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 FOR CERTIFICATION OF ADMINISTRATIVE LAW JUDGE'S RULING DATED JANUARY 15, 2019**

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, "Defendants" or the "NewSun Parties"), hereby file a reply in support of their Motion for Certification of Administrative Law Judge's Ruling Dated January 15, 2019. Complainant Portland General Electric Company ("PGE") raises no viable argument as to why certification should be denied.

A. The Financial Impact of the Commission's Decision Is Irrelevant to the Meaning of the NewSun Parties' Power Purchase Agreements.

PGE asserts that admission of the Khandoker testimony is not "clear legal error" under the "lenient rule for admissibility" in proceedings before the Commission. PGE's Response to Defendants' Motion for Certification of Administrative Law Judge's Ruling Dated January 15, 2019 ("PGE's Response") at 6. *See also id.* at 4 (PGE asserting that evidence is admissible "under the broad and lenient rules of evidence applicable to Commission proceedings"). However, financial impact evidence is not relevant to this dispute. *See generally* Defendants'

Motion to Strike Testimony and Exhibits filed December 14, 2018 ("Motion to Strike") at 4-7 (explaining); Defendants' Motion for Certification of Administrative Law Judge's Ruling Dated January 15, 2019 ("Motion for Certification") at 4-5 (same). Respectfully, and for the reasons set forth in the NewSun Parties' Motion for Certification, Administrative Law Judge Allan Arlow's conclusion that the evidence is admissible is misplaced.

Ignoring the applicable law, PGE argues that the Khandoker testimony may be allowed into the record solely for the purpose of addressing the "narrowed" issue of "the state of mind of those preparing and negotiating the contract." PGE's Response at 6. But the Khandoker testimony has absolutely no bearing on "the state of mind of those preparing and negotiating the contract." Mr. Khandoker did not participate in drafting the contract forms or obtaining approval of those forms from the Public Utility Commission of Oregon (the "Commission"). He was not present when the contracts were drafted. Mr. Khandoker does not even purport to have communicated with anyone who actually did participate in drafting the forms, obtaining approval of the forms, or entering into the PPAs with the NewSun Parties. He does not possess first hand, or even second hand, knowledge of "the state of mind of those preparing and negotiating the contract."

Moreover, none of the other PGE witnesses assert that they took Mr. Khandoker's analysis into consideration in drafting the standard contract form in 2014 or the NewSun PPAs in 2016. Nor could they credibly so assert because Mr. Khandoker's analysis is based on economic assumptions and market-price forecasts that exist at the time he filed his testimony in late 2018, *not at the time the contract form was developed in 2014*. *See* PGE/300, Khandoker/4 (Mr. Khandoker stating he used estimates from PGE's "most recently filed integrated resource plan"). Mr. Khandoker's analysis did not use economic assumptions PGE would have made at the time

of contracting with the NewSun Parties 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 strained theory of its relevance.

Finally, even Mr. Khandoker concedes that his calculations are inaccurate. *See, e.g.* PGE/300, Khandoker/5 ("I present this evidence not for the precise financial impact"). Simply put, the purported evidence is irrelevant, provides no insight as to the "state of mind" of those who prepared the PPAs and is (according to PGE's own witness) imprecise. The offered evidence falls far short even of the hyper-lenient standard of admissibility for which PGE advocates.[1]

B. Mr. Khandoker's Testimony Is Intended to, and May Cause, Undue Prejudice.

PGE raises the bizarre argument that there is no harm in admitting the Khandoker testimony because the Commission has not yet erred by considering the evidence. *See, e.g.*, PGE's Response at 5 ("the Commission will not automatically apply an erroneous legal analysis simply because the Commission reviews Mr. Khandoker's testimony"); *id*. at 5 ("[b]ecasue defendants merely assume that the Commission will err in the future, there is nothing in the

[1]It is worth noting that PGE does not attempt to defend the AJL's conclusion that the NewSun Parties' Answer put the issue of the magnitude of financial impact into dispute in this case. As was set forth in the NewSun Parties' Motion for Certification, the NewSun Parties only answered that allegation after their motion to dismiss was denied and they were required to respond to the allegation. Moreover, the NewSun Parties do not dispute that the Commission's decision will have a financial impact. However, because the fact that there will be a financial impact for the NewSun Parties or PGE at the end of this case is non-disputed, and financial impact evidence has no bearing on the contract interpretation issues presented here, evidence as to the magnitude of that impact is irrelevant.

record to indicate ALJ Arlow or the Commission have violated or will violate the law or their duties"); *id.* at 6 ("defendants' reasoning is ultimately flawed because defendants unjustifiably assume the Commission will use Mr. Khandoker's testimony inappropriately"). PGE applies the wrong standard. The legal standard for certification is not whether the ruling *will* prejudice a party. Rather, under OAR 860-001-0110(2)(a), certification is required if "[t]he ruling *may* result in . . . undue prejudice to a party." (Emphasis added). The question here is not *will* ALJ Arlow and the Commission improperly consider the Khandoker testimony; rather, the question is *could* the AJL's admission of prejudicially irrelevant evidence result in consideration of that evidence to the detriment of the NewSun Parties. The answer to that question clearly is "yes." Improper evidence has been admitted. Because it was admitted, there is a risk that it will be considered. That "may result . . . in undue prejudice" to the NewSun Parties. OAR 860-001-0110(2)(a).

Under PGE's logic, there would never be any reason to exclude inadmissible evidence in a proceeding before the Commission (or any other tribunal), because the Commission might not subsequently consider that inadmissible evidence. But only *relevant* evidence is admissible. OAR 860-001-0450(1); OAR 860-001-0480(10). *See also East County Recycling, Inc. v. Pneumatic Const., Inc.*, 214 Or App 573, 580-584, 167 P3d 464 (2007) (inadmissible evidence should be stricken form the summary judgment record). PGE's approach is the equivalent of throwing everything against the wall to see what will stick. That is not how the rules of evidence work.

Admission of the Khandoker testimony very well "may result in . . . undue prejudice to a party." OAR 860-001-0110(2)(a). As set forth above, the testimony has no proper place in this proceeding. The NewSun Parties do not have to wait for the Commission to consider such

inadmissible evidence before objecting to it. The evidence does not belong in the record. Certification is warranted so that the Commission may address the admissibility issue directly.

C. PGE's Efforts to Downplay Its Misplaced Reliance on the Khandoker Testimony Fall Short.

PGE's final argument is that "the inclusion of Mr. Khandoker's testimony is not 'of sufficient significance' that it must be answered by the Commission at this time." PGE's Response at 7. If the evidence is insignificant, as PGE now claims, then it serves no valid purpose here. Moreover, PGE's own briefing on summary judgment belies PGE's assertion that PGE does not view the Khandoker evidence as significant. PGE relies on and cites the Khandoker testimony in the introduction to its motion for summary judgment. *See* Portland General Electric Company's Motion for Summary Judgment ("PGE's Motion for Summary Judgment") at 3. And, PGE relies on that testimony not for the "narrowed use of the evidence to the state of mind of those preparing and negotiating the contract," the only purpose for which PGE now asserts the evidence would be admissible. *See* PGE's Response at 6 (PGE so arguing). Rather, in its summary judgment briefing, PGE offers the Khandoker testimony for the acknowledged impermissible purpose of the fiscal impact the outcome of the case will have. PGE's argument in its opposition to the NewSun Parties' motion for certification is flatly contradicted by PGE's own argument on summary judgment.

CONCLUSION

For the reasons set forth in the NewSun Parties' Motion for Certification and above, the NewSun Parties respectfully request that the ALJ certify to the Commission that portion of the ruling issued on January 15, 2019 denying the NewSun Parties' motion to strike the Khandoker testimony and exhibit.

DATED this 20th day of February, 2019.

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