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February 13, 2019

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
PO Box 1088
Salem, Oregon 97308-1088

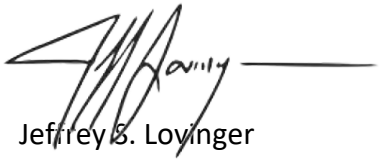
Re: UM 1931 - Portland General Electric Company v. Alfalfa Solar I LLC, et al.

Attention Filing Center:

Enclosed for filing in the above-named docket is Portland General Electric Company's Response to Defendants' Motion for Certification of Administrative Law Judge's Ruling Dated January 15, 2019.

Thank you for your assistance.

Very truly yours,



Jeffrey S. Lovinger

ALFA-PUC\835991

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

Portland General Electric Company ("PGE") respectfully requests that the Public Utility Commission of Oregon ("Commission") or its Administrative Law Judge ("ALJ") deny defendants' motion for certification of the ALJ's January 15, 2019 ruling.

I. BACKGROUND AND PROCEDURAL HISTORY

This case involves the parties' dispute over the correct interpretation of ten standard power purchase agreements that PGE and defendants executed in 2016 ("NewSun PPAs"). The dispute centers on whether those PPAs provide that PGE must pay fixed prices for defendants' net output for a 15-year period measured from the date of contract execution or from the commercial operation date ("COD"). The interpretation concerning those ten PPAs may also be relevant to the interpretation of approximately 52 other executed PPAs which have text similar to the text at issue in the NewSun PPAs.

On December 7, 2018, PGE filed the direct testimony and exhibits of three witnesses, including witness Ryin Khandoker.[1] On December 14, 2018, defendants filed a motion to strike portions of the testimony for all three witnesses, including all of Mr. Khandoker's testimony and

[1] *See* PGE/300 (Direct Testimony of Ryin Khandoker), PGE/301 (Tables Providing Economic Analysis).

the accompanying exhibit. Mr. Khandoker testifies to up to an estimated $200 million harm to customers if PGE had intended for the PPAs to mean 15 years of fixed prices from COD instead of from execution.[2] He testifies that the difference between those two dates would be between $44 million and $62 million for the 10 NewSun PPAs, and up to $200 million if that had been PGE's intent for all 62 PPAs with similar text.[3]

On January 15, 2019, ALJ Allan Arlow denied defendants' motion to strike. ALJ Arlow denied the motion "because the states of mind of those entering into the PPAs are central to the disposition of this case, [thus] any testimony and exhibits that might tend, however lightly, to illuminate the parties' individuals' states of mind should be considered and weighed according to their probative value—a value that could vary from trivial to dispositive."[4] Defendants' motion for certification, filed on January 30, 2019, asks ALJ Arlow to certify for the Commission's review the portion of the January 15, 2019 ruling that denied the motion to strike Mr. Khandoker's testimony.

II. LEGAL STANDARD

Defendants' motion requests certification pursuant to OAR 860-001-0110. Subsection (2) of the rule provides:

> (2) The ALJ must certify the ruling to the Commission under OAR 860-001-0110 if the ALJ finds that:
>
> (a) The ruling may result in substantial detriment to the public interest or undue prejudice to a party;
>
> (b) The ruling denies or terminates a person's participation; or
>
> (c) Good cause exists for certification.[5]

Defendants argue that certification is appropriate because of undue prejudice under (2)(a) and good cause under (2)(c).

[2] PGE/300, Khandoker/4.
[3] *Id.*
[4] ALJ Ruling at 5 (Jan. 15, 2019).
[5] OAR 860-001-0110(2).

III. ARGUMENT

A. The ALJ should deny the motion to certify because Defendants have failed to identify any undue prejudice.

Defendants are not entitled to certification of the January 15 ruling because they have failed to demonstrate undue prejudice in their motion for certification. "Undue prejudice" under OAR 860-001-0110(2)(a) means an unreasonable or unfair detriment to a party's rights.[6] Defendants have not demonstrated any unreasonable or unfair detriment to their substantive rights.

Defendants' motion for certification mentions their rights only once and, without support or argument, merely presumes that there is prejudice: "The admission of [Mr. Khandoker's] evidence is highly prejudicial to the [defendants'] rights to have the PPAs interpreted in an objectively neutral manner under normally applicable rules of contract interpretation."[7] Instead of focusing on their rights and explaining the prejudice they believe will harm those rights, defendants' argument assumes the Commission is transformed into a subjectively biased decisionmaker operating outside the law merely because Mr. Khandoker's evidence is in the record. As illustrated by ALJ Arlow's careful ruling that "narrow[ed] the relevant issues in this proceeding" to "the states of mind of those entering the PPAs",[8] the Commission is fully capable of evaluating Mr. Khandoker's evidence within the confines of the claims and facts at issue between the parties under the applicable law. Simply put, ALJ Arlow's January 15 ruling has already signaled the narrow purposes for which Mr. Khandoker's evidence may be relevant and probative,[9] and the presence of that evidence in the record does not cause the Commission to abandon the lawful process for considering evidence appropriately. Defendants' assertions to the contrary misconstrue ALJ Arlow's ruling, ignore the legal safeguards in place, and imply the

[6] *See, e.g., Blue Marmot V LLC, et al. v. Portland Gen. Elec. Co.*, Docket No. UM 1829, ALJ Ruling at 3 (Apr. 27, 2018) (denying motion for certification of ruling denying motion to strike testimony because the admission of testimony was not "prejudicial to the rights of the complainants"); *Re Rates for Motor Carriers*, 1961 WL 117263, 39 P.U.R.3d 167 (Or. P.U.C. Apr. 20, 1961) (holding that movant failed to establish undue prejudice where ratemaking was "just, reasonable, and fair").
[7] Defendants' Motion for Certification at 2 (Jan. 30, 2019) (hereafter "Motion for Certification").
[8] ALJ Ruling at 5.
[9] *Id.*

Commission will not follow the law.

Defendants' motion for certification includes only one paragraph directly addressing defendants' undue prejudice argument.[10] Defendants argue that "undue prejudice arises" for three reasons: 1) Mr. Khandoker's evidence is irrelevant and inadmissible; 2) "federal and state law affirmatively bar the Commission" from relying on Mr. Khandoker's evidence; and 3) the Commission will "apply an erroneous legal analysis" due to reviewing and considering the evidence.[11] Each of those unsupported presumptions is wrong.

First, Mr. Khandoker's testimony is relevant and admissible. ALJ Arlow has already concluded that because the contract provision at issue is ambiguous, the contracting parties' "states of mind . . . are central to the disposition of the case," and Mr. Khandoker's testimony should be considered and weighed according to its value to "illuminate the parties' . . . states of mind" when contracting.[12] Additionally, ALJ Arlow concluded that defendants' answer to the complaint put the magnitude of the contract dispute at issue.[13] Accordingly, under the broad and lenient rules of evidence applicable to Commission proceedings,[14] ALJ Arlow denied the motion to strike because Mr. Khandoker's testimony was relevant and admissible.

Second, the Commission is not barred by federal or state law from relying on Mr. Khandoker's evidence. ALJ Arlow articulated how Mr. Khandoker's evidence is proper and relevant to certain contested issues in this case, and defendants have not and cannot point to anything in ALJ Arlow's ruling as a violation of federal or state law. Instead, defendants contend that Mr. Khandoker's testimony is ratemaking testimony, ignoring that ALJ Arlow already confined the issues to which the testimony can be used. Simply put, no law bars Mr. Khandoker's testimony from being in the record, and defendants' argument based on its unfounded fear that the Commission will engage in ratemaking must be rejected. The Commission is aware that it may not modify the prices fixed in a fully executed and effective

[10] *See* Motion for Certification at 7.
[11] *Id*.
[12] ALJ Ruling at 5.
[13] *Id*.
[14] *See* OAR 860-001-0450.

PURPA contract;[15] there is no reason to conclude that the Commission will attempt to do so in this case, with or without the Khandoker testimony in evidence.

Third, the Commission will not automatically apply an erroneous legal analysis simply because the Commission reviews Mr. Khandoker's testimony. The presumption is that the Commission will abide by the law, not undermine it.[16] Because defendants merely assume that the Commission will err in the future, there is nothing in the record to indicate ALJ Arlow or the Commission have violated or will violate the law or their duties. The Commission is fully capable of considering evidence only for the purposes for which it is relevant and admissible. Defendants' argument is based on a presumption that the Commission cannot properly review evidence and will disobey the law; hence, the argument is without support and must be rejected.

Defendants' undue prejudice argument fails because it does not identify any actual prejudice from the presence of Mr. Khandoker's testimony in the record. Defendants' assumptions that the Commission will use the evidence for improper purpose are unfounded and contrary to the law. Accordingly, the motion for certification should be denied.

B. Defendants have failed to demonstrate good cause exists for certification.

Defendants also argue that good cause exists to certify the January 15 ruling for Commission review, but defendants' motion fails to demonstrate good cause. Defendants argue that good cause exists: 1) for the same reasons they articulated in the undue prejudice discussion; 2) because the January 15 ruling was clear legal error; and 3) because the issue of admitting Mr. Khandoker's testimony is so important and immediate that the Commission itself must address it now.[17] PGE will address each of these arguments in turn.

First, insofar as defendants' good cause argument overlaps with its undue prejudice

[15] *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.").

[16] *See, e.g.*, ORS 40.135(1)(x) (Oregon evidentiary presumption that "[t]he law has been obeyed"); ORS 40.135 (1)(j) (Oregon evidentiary presumption that an "official duty has been [] performed"); *State Highway Comm'n v. R. A. Heintz Const. Co.*, 245 Or. 530, 539 (1967) (presumption that an official duty has been performed); *State ex rel. Livingstone v. Williams*, 45 Or. 314, 329-30 (1904) (municipal judge is presumed to have "regularly performed" her "official duty" in the "absence of any averment to the contrary").

[17] Motion for Certification at 7.

argument, PGE incorporates its own argument, stated above, concerning undue prejudice. Whether defendants' argument is characterized as unfair prejudice or good cause is immaterial: defendants' reasoning is ultimately flawed because defendants unjustifiably assume the Commission will use Mr. Khandoker's testimony inappropriately. This assumption is without merit and contrary to law, and defendants' argument therefore fails.

Second, ALJ Arlow's January 15 ruling was correct, and given the lenient rule for admissibility before the Commission, it was certainly not clear legal error. The January 15 ruling correctly stated the applicable law:

> OAR 860-001-0450 provides the primary legal standard for the admission of evidence in proceedings before the Commission and is broader and more lenient than the rules of evidence used in Oregon courts. 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.[18]

The ALJ's ruling correctly applied that law. First, it narrowed the use of the evidence to the state of mind of those preparing and negotiating the contract.[19] That is consistent with PGE's intended use. As PGE stated in its opposition to the motion to strike:

> [T]he magnitude of the harm to PGE's customers is relevant to showing whether it is 'reasonable' to assume that PGE would have drafted a PPA that implicitly set the 15-year period at contract execution . . . . 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 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).[20]

Mr. Khandoker testifies to an estimated harm to customers of up to $200 million if PGE intended for the PPAs to mean fixed prices for 15 years from COD instead of from contract execution.

[18] ALJ Ruling at 4.
[19] *Id.* at 5.
[20] PGE's Response Opposing Defendants' Motion to Strike at 8-9 (Dec. 28, 2018).

This is exactly the type of evidence "commonly relied upon by reasonably prudent persons in the conduct of their serious affairs,"[21] and hence it is admissible.

Third, and finally, the inclusion of Mr. Khandoker's testimony is not "of sufficient significance" that it must be answered by the Commission at this time. Defendants misconstrue the purpose of the testimony when they claim that the Commission will "[rely] on this type of ratepayer-impact evidence for the purpose of interpreting the meaning of long-term fixed-price PURPA contracts," and this will send a "signal to existing and prospective [Qualifying Facilities] that the [Commission]… is willing to consider" this evidence in violation of state and federal law.[22] Again, ALJ Arlow carefully articulated that Mr. Khandoker's testimony is relevant to the parties' states of mind when contracting and the magnitude of the contract dispute.[23] ALJ Arlow's ruling cannot be construed as broadly as defendants attempt to construe it. Additionally, the Commission itself will have the opportunity to consider and weigh Mr. Khandoker's evidence when it rules on the pending dispositive motions in this case. Certifying the question at this point would further delay decisions on those dispositive motions, and the Commission's rulings on the dispositive motions could make defendants' concerns in their motion for certification moot (*e.g.*, the Commission grants a dispositive motion without relying on Mr. Khandoker's evidence inappropriately, or without relying on the Khandoker testimony at all). Accordingly, defendants' motion has failed to articulate any good cause to certify the ALJ's January 15 ruling.

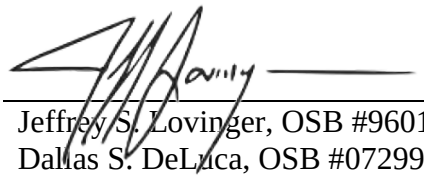
IV. CONCLUSION

Defendants have failed to articulate any undue prejudice or good cause that merits OAR 860-001-0110 certification of the ALJ's January 15, 2019 ruling denying defendants' motion to strike the testimony and exhibit of Mr. Khandoker. Accordingly, the ALJ should deny the motion for certification.

[21] ALJ Ruling at 4.
[22] Motion for Certification at 7.
[23] ALJ Ruling at 5.

DATED this 13th day of February, 2019.

Respectfully submitted,



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