BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. ALFALFA SOLAR I LLC, et al. Defendants.	)	**DEFENDANTS' MOTION FOR CERTIFICATION OF ADMINISTRATIVE LAW JUDGE'S RULING DATED JANUARY 15, 2019**

INTRODUCTION AND SUMMARY

Pursuant to OAR 860-001-0110, 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 request certification of the Ruling issued by Administrative Law Judge ("ALJ") Allan J. Arlow on January 15, 2019 (the "Ruling"). Specifically, the NewSun Parties request that the ALJ certify the portions of the ruling denying the NewSun Parties' motion to strike the testimony and exhibit of Ryin Khandoker filed by Complainant Portland General Electric Company ("PGE") on December 7, 2018 (PGE/300-PGE/301). At issue in this proceeding is the interpretation of fully executed agreements. Mr. Khandoker's testimony and exhibit focus solely on a theoretical financial impact depending on which interpretation the Commission adopts. Yet the fiscal impact of the Commission's decision is entirely irrelevant as to meaning of the parties' agreements.

For the reasons set forth herein, ALJ Allan Arlow should certify the Ruling for consideration by the Commissioners, who should strike the Khandoker testimony and exhibit from the record.[1] The points and arguments supporting this motion are further set forth in the NewSun Parties' motion to strike filed on December 14, 2018, and the NewSun Parties' reply in support of the motion to strike filed on January 4, 2019. The Khandoker evidence pertains entirely to the financial impact on PGE and its ratepayers if the Commission decides that PGE must pay the NewSun Parties the fixed prices in their power purchase agreements ("PPAs") for fifteen years after the Commercial Operation Date as opposed to fifteen years after execution of the agreements. It is the quintessential ratepayer-impact evidence that federal and state law expressly bar the Commission from relying upon in its interpretation of the NewSun PPAs. PGE has identified no relevant purpose for the testimony and the testimony has no bearing whatsoever on the legal interpretation of the PPAs. Simply put, PGE submitted the evidence to exert improper influence on the Commission and skew the contractual analysis in its favor to reach a preferred result. The testimony is little more than a thinly veiled attempt to improperly bias the Commission against the NewSun Parties. The Khandoker testimony and exhibit have no relevance as to the actual dispute before the Commission.

The admission of this evidence is highly prejudicial to the NewSun Parties' rights to have the PPAs interpreted in an objectively neutral manner under normally applicable rules of contract interpretation, and the evidence should therefore be stricken.

[1]Although the NewSun Parties disagree with the denial of the NewSun Parties' request to strike portions of Robert Macfarlane's opening testimony, the NewSun Parties limit this motion for certification to the portion of the Ruling that denied the motion to strike the Khandoker testimony.

LEGAL STANDARD

The Commission's administrative rules provide that "[a] party may request that the ALJ certify an ALJ's written or oral ruling for the Commission's consideration." OAR 860-001-0110(1). The rules further provide that:

"The ALJ must certify the ruling to the Commission under OAR 860-001-0090 if the ALJ finds that:

"(a) The ruling may result in a 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."

OAR 860-001-0110(2).

ARGUMENT

This dispute is a declaratory judgment action regarding the disputed meaning of fully executed contracts. Specifically, the parties dispute *when* the fifteen-year fixed-price period must commence under the PPAs. The resulting cost of one interpretation or the other to PGE is not relevant whatsoever.

The purpose of testimony is to provide relevant evidence, which is defined as "evidence tending to make the existence of a *fact at issue* in the proceedings more or less probable than it would be without the evidence." OAR 860-001-0450(1)(a) (emphasis added). *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 P3d 1152 (upholding Commission's exclusion of irrelevant evidence), *review denied*, 293 Or 190 (1982). When a proceeding will be resolved on summary

judgment, inadmissible evidence should be stricken from the record. *East County Recycling, Inc. v. Pneumatic Const., Inc.*, 214 Or App 573, 580-584, 167 P3d 464 (2007).

Under Oregon law, in interpreting a contract, a judge first looks to the text and context of the disputed terms. If the meaning of the disputed terms is clear from the text and context, the inquiry ends. *Yogman v. Parrott*, 325 Or 358, 361, 937 P3d 1019 (1997). If the meaning of the disputed terms is not clear from text and context, then the judge may look to extrinsic evidence that may explain a legitimate ambiguity. *Yogman*, 225 Or at 363-364. If text, context and extrinsic evidence do not resolve the ambiguity, then the reviewing judge may consider maxims of construction. *Id.* at 364. The Commission itself recently resolved a Public Utilities Regulatory Policies Act of 1978 (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).

At issue in this case and on the parties' cross-motions for summary judgment is when the applicable fifteen-year payment period under the PPAs commences. Whether a specific outcome will financially benefit one party or the other is neither relevant nor material to the interpretation of the PPAs under the applicable *Yogman* analysis. Moreover, ratemaking considerations are immaterial here. The Ninth Circuit has held that a contract may not be re-interpreted based on issues of financial impact. *Independent Energy Producers Assoc., Inc. v. California Public Utilities Com'n*, 36 F3d 848, 857-58 (9th Cir 1994). The impact on PGE and its ratepayers simply is not a permissible basis to motivate the Commission in deciding this case. *Id.* Under PURPA, once rates are set in an executed contract, the contract's interpretation is governed by

contract law, not the financial impact to the purchasing utility. *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F3d 129, 139 (3rd Cir 1988).

The ALJ's Ruling acknowledges that *Yogman* controls the analysis of the PPAs at issue. Ruling at 5. Yet, the Ruling identifies no basis for the relevance of Khandoker's economic-impact evidence to the meaning of the NewSun PPAs. The Ruling suggests that the Khandoker testimony and exhibit could be relevant extrinsic evidence, "however lightly," as reflecting on "the states of minds of those entering into the PPAs[,]" even though the Ruling recognizes that the economic forecasts made by Khandoker are not based on economic conditions at the time of contracting. Ruling at 5. The Ruling reached this conclusion because "PGE's initial complaint alleged the *current* magnitude of the impact of the interpretation of the NewSun QF standard PPAs upon its costs recoverable in rates from customers" and NewSun answered that allegation rather than moving to strike it. *Id.* The Ruling then states:

> "Due to NewSun QFs' decision to answer the allegation rather than move to strike it as irrelevant, the magnitude of anticipated harm became a disputed fact and thus properly subject to the submission of testimony. Accordingly, PGE/300-301, Khandoker is not stricken from the record."

Id.

Respectfully, the Ruling misconstrues the record and is inconsistent with applicable law. After PGE filed its complaint, the NewSun Parties moved to dismiss this matter. *See Motion to Dismiss*, Docket No. UM 1931 (Feb. 28, 2018). In so doing, the NewSun Parties effectively moved against *all* the allegations in the complaint. Indeed, the NewSun Parties *specially* moved to dismiss on the ground that this Commission is preempted from applying its general ratemaking standards to its interpretation of the NewSun PPAs. *See id.* at 15, 20. The NewSun Parties answered the allegations in the complaint only after the Commission denied the NewSun Parties' motion. *See* Order No. 18-174 (May 23, 2018). And in doing so, the NewSun Parties

raised preemption under PURPA as an affirmative defense. *Answer*, Docket No. UM 1931 at ¶ 28 (June 6, 2018) (stating, "[t]he Oregon statutes and administrative rules under which the Commission is acting are preempted by federal law"). The NewSun Parties cannot properly be faulted for responding to allegations the ALJ effectively required them to address while preserving their objections thereto.[2]

Moreover, the NewSun Parties' acknowledgement of PGE's extraneous allegation in their Answer does not make financial magnitude a *relevant* disputed fact. Pleadings can, and often do, contain allegations that are not material to the underling legal issues presented in a case. The issue is whether the "disputed fact" from the pleadings is relevant to the contract interpretation issues presented in this case. As the United States Supreme Court explained over three decades ago: "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 248, 106 S Ct 2505, 2510, 91 L Ed 2d 202 (1986). *See also Hubbard v. Olsen-Roe Transfer Co.*, 110 Or 618, 629, 224 P 636, 640 (1924) ("[i]rrelevant matter does not affect the subject–matter of the controversy so as to assist the trial of a cause"). Here, the financial-impact information PGE seeks to present through the Khandoker testimony simply is not type of evidence that may be considered in this dispute. It is categorically irrelevant to this dispute and

[2]The parties agree that the Commission's decision will have a financial impact. The NewSun Parties admitted that "the difference in the amount PGE will pay for power delivered by the NewSun Parties likely will differ by millions of dollars depending on whether the 15-year fixed-price period in the NewSun PPAs is measured from the date of contract execution or the Commercial Operation Date." *Answer*, ¶ 18. Accordingly, beyond financial magnitude being irrelevant to the contract interpretation issues presented on summary judgment, there is no justification for admitting evidence on a non-disputed, and immaterial, point.

cannot properly be part of the summary judgment record. That testimony and exhibit should be stricken.

The ALJ's Ruling allowing admission and consideration of extrinsic evidence regarding the financial impact of the parties' competing interpretations of the PPAs would cause undue prejudice to the NewSun Parties and good cause exists for certification. Undue prejudice arises because the ALJ has agreed to the admission and consideration of irrelevant and inadmissible evidence, which federal and state law affirmatively bar the Commission from relying upon in reaching its decision in this proceeding. The AJL Ruling means that the ALJ and the Commissioners apparently will review and consider that evidence as part of this contractual dispute, and thereby apply an erroneous legal analysis to the prejudice of the NewSun Parties. There is no valid purpose for the evidence's existence in the record. Good cause exists for those reasons as well, and also because the Ruling was clear legal error.

At a bare minimum, the question of the admission of this evidence in this proceeding is of sufficient significance that it should be answered by the Commissioners. Reliance on this type of ratepayer-impact evidence for the purpose of interpreting the meaning of long-term fixed-price PURPA contracts is the type state utility commission action that consistently has been found to be preempted by PURPA. Indeed, inclusion of this type of evidence in the record sends the signal to existing and prospective QFs that the Public Utility Commission of Oregon is willing to consider rate-payer impacts in disputes of executed PURPA contracts even though federal and state law unequivocally bar such considerations to in order to provide investors the certainty necessary to invest in QF projects. Consideration of this type of evidence undermines the certainty needed in executed PURPA contracts in Oregon. If the Khandoker evidence will

remain in the record, the NewSun Parties submit that it is necessary for the Commissioners to address the issue.

CONCLUSION

For the reasons set forth above, the NewSun Parties respectfully request that the ALJ certify to the Commission that portion of the Ruling denying the NewSun Parties' motion to strike the Khandoker testimony and exhibit.

DATED this 30th day of January, 2019.

By: s/ *Steven C. Berman*

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