaint, the question presented by this case is when the fifteen-year fixed-price payment term begins under the PPAs. *See, e.g.,* Complaint at 1 ("The parties' dispute centers on whether, under the terms of the NewSun PPAs, PGE must pay fixed prices for the NewSun Solar Parties' net output for a 15-year period measured from the date of contract execution, or from the beginning of commercial operation"); *id.* at ¶ 3 ("[t]his case involves the interpretation of standard PPAs that were executed between PGE and the New Sun Solar Parties consistent with the Commission's rules and orders implementing the Public Utility Regulatory Policies Act"). The NewSun Parties agree. *See, e.g.*, Defendants' Answer and Affirmative Defenses at 1 ("the NewSun Parties and PGE disagree about the proper interpretation of ten power purchase agreements executed during the period January through June 2016").

In its response, PGE admits that it seeks to introduce Mr. Khandoker's testimony to "provide evidence of the increase in cost that would result if Defendants' interpretation of the

NewSun PPAs is correct." Response at 6. Yet, PGE asserts that such testimony is permissible because "the magnitude of harm caused by adopting the NewSun QF's interpretation is itself a 'fact at issue in the proceedings.'" *Id.* at 8. PGE's argument misses the mark. The NewSun Parties do not dispute that the Commission's interpretation of the PPAs will have a significant financial impact on the parties. However, that financial impact is not relevant or material as to what the PPAs mean. PGE points to no applicable law (and there is none) that supports the proposition that a contract's meaning hinges on which party benefits financially from a court or reviewing body's interpretation of that contract. PGE's argument is little more than "if we lose, it will cost us money." That is not contested. It also is not a proper legal basis for how an agreement should be interpreted.

PGE next argues that Mr. Khandoker's testimony is relevant because it supports PGE's legal argument that PGE would have drafted the PPAs differently had PGE intended to have the fifteen-year fixed-price period commence on the Commercial Operation Date. Response at 7. Yet, Mr. Khandoker does not so opine is his testimony. Mr. Khandoker provides no history or insights into the drafting history of the PPAs. Mr. Khandoker provides no basis to conclude he had any involvement with PGE's PURPA contracts at the time the contract forms at issue were developed in Docket No. UM 1610 or at the time that the NewSun PPAs were executed in 2016. His testimony could just as easily stand for the proposition that PGE no longer wishes to be bound by the terms of its PPAs and therefore has pursued a legal strategy that the PPAs have a different meaning than what PGE intended and understood when drafted. Mr. Khandoker's testimony is not relevant to what PGE believed the contracts meant when the parties entered into them.

Indeed, Mr. Khandoker's economic analysis on the impact to PGE is based on economic assumptions and market-price forecasts that exist at the time he filed his testimony in late 2018. *See* PGE/300, Khandoker/5 (stating Mr. Khandoker used estimates from PGE's "recently filed integrated resource plan"). Mr. Khandoker did not attempt to use economic assumptions PGE would have made at the time of contracting in early 2016, or at the time the standard contract form at issue was developed in 2014, which would have been different than PGE's current economic forecasts and assumptions. Accordingly, Mr. Khandoker's economic analysis cannot possibly have any relevance to the circumstances giving rise to the contract, even under PGE's own theory of its relevance (with which the NewSun Parties strongly disagree).

PGE's final argument is that the evidence as to the "amount of controversy" in this case is admissible to "allow[] the Commission to make informed decisions" about the effort the Commission should put into this case. Response at 9. Again, it is undisputed that the fiscal impact of the Commission's resolution of this case will be significant; the exact magnitude of that impact has no import on the contract interpretation issues before the Commission. Moreover, PGE has not offered Mr. Khandoker's testimony to encourage the Commission to hold oral argument or issue an expedited decision; rather PGE has offered Mr. Khandoker's testimony to support PGE's interpretation of the PPAs *on the merits*.

Further undermining PGE's argument is PGE's acknowledgement that Mr. Khandoker's testimony is not an *accurate* assessment of the financial impact of the parties' differing interpretations of the PPAs. *See, e.g.*, Response at 6 ("Mr. Khandoker's testimony is not presented to provide a precise forecast of the cost impact of the two competing interpretations and Mr. Khandoker acknowledges that these estimates assume all of the projects in question are ultimately built"). An unreliable assessment, based on unfounded assumptions, is inadmissible.

See, e.g., Douglas Const. Corp. v. Mazama Timber Products, Inc., 256 Or 107, 115, 471 P2d 768 (1970) (damages must be established "with 'reasonable certainty'" and may not "depend upon many intangible factors"). Even if the fiscal impact of the Commission's decision on the parties were material to the contract interpretation issues presented in this proceeding, Mr. Khandoker's testimony does present reliable testimony as to that impact.

PGE's argument that Mr. Khandoker's testimony is not barred by Section 210(e) of PURPA fares no better. PURPA affirmatively bars the Commission from basing its decision in this case on the financial impact information Mr. Khandoker presents. *See generally* Defendants' Motion to Strike at 5-6. It is well-settled that once a PPA is signed by the parties and approved by the appropriate state agency, "the rights of the parties . . . are to be determined by applying normal principals of contract interpretation to the agreement." *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F3d 129, 139 (3d Cir 1998). The Commission recently confirmed this interpretative method when it applied Oregon's common law rules of contract interpretation in a decision interpreting PGE's standard contract. *See Portland General Elec. Co. v. Pacific Northwest Solar, LLC*, Docket No. UM 1894, Order No. 18-284, at 5 (Aug. 2, 2018). Despite PGE's protestations to the contrary, evidence about the financial impact of the parties' competing interpretations of a negotiated and approved contract is not considered when "applying normal provisions of contract interpretation." *Crossroads Cogeneration Corp.*, 159 F3d at 139.

B. Mr. Macfarlane's Testimony Contains Inadmissible Legal Opinions and Arguments.

PGE does not dispute that legal opinions, arguments and conclusions are generally inadmissible. Rather, PGE first posits that Mr. Macfarlane's testimony should not be stricken,

because the parties dispute the legal standards that apply to the contract interpretation issues raised by this case. *See generally* Response at 11-13 (PGE so arguing). Yet, Mr. Macfarlane's testimony is silent as to what *legal* standard the Commission should apply to the contract interpretations presented here. Of course, as a non-lawyer, Mr. Macfarlane is unqualified to opine on that issue. Nor does he opine on that issue in his testimony. PGE's argument is entirely irrelevant.[1]

PGE next asserts that Mr. Macfarlane's legal opinions, arguments and conclusions should not be stricken because "Defendants do not provide any discussion regarding any of the specific language moved against." Response at 13. That is wrong. In their motion to strike, the NewSun Parties devote over three pages, and cite multiple cases, supporting their position. *See generally* Motion to Strike at 7-9. The New Sun Parties also attached a detailed exhibit, setting forth line-by-line the testimony that should be stricken. The NewSun Parties have fully briefed the issue.

To the extent PGE suggests that a party must provide legal briefing on each and every line of inadmissible testimony, as opposed to briefing representative examples and providing a line-by-line exhibit of all instances, the result would be unnecessarily long and repetitive motions to strike, which would be burdensome both for parties and for the Commission. PGE did not have to guess the basis of the NewSun Parties' objection to the identified portions of Mr. Macfarlane's testimony. If PGE wanted to respond line-by-line, or even identify a single

[1] PGE's creative argument that the executed standard contract should be interpreted in part as a statute and in part as a contract is entirely without merit. As noted above, both the Commission and the United District Court of Oregon have now ruled that PGE's executed standard contracts are to be interpreted in the same manner as any other contract. *Alfalfa Solar I LLC v. Portland Gen. Elec. Co.*, No 3:18-CV-40-SI, slip op. at 13-15, 2018 WL 2452947 (D Or May 31, 2018); *Portland General Elec. Co.*, Order No. 18-284, at 5. The NewSun Parties reserve the right to again respond more fully to this meritless argument in summary judgment briefing.

objectional portion of Mr. Macfarlane's testimony and attempt to explain why that portion is not inadmissible legal opinion testimony, it could have done so.

Moreover, PGE's argument is inconsistent with its own prior practice before the Commission. When PGE has in the past moved to strike multiple portions of a witness's testimony all on the same basis, it has provided an attachment identifying the specific lines of challenged testimony—exactly as the NewSun Parties did here.[2] PGE's assertion that the same approach it has taken to motions to strike in the past is somehow inadequate when the motion is brought by an adversary rings hollow.

PGE also seeks to miscast the NewSun Parties' position. The NewSun Parties do not assert that all "regulatory background" and history of the PPAs are irrelevant or immaterial. The NewSun Parties have not sought to strike *factual* testimony. Nor have the NewSun Parties sought to strike passages where Mr. Macfarlane merely lays a foundation for admission of exhibits related to regulatory background. *See, e.g.*, PGE/100, Macfarlane/13:10-20. Rather, the NewSun Parties properly object to Mr. Macfarlane's legal speculation, which reads exactly like a legal brief.

PGE's efforts to distance itself from its own successful argument in *Blue Marmot V LLC et al. v. Portland Gen. Elec. Co.*, OPUC Docket No. UM 1829 et al. ALJ Ruling (Dec. 13, 2017) falls flat. *See generally* Response at 16-17. In *Blue Marmot*, Administrative Law Judge ("ALJ") Allen Arlow *accepted* PGE's position that a witness's interpretation and application of the law to the facts is inadmissible. *See* Motion to Strike at 8 (discussing that opinion). The

[2] *See PGE's Motion to Strike*, OPUC Docket No. UM 1566 (Nov. 2, 2012), available at https://edocs.puc.state.or.us/efdocs/HAO/um1566hao165718.pdf (containing limited discussion of testimony in the motion and attaching an attachment listing all lines objected to by PGE).

AJL's decision was not based on the witnesses' role in regulatory process (as PGE argues), but rather on the well-settled rule that a witness, especially a non-lawyer witness, may not offer legal analysis or argument. Here, the NewSun Parties seek to strike such argument. And, for the same reasons ALJ Arlow granted PGE's motion to strike legal argument presented by witnesses in *Blue Marmot*, Mr. Macfarlane's testimony should be stricken here.

PGE's assertion that Mr. Macfarlane's testimony is admissible extrinsic evidence of the parties' intent in entering into the PPAs is similarly unavailing. While PGE contends that Mr. Macfarlane has provided testimony "regarding the regulatory process in which he was involved," *see* Response at 16, the NewSun Parties did not move to strike the portions of Mr. Macfarlane's testimony that relate to his involvement in the regulatory process.[3] Nor did the NewSun Parties move to strike testimony where Mr. Macfarlane states matters within his personal knowledge, such as his purported understanding of Order No. 05-584 and his intent when he allegedly wrote Schedule 201. *See, e.g.*, PGE/100, Macfarlane/31:7-13.

The NewSun Parties moved to strike specific portions of Mr. Macfarlane's testimony—all of which are identified in Exhibit A to the NewSun Parties' motion—that constitute inadmissible legal opinions, arguments and conclusions, and that do not address Mr. Macfarlane's involvement in the regulatory process. Indeed, PGE fails to identify, either in the body of its motion or in an exhibit attached to the motion, a single example of testimony *which the NewSun Parties actually move to strike* that PGE believes constitutes admissible

[3] The NewSun Parties do not concede that the portions of Mr. Macfarlane's testimony regarding the regulatory process surrounding the preparation of PGE's standard contract forms are necessarily relevant to the meaning of the PPAs, whether as extrinsic evidence of the parties' intent or otherwise. This motion, however, addresses only those portions of Mr. Macfarlane's testimony that are inadmissible legal opinions, arguments, and conclusions. The NewSun Parties will address the relevance of the remainder of Mr. Macfarlane's testimony in briefing.

percipient witness testimony as opposed to inadmissible testimony constituting legal opinion, argument and conclusions.

By way of example, the first portion of Mr. Macfarlane's testimony the NewSun Parties move to strike is the following sentence: "My testimony shows that the language in the NewSun PPAs clearly provides that the 15-year period begins at execution of the contract and not at commercial operation." PGE/100, Macfarlane/2:2-4. This sentence alone belies PGE's assertion that Mr. Macfarlane's testimony does not include legal conclusions. To the contrary, this testimony purports to answer the ultimate question at issue in this proceeding. It has nothing to do with the regulatory process or Mr. Macfarlane's understanding of it at the time he drafted any of the disputed PPAs or contract forms, and it cannot possible be understood as testimony regarding events Mr. Macfarlane participated in or witnessed.

In sum, the NewSun Parties' motion properly identifies the basis of their objection to portions of Mr. Macfarlane's testimony—namely, that these portions constitute inadmissible legal opinions, arguments and conclusions—and the specific portions which they move to strike on that basis. PGE's attempt to characterize the identified portions of Mr. Macfarlane's testimony as extrinsic evidence of the parties' intent fails and should be rejected.

C. The Legal Opinions and Arguments From Mr. True's Testimony Also Are Inadmissible.

The four sections of Mr. True's testimony the NewSun Parties have moved to strike are either legal opinions and arguments or based on the inadmissible legal opinions and arguments from Mr. Macfarlane's testimony. PGE's assertion that the NewSun Parties have provided "absolutely no discussion of the language moved against" is misplaced for the reasons set forth

above. Response at 18. The NewSun Parties presented detailed legal argument as to why such opinions and conclusions are inadmissible and has designated the testimony to be stricken.

D. PGE Should Not Be Given Leave to Supplement or Amend Mr. Macfarlane's Testimony

PGE requests leave to supplement or amend Mr. Macfarlane's testimony if the Commission grants the NewSun Party's motion to strike. That request should be denied, for the following reasons:

- PGE has not proposed any amended or supplemental testimony.
- PGE has not set forth why any amended or supplemental testimony would be admissible or relevant.
- The parties have agreed to an expedited hearing schedule (indeed that expedited schedule was a condition of Judge Michael Simon staying the federal court case), and PGE's proposal would undermine that schedule and delay resolution of this case.

For the reasons set forth above, and in Defendants' Motion to Strike, the Commission should strike the testimony and exhibits listed in Exhibit A to the Motion to Strike.

DATED this 4th day of January, 2019.

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