BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	)	**PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE OPPOSING DEFENDANTS' MOTION TO STRIKE**

Portland General Electric Company ("PGE") respectfully requests that the Public Utility Commission of Oregon ("Commission") deny Defendants' December 14, 2018 motion to strike portions of PGE's direct testimony and exhibits.

I. BACKGROUND

A. The Parties' Dispute Over the 15-Year Fixed-Price Period

This case involves a dispute over the correct interpretation of ten standard power purchase agreements entered into by PGE and Defendants in 2016 (the "NewSun PPAs"). The contracts provide that PGE will pay the Renewable Fixed Price Option (the "fixed price") for net output delivered during an initial 15-year period. And the contracts provide that PGE will pay the Mid-C Index Price (the "market price") for net output delivered after the initial 15-year period through the end of the contract term. The parties disagree about when the 15-year fixed-price period begins to run.

Under PGE's interpretation, the 15-year fixed-price period begins when the contracts begin—at contract execution. Under Defendant's interpretation, the 15-year fixed-price period begins to run on the commercial operation date, a date that can occur

up to four years after contract execution. The difference between these two interpretations is not trivial. PGE witness Ryin Khandoker estimates that adopting Defendants' interpretation will result in PGE's customers paying approximately $44 million to $62 million more than they would under PGE's interpretation.[1] And if Defendants' interpretation is applied to PGE's other qualifying facility ("QF") contracts with similar terms as the NewSun PPAs, the cost of Defendants' interpretation could be $143 million to $200 million more than the cost of PGE's interpretation.[2]

B. PGE's Direct Testimony and Defendants' Motion to Strike

On December 7, 2018, PGE filed the direct testimony and exhibits of Robert Macfarlane (PGE/100-108, Macfarlane), Bruce True (PGE/200-215, True), and Ryin Khandoker (PGE/300-301, Khandoker). PGE's direct testimony and exhibits are intended to provide evidence of the context underlying the formation of the NewSun PPAs. The Macfarlane testimony provides evidence of the regulatory history or regulatory context underlying the NewSun PPAs. The True testimony provides evidence of the parties' states of mind regarding the 15-year fixed-price issue before they executed the contracts. The Khandoker testimony provides evidence of the financial magnitude of the harm that PGE's customers would suffer if the 15-year fixed-price period begins on the commercial operation date rather than at contract execution.

On December 14, 2018, Defendants moved to strike portions of PGE's direct testimony and exhibits. Defendants have moved to strike all of the Khandoker testimony on financial impact, asserting such testimony is irrelevant and that it is barred by the prohibition on "utility-type regulation" established by Section 210(e) of the Public Utility

[1] PGE/300, Khandoker/2:12-14.
[2] PGE/300, Khandoker/2:14-19.

Regulatory Policy Act ("PURPA"). Defendants have moved to strike approximately half of the Macfarlane testimony (about 16 out of 32 pages of testimony) as inadmissible legal conclusions. And Defendants have moved to strike four elements of the True testimony on the grounds that they cross-reference, or repeat, alleged legal conclusions from the Macfarlane testimony.

C. Summary of PGE's Response

The Commission should deny defendants' motion to strike. The Khandoker testimony is relevant to the Commission's interpretation of when the 15-year fixed price period begins for the three reasons discussed below and Section 210(e) of PURPA does not prohibit the Commission from *interpreting* the NewSun PPAs (it prohibits the Commission from *modifying* the contracts, and PGE is not asking the Commission to modify the contracts).

Defendants' motion to strike the Macfarlane testimony should be denied for several reasons. First, Defendants have failed to articulate their reasons for moving against nearly half of the Macfarlane testimony.[3] Defendants do not provide any discussion, argument, or analysis regarding why any of the specific language moved against must be considered an inadmissible legal conclusion. Second, Mr. Macfarlane was the PGE employee primarily responsible for seeking and obtaining Commission approval of PGE compliance filings in response to the Commission's PURPA orders from 2009 through 2017; Mr. Macfarlane is therefore qualified to testify regarding PGE's

[3] *See Shields v. Campbell*, 277 Or. 71, 77, 559 P.2d 1275, 1279 (1977) ("A party owes the trial court the obligation of a sound, clear and articulate motion, objection or exception, so as to permit the trial judge a chance to consider the legal contention or to correct an error already made."); *Pacific Engineering Corp. v. Evans Products Co.*, 280 Or. 257, 262-63; 570 P.2d 655, 658 (1977) ("… objections to evidence must ordinarily be stated with sufficient specificity to disclose to the trial court the defects in the proposed evidence which [the moving party] expects to urge in the event of an appeal and to give the trial court and counsel an opportunity to remedy any such defects.").

understanding of the requirements of the Commission's PURPA orders and the intent behind PGE's compliance filings. Mr. Macfarlane's testimony represents his understanding of what the Commission's PURPA orders required from PGE and his understanding of how PGE's contract forms were intended to function to meet those requirements. Third, a review of the specific language moved against in Mr. Macfarlane's testimony demonstrates that it does not contain inadmissible legal conclusions.

Finally, the True testimony should not be stricken for cross-referencing the Macfarlane testimony because the Macfarlane testimony is admissible.

Alternatively, if the Commission determines that any of the Macfarlane testimony is inadmissible because Mr. Macfarlane did not expressly state that his testimony represents his understanding of what the Commission's orders require or his understanding of how PGE's contract forms were intended to function, there is a simple remedy short of striking the testimony that would enable the Commission to base its decision on a full record that includes the relevant regulatory history and context. PGE could easily remedy this objection by filing supplemental or amended direct testimony that clarifies that all of Mr. Macfarlane's direct testimony is based on his understanding of what the referenced Commission orders required from PGE and on his understanding of how PGE's standard contract forms and Schedule 201 rate schedules were intended to function to comply with the Commission's orders.

II. RESPONSE

A. Applicable Legal Standards

As the party moving to strike PGE's opening testimony, Defendants have the obligation to make a "sound, clear and articulate motion . . . so as to permit the [Commission] a chance to consider the legal contention."[4] Defendants' objections to PGE's evidence "must ordinarily be stated with sufficient specificity to disclose to the trial court the defects in the proposed evidence which [the moving party] expects to urge in the event of an appeal and to give the trial court and counsel an opportunity to remedy any such defects."[5]

The Commission's evidentiary standards are less strict than those of the courts.[6] OAR 860-001-0450 provides the primary legal standard for the admission of evidence in proceedings before the Commission. Under that rule, relevant evidence is "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" and evidence is admissible "if it is of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs."[7] Under its more relaxed standard of evidentiary admissibility and relevance, the "Commission has the responsibility, and is able, to weigh evidentiary integrity when rendering a decision."[8]

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[4] *Shields v. Campbell*, 277 Or. 71, 77, 559 P.2d 1275, 1279 (1977) (stating standard under Oregon's evidentiary rules).
[5] *Pacific Engineering Corp. v. Evans Products Co.*, 280 Or. 257, 262-63; 570 P.2d 655, 658 (1977).
[6] *See In the Matter of Wah Chang v. PacifiCorp*, Docket No. UM 1002, ALJ Ruling at 10 (Jul. 25, 2006) ("Administrative agencies are not subject to the same evidentiary standards as courts of law. Although the Commission may apply the [Oregon Rules of Evidence] … it does not routinely do so.").
[7] OAR 860-001-0450(1)(a) and (b).
[8] Docket No. UM 1002, ALJ Ruling at 10.

B. Ryin Khandoker's Testimony is Relevant and is Not Prohibited by PURPA

Ryin Khandoker's testimony and exhibit (PGE/300-301) provide evidence of the increase in cost that would result if Defendants' interpretation of the NewSun PPAs is correct. Mr. Khandoker estimates PGE's customers would pay $44 million to $62 million more (in nominal dollars) for power from Defendants' projects under Defendants' interpretation than they would pay under PGE's interpretation.[9] Mr. Khandoker also points out that PGE has 52 PURPA contracts with terms and conditions similar to those found in the NewSun PPAs and that if the Defendants' interpretation is applied to those 52 contracts as well as the 10 NewSun PPAs, then PGE's customers would pay approximately $143 million to $200 million more (in nominal dollars) for power from those 62 projects than they would pay under PGE's interpretation.[10]

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.[11] However, regardless of how many projects are ultimately constructed, Mr. Khandoker's testimony provides the Commission with a useful evidence regarding the "order or magnitude" of the potential financial impact associated with the parties' different interpretations of when the 15-year fixed-price period begins.

Defendants have moved to strike the Khandoker testimony for two reasons. First, Defendants argue that evidence of the financial impact of Defendant's interpretation of

[9] PGE/300, Khandoker/2:12-14.
[10] PGE/300, Khandoker/2:14-19.
[11] PGE/300, Khandoker/5:1-3, 12-17.

the NewSun PPAs is irrelevant to the Commission's decision in this case.[12] Second, Defendants argue that consideration of the Khandoker testimony would amount to "ratemaking activity" that is prohibited by Section 201(e) of PURPA.[13] Defendants' motion to strike the Khandoker testimony should be denied because the testimony is relevant and Section 210(e) of PURPA does not prohibit the Commission from using relevant evidence to *interpret* an executed PURPA contract.

1. Ryin Khandoker's Testimony is Relevant.

The Khandoker testimony demonstrates that the magnitude of harm associated with allowing fixed prices to diverge from actual costs for more than 15 years is substantial ($44 million to $200 million). Under the Commission's rules on evidence, the Khandoker testimony is relevant if it tends to make a fact at issue more likely than it would be without the evidence.[14] The Khandoker testimony is relevant to the facts at issue in this case for at least three reasons.

First, the pleadings in this case expressly put the magnitude of the harm in dispute and Mr. Khandoker's testimony is relevant in resolving that dispute. In its Complaint, PGE alleges that the "the Commercial Operation Date is a multi-million dollar question that will have a significant impact on PGE's customers" and that "the net present value of the difference between the two competing interpretations could require PGE to pay the NewSun Solar Parties tens of millions of dollars in additional power costs that would ultimately be borne by PGE's retail customers."[15] The NewSun QFs did not move to

[12] Defendants' Motion to Strike at 5 ("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.").
[13] *Id.* (citing 16 USC 824a-3(e)(1), hereinafter "Section 201(e) of PURPA").
[14] OAR 860-001-0450(1)(a).
[15] Complaint at ¶ 20.

strike this portion of the Complaint, and it is now too late to do so.[16] Instead, the NewSun QFs responded on the merits. In their Answer, the NewSun QFs allege that the price to be paid under the parties competing interpretations of the PPAs "will differ by millions of dollars," not tens of millions as alleged in the Complaint.[17] Further, the NewSun QFs denied the extent to which the parties' competing interpretations would harm PGE's customers as applied to the NewSun QFs' PPAs and as applied marketwide.[18] Thus, the magnitude of the harm caused by adopting the NewSun QFs' interpretation is itself a "fact at issue in the proceedings" and Mr. Khandoker's testimony is relevant evidence resolving this factual dispute.

Second, the magnitude of the harm to PGE's customers is relevant in showing whether it is "reasonable" to assume that PGE would have drafted a PPA that implicitly set the 15-year period at contract execution, as alleged in the Answer.[19] As alleged in the Complaint, PGE's "2007 Contract Forms expressly and unambiguously limited the fixed-price period to the first 15-years of the contract term beginning at contract execution."[20] PGE intends to argue in its motion for summary judgment that some of the express language from the original 2007 contract forms was deleted as part of an irrelevant revision to the contract forms in response to an unrelated order. The Khandoker testimony supports the conclusion that PGE would not have *implicitly* changed its approach to the 15-year fixed price period. If PGE had intended to make a change with impacts on customers of the magnitude demonstrated by the Khandoker testimony, then it

[16] *See* ORCP 21E (requiring that a motion to strike a pleading be made "before responding to a pleading").
[17] Answer at ¶ 18.
[18] *See id.*
[19] Answer at 4 ("The NewSun Parties' understanding of PGE's standard form contracts at issue was the most reasonable and consistent interpretation of the express language of those form contracts . . . .")
[20] Complaint at ¶ 10.

would have done so with express language (as it did in July 2017 after the Commission expressly ordered PGE to change the start date of the 15 years fixed price period).[21]

Third, the Khandoker testimony provides the Commission with an indication of the "amount in controversy" in this case and that allows the Commission to make informed decisions about how much of its limited administrative resources to dedicate to the resolution of this case. For example, the parties anticipate requesting oral argument on cross-motions for summary judgment. The Commission does not always, or even routinely, allow for oral argument on dispositive motions because that would create too great a burden on the Commission's time and resources. The Khandoker testimony increases the likelihood that the Commission will grant oral argument because it demonstrates that the potential impact of the Commission's decision in this case is substantial ($44 million to $200 million) and therefore justifies a substantial investment of the Commission's administrative resources. Similarly, the parties seek an expedited decision in this case, but that also places increased demands on the Commission's resources. The Khandoker testimony makes it more likely that the Commission will grant expedited processing and issue an expedited decision because it demonstrates that the "amount in controversy" is substantial and justifies a substantial investment of the Commission's administrative resources.

[21] *See Northwest and Intermountain Power Producers Coalition et al. v. Portland Gen. Elec. Co.,* Docket No. UM 1805, Order No. 17-256 at 4 (Jul. 13, 2017) (order requiring PGE, on a going forward basis, to offer standard contracts that "provide for 15 years of fixed prices that commence when the QF transmits power to the utility."); and Docket No. UM 1805, PGE's Compliance Filing (Schedule 201) in compliance with Order 17-256 (Jul. 20, 2017) (providing in Section 4.1 of the renewable standard contract form that "PGE shall pay Seller the Contract Price for all Delivered Net Output. For the first 15 years measured from the date in Section 2.2.2 [the scheduled commercial operation date], the Contract Price will be the Renewable Fixed Price Option under the Schedule; thereafter and for the remainder of the Term, the Contract Price will be the Mid-C Index Price.").

For all of the reasons stated above, the Khandoker testimony on financial impact is relevant to the Commission's interpretation of the NewSun PPAs and Defendants' motion to strike the testimony should be denied.

2. Ryin Khandoker's testimony is not barred by Section 210(e) of PURPA.

Section 201(e) of PURPA exempts QFs from "utility-type" regulation by state utility commissions.[22] But this exemption does not apply to State laws and regulations that implement Subpart C of FERC's regulations, which apply "to the regulation of sales and purchases between qualifying facilities and electric utilities."[23] As a result, while a State cannot engage in "utility-type" regulation of a QF, a State may regulate (and hence, may later adjudicate disputes about) the sales and purchases between QFs and regulated utilities. As the Commission and the Courts have ruled, a State may *interpret*, but cannot *modify* an executed PPA.[24]

In the instant case, PGE has asked the Commission to interpret the NewSun PPAs to determine when the 15-year fixed-price period begins to run. The Khandoker testimony is relevant for the reasons discussed above. Defendants motion to strike suggests that this relevant testimony should be stricken because once the Commission

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[22] *See* 16 U.S.C. § 824a-3(c)(1) and 18 C.F.R. § 292.602(c)(1).

[23] *See* 18 C.F.R. § 292.602(c)(2) ("A qualifying facility may not be exempted from State law and regulations implementing subpart C.") and 18 C.F.R. § 292.301(a) (articulating the scope of subpart C as "the regulation of sales and purchases between qualifying facilities and electric utilities.").

[24] *See Portland Gen. Elec. Co. v. Pac. N.W. Solar,* Docket No. UM 1894, Order No. 18-025 at 4 (Jan. 25, 2018) (order denying QF's motion to dismiss for lack of personal jurisdiction, finding the Commission has the jurisdiction and authority to interpret a PURPA standard contract, and noting "we do not have authority to alter the terms of the contract, or its established avoided cost prices, once it is executed."); *see also Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Public Utility Control*, 531 F.3d 183, 188-189 (2d Cir. 2008) (holding that a state utility commission does not violate Section 210(e) of PURPA when it interprets a PURPA standard contract); *New Martinsville v. Public Service Com'n*., 729 SE2d 188, 196 (W. Va. 2012) ("Once the state agency has approved the [PURPA] agreement, however, any attempt to modify the agreement would subject the QF to "utility-type" regulation barred by Section 210(e) of PURPA. [citing *Freehold*] Upon review, we find that *Freehold* has no application in this instance. Contrary to the assertions of the [QF] Generators, the [state utility] Commission has not modified the terms of the existing EEPAs but, instead, has only determined ownership of assets – the credits – which were not contemplated and, thus, not provided for in the EEPAs. Other jurisdictions that have considered this same issue agree that an interpretation of a power purchase agreement which is silent on the issue of credit ownership does not violate PURPA.").

considers the magnitude of the impact associated with Defendants' position, the Commission will be motivated to improperly *modify* the NewSun PPAs rather than properly *interpret* the contracts.[25] The Commission should reject this unfounded argument. The Commission is aware that it lacks the authority to modify the NewSun PPAs. There is no reason to conclude that the Commission cannot consider the relevant Khandoker testimony and limit itself to *interpretation* of the NewSun PPAs.

B. Robert Macfarlane's Testimony is Relevant, Admissible and Does Not Contain Prohibited Legal Conclusions

The direct testimony and exhibits of Robert Macfarlane provide detailed evidence about the most relevant aspects of the Commission regulatory process underlying the standard contract forms that are the basis of the NewSun PPAs. This regulatory history and context will be critical to the Commission's ability to interpret the NewSun PPAs. Indeed, in this case the Commission has already recognized that the NewSun PPAs are not common law contracts but rather arise out of the Commission's regulatory process and "have the force of regulation under our implementation of PURPA."[26]

1. Mr. Macfarlane's testimony regarding regulatory history or context is relevant to the Commission's interpretation of the NewSun PPAs because they are standard contracts.

There has been some disagreement and confusion over whether the NewSun PPAs must be interpreted as common law contracts under the standards of *Yogman v.*

[25] Defendants' Motion to Strike at 7 ("Mr. Khandoker invites the Commission to illegally act out of motivation to protect PGE's ratepayers.").

[26] *Portland Gen. Elec. Co. v. Alfalfa Solar I LLC et. al*, Docket No. UM 1931, Order No. 18-174 at 3 ("At the outset, we note that NewSun QFs mischaracterize the nature of this complaint. The instant proceeding is not a common law contract dispute, but rather one that relates to matters that have been specifically delegated to us under federal and state law.") and 4 ("The terms and conditions of these contracts [the contract forms on which the NewSun PPAs are based] were litigated before the Commission, adopted by the Commission, and have the force of regulation under our implementation of PURPA.") (May 23, 2018).

Parrot, 325 Or 358 (1997), or as statutorily or administratively required contracts under the standards for interpreting legislation articulated in *PGE v. BOLI,* 317 Or 606 (1993).

PGE has taken the position that the NewSun PPAs should be interpreted predominately under the *BOLI* standard just like an insurance contract containing language mandated by statute.[27] But PGE has also indicated that the *Yogman* standard may be appropriate where the NewSun PPAs reflect changes to the standard PPA form (e.g., where there is a project-specific term or value inserted in the blank spaces of the contract forms, where project-specific information is inserted in exhibits, or where the parties agree to any ministerial modification or addition to the standard contract language).[28]

Defendants have argued that the NewSun PPAs are common law contracts and should be interpreted under the principles of *Yogman*.[29] The Administrative Law Judge has, as a preliminary matter, ruled that the Commission will need to examine the parties' states of mind under the *Yogman* standard.[30]

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[27] *See* Docket No. UM 1931, PGE's Reply in Support of its Motion to Compel at 6 and fn 13 (Aug. 10, 2018) ("The correct method to interpret the NewSun PPAs and other standard [Schedule] 201 PPAs is the way a court interprets an insurance contract that contains provisions mandated by statute or regulation: where a contract term is required by statute (or administrative order), "we attempt to determine the legislature's intention in enacting that statute rather than the parties' contractual intention in entering into the insurance contract.". *See Fox v. Country Mut. Ins. Co.*, 327 Or. 500, 566 (1998); *Perez v. State Farm Mut. Auto. Ins. Co.*, 289 Or. 295, 297-98 & 299 n.2 (1980) (because insurance contract term at issue was required by statute the court "approach[ed] the issue as a problem of statutory construction."); *Emery Air Freight Corp. v. United States*, 499 F.2d 1255, 1259-60 (Ct. Cl. 1974) (court examined the administrative record to interpret the meaning of a term in the tariff-based contract between the parties)."); *See also*, *PGE's Response to Defendants' Motion for Protective Order Staying Discovery* at 7-8 (Jul. 13, 2018).

[28] Docket No. UM 1931, PGE's Reply in Support of its Motion to Compel at fn 13 (Aug. 10, 2018) ("For the parts of the NewSun PPAs that involve negotiated terms, the Commission should implement those sections as common law contracts under *Yogman v. Parrot* and related cases.").

[29] Defendants' Motion to Strike at 5 (Dec. 14, 2018).

[30] Docket No. UM 1931, ALR Ruling Denying Defendants' Motion for Summary Disposition at 7 and 9 (Aug. 23, 2018) (applying *Yogman*, concluding summary disposition inappropriate without "additional evidentiary offerings" and stating that "Commission resolution of these cases requires an examination of the elements constituting the parties' states of mind at the time these contracts were executed[.]").

The Commission has not yet made a definitive determination as to which interpretive standard governs review of which aspects of the NewSun PPAs. In any event, and under either standard, it is clear that the Commission will need to consider the regulatory history and context underlying the development of the standard contract terms contained in the NewSun PPAs. Defendants' appear to agree, because they have repeatedly observed that the Commission will need to review the regulatory background and context underlying PGE's standard contract forms and Defendants' do not argue that Mr. Macfarlane's testimony about regulatory history is irrelevant.[31]

2. Defendants' motion to strike the Macfarlane testimony should be denied because Defendants do not identify what is objectionable about the specific testimony moved against.

Defendants have moved to strike approximately half of the 32 pages of Macfarlane testimony. Defendants assert that the testimony moved against is inappropriate legal conclusion. Yet incredibly, Defendants do not provide any discussion regarding any of the specific language moved against. Defendants provide no discussion or argument as to why any specific provision should be considered inadmissible legal conclusion. And Defendants only quote or cite two sentence fragments from Mr. Macfarlane's 32 pages of testimony.[32]

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[31] *See* Defendants' Motion for Protective Order Staying Discovery at 1 (Jul. 5, 2018) (arguing that discovery is unnecessary because the Commission does not need to examine evidence "beyond the four corners of these standard form contracts and the regulatory context from which they arose …"); Defendants' Reply in Support of Defendant's Motion for Protective Order at 2 ("… the only relevant circumstances at issue are the regulatory background that created the standard contracts …").

[32] Defendants' Motion to Strike at 7-9 (the only specific language moved against that Defendants even mention in their motion is: (1) "I discuss the language of the NewSun PPA and how that language limits the authority of fixed prices to the first 15 years after the execution of the contract"; and (2) "… the 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)." These two statements simply summarize Mr. Macfarlane's more detailed testimony regarding his understanding of how PGE's standard contract forms (on which the NewSun PPAs are based) are intended to function. Quoting these two sentences or sentence fragments is clearly inadequate to provide PGE or the Commission with notice of why Defendants believe any of the specific testimony moved against is an inadmissible legal conclusion.).

As the moving party, Defendants must articulate the specific basis for their motion.[33] Defendants should not be allowed to level a generalized charge that half of Mr. Macfarlane's 32 pages of testimony are inadmissible legal conclusions and then not be required to provide any evidence, argument, or explanation as to why specific provisions of the testimony should be considered inadmissible. Allowing Defendants to proceed in such a manner would violate basic principles of fairness and due process because PGE must guess as to why Defendants maintain any specific provision of Mr. Macfarlane's testimony should be considered to be a legal conclusion.

The vagueness of Defendants' motion is problematic here because the testimony to be stricken consists largely of accurate paraphrases and quotations from Commission orders and from standard contract forms. For instance, Defendants ask the Commission to strike the following testimony by Mr. Macfarlane:

> **Q. Is Schedule 201 incorporated into the NewSun PPAs?**
> A. Yes, pursuant to Section 1.33, all of the terms of Schedule 201 are incorporated into the NewSun PPA. This means that the terms and conditions in the Schedule are terms and conditions of the NewSun PPAs.[34]

Mr. Macfarlane's testimony simply and accurately paraphrases the content of Section 1.33 of the NewSun PPA attached as PGE/101:

> 1.33. "Schedule" shall mean PGE Schedule 201 filed with the Oregon Public Utilities Commission ("Commission") in effect on the Effective Date of this Agreement and attached hereto as Exhibit D, the terms of which are hereby incorporated by reference.[35]

[33] *Shields v. Campbell*, 277 Or. at 77; *Pacific Engineering Corp. v. Evans Products Co.*, 280 Or. at 262-63.
[34] PGE/100, Macfarlane/5; 4-7.
[35] PGE/101; Macfarlane/6.

There are numerous similar examples.[36] It is not clear what Defendants find objectionable about accurate testimony quoting or paraphrasing the PPAs' terms.

PGE should have the opportunity to understand the basis for each specific request to strike before PGE is required to respond. Likewise, the ALJ or Commissioners should not have to guess why each particular provision of testimony moved against is alleged to be a legal conclusion. Defendants should not be allowed to remedy this defect in their reply brief because by then it is too late; PGE should have the opportunity to respond to specific objections and arguments regarding each piece of testimony moved against.

PGE respectfully requests that Defendants' motion to strike the Macfarlane testimony (and the collateral motion to strike the True testimony) be denied because Defendants have completely failed to provide any justification or explanation as to why each specific provision moved against should be considered to be inadmissible legal conclusion. A motion must put the party moved against on notice of the basis asserted for the action requested. Defendants' total failure to discuss all but two sentence fragments in the roughly 15 pages of testimony Defendants ask the Commission to strike is completely inadequate and should be denied.

3. Robert Macfarlane's testimony does not consist of legal conclusions.

Mr. Macfarlane's testimony does not include legal conclusions. Mr. Macfarlane's testimony is admissible extrinsic evidence of the parties' intent in entering into the PPAs. Mr. Macfarlane was the PGE employee primarily responsible for compliance filings responding to the Commission's PURPA orders from 2009 through 2017. His testimony is relevant evidence of PGE's contemporaneous interpretation of the PPAs at issue.

[36] *See, e.g.*, PGE/100, Macfarlane/6 (accurately paraphrasing or quoting PGE's Schedule 201).

Further, Mr. Macfarlane's testimony provides relevant evidence of PGE's participation in and understanding of the regulatory context in which the PPAs arose. It is undisputed that PGE's standard contract forms were drafted to comply with the Commission's PURPA orders.[37] Mr. Macfarlane provided PGE's testimony during many of the Commission proceedings that led to modifications in the PGE contract forms (e.g., Docket Nos. UM 1396, UM 1610, UM 1805) and he was charged with considering the Commission's PURPA orders as they came out, and with developing PGE's responsive compliance filings and supporting testimony.

Mr. Macfarlane has provided testimony regarding the regulatory processes in which he was involved. He represented PGE as one of two parties "negotiating" a set of regulatory contract provisions (i.e., the Commission and PGE were engaged in a regulatory process of developing the terms and conditions of PGE's Commission-mandated and Commission-approved standard contract forms). In that process, Mr. Macfarlane was required to evaluate the impact of the Commission's PURPA orders on PGE's standard contract forms and then propose specific contract terms intended to comply with the Commission's orders.

In their motion to strike, Defendants argue the Commission should impose the same filter on Mr. Macfarlane's testimony as was imposed on the testimony of William Talbot and Keegan Moyer in the Blue Marmot cases.[38] But Mr. Macfarlane's testimony is different in kind from that of Messrs. Talbot and Moyer. In the Blue Marmot cases, the witnesses were offering their opinions about the meaning of Commission orders when

[37] *See e.g.,* Docket No. 1931, Order No. 18-174 at 4 (May 23, 2018) ("The terms and conditions of these [standard form] contracts were litigated before the Commission, adopted by the Commission, and have the force of regulation under our implementation of PURPA.").
[38] Defendants' motion to dismiss at 8.

neither the witnesses nor the Blue Marmots were party to the regulatory process in question. Talbot and Moyer were testifying as to the meaning of Commission orders that neither they nor the Blue Marmots responded to with compliance filings. Here, Mr. Macfarlane is testifying about his understanding of Commission orders that PGE was required to respond to with PGE compliance filings that are at the center of this complaint proceeding, and he is testifying to his understanding of how PGE's compliance filings were intended to function to comply with those orders. In this context, Mr. Macfarlane's testimony provides evidence of PGE's understanding and intent and is not merely an attempt to submit a legal conclusion.

For the reasons discussed above, the Commission should conclude that Mr. Macfarlane's testimony does not represent inadmissible legal conclusions.

4. Alternatively, the Commission should permit PGE to file supplemental or amended to testimony in response to the Defendants' objections.

In the alternative, if the ALJ or Commission concludes that some or all of the testimony moved against is objectionable because Mr. Macfarlane did not expressly state that he was providing "his understanding" of what an order requires or "his understanding" of how a provision in a PGE standard contract was intended to function, then PGE should be allowed to file supplemental or amended testimony of Robert Macfarlane so stating. The supplemental or amended testimony would clarify that Mr. Macfarlane's statements regarding the Commission's PURPA orders represent his understanding of those orders. The supplemental or amended testimony would further clarify that Mr. Macfarlane's statements regarding PGE's standard contract forms represent his understanding of how PGE intends those forms to function to comply with the requirements of the Commission's PURPA orders.

There would be good cause to grant leave for Mr. Macfarlane to file supplemental or amended testimony. Supplemental or amended testimony would clarify any confusion that may exist regarding the basis for Mr. Macfarlane's testimony about the Commission's PURPA orders and PGE's standard contract forms without adding new arguments. Mr. Macfarlane's supplemental or amended direct testimony would avoid confusion and would facilitate the expedited resolution of this case. However, PGE believes that supplemental or amended testimony is entirely unnecessary because Defendants' motion to strike should be denied for the reasons discussed above.

C. Bruce True's Testimony is Relevant, Admissible, and Does Not Contain Legal Conclusions

Defendant's have moved to strike four portions of Mr. True's testimony on the grounds that it allegedly "repeats the inadmissible legal conclusions of Mr. Macfarlane."[39] Defendants provide absolutely no discussion of the language moved against in the True testimony. Defendants' motion to strike the True testimony should be denied because Defendants have provided no discussion or argument to explain why the specific provisions of the True testimony moved against are allegedly inadmissible legal conclusions. In addition, to the extent Mr. True's testimony is repeating or referring to Mr. Macfarlane's testimony, Mr. True's testimony should not be stricken for the same reasons that Mr. Macfarlane's testimony should not be stricken.

IV. CONCLUSION

For the reasons discussed above, PGE respectfully request that the Commission deny Defendants' December 14, 2018 motion to strike portions of PGE's direct testimony and exhibits. In the alternative, if the Commission concludes that some of Mr.

[39] Defendant's Motion to Strike at 10.

Macfarlane's testimony should be stricken because Mr. Macfarlane did not expressly state that his testimony reflects his understanding of what the Commission's orders require or reflects his understanding of how PGE's standard contract forms are intended to function, then PGE respectfully requests leave to file supplemental or amended testimony of Robert Macfarlane to clarify this point.

DATED this 28th day of December, 2018.

Respectfully submitted,

/s/ David White
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