ISSUED: January 15, 2019

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1931

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, vs. 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, WASCO SOLAR I LLC, Defendants.	RULING

DISPOSITION: MOTION TO STRIKE DENIED

I. SUMMARY

In this ruling, I deny the motion to strike filed by 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 (defendants or NewSun QFs) against the direct testimony and exhibits submitted by Portland General Electric Company (PGE).

II. PROCEDURAL HISTORY

On August 23, 2018, I issued a ruling denying the defendants' motion for summary disposition. A revised procedural schedule for discovery and the submission of testimony was adopted by ruling of November 19, 2018, and pursuant to that schedule, on December 7, 2018, PGE filed direct testimony and exhibits of Robert Macfarlane (PGE/100-108, Macfarlane), Bruce True (PGE/200-215, True), and Ryin Khandoker (PGE/300-301, Khandoker). On December 14, 2018, NewSun QFs filed a motion to strike PGE/300-301 in its entirety and portions of PGE/100 and PGE/200 that include or

refer to "inadmissible legal conclusions and interpretations of law."[1] PGE filed its response opposing the motion to strike on December 28, 2018. On January 4, 2019, NewSun QFs filed a reply in support of their motion to strike testimony and exhibits.

III. DISCUSSION

A. Positions of the Parties

NewSun QFs cite their opposition to PGE testimony as either being irrelevant, as with the Khandoker testimony, or impermissibly addresses questions of law, as with the Macfarlane and True testimony.

They first state that the scope of the action is narrow: "a declaratory judgment action regarding the meaning of disputed terms of fully executed contracts."[2] They charge that the Khandoker testimony is not relevant and exists only to make an inadmissible appeal regarding the financial harm to PGE if NewSun QFs prevail. The testimony should therefore be stricken in NewSun QFs' view. They further argue that federal and state law bar the Commission from considering the impact on PGE's rates in reaching its decision in this case, stating that it is necessary to protect qualifying facilities from the re-opening of the contract rates and to avoid subjecting QFs or their PPAs to ongoing ratemaking considerations, which would undermine the financial viability of qualifying facilities. The Commission is to engage in contract interpretation, not ratemaking and must include only evidence relevant to that work.

NewSun QFs state, with respect to the Macfarlane testimony, that it is well-settled that testimony regarding legal conclusions is inadmissible, especially when the witness is not an attorney. NewSun QFs also ask that portions of the True testimony (PGE/200) be stricken to the extent that they repeat Mr. Macfarlane's inadmissible legal conclusions.

In response, PGE states that the proffered testimony and exhibits "are intended to provide evidence of the context underlying the formation of the NewSun QF PPAs. The Macfarlane testimony provides evidence of the regulatory history or regulatory context underlying the NewSun QF PPAs. The True testimony provides evidence of the parties' states of mind regarding the 15-year fixed-price issue before they executed the contracts."[3]

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[1]Defendants' Motion to Strike at 7 (Dec 14, 2018).
[2]*Id.* at 3.
[3] PGE Response at 2 (Dec 28, 2018).

With respect to the Khandoker testimony, PGE provides three reasons to permit its inclusion in the record on grounds of relevancy. First, PGE notes that its original complaint addresses the question of the magnitude of harm, which NewSun QFs did not move to strike as outside of the scope of the proceeding and that, under ORCP 21E, it is now too late to do so. PGE further notes that NewSun QFs' response itself addressed the magnitude of the dollar amounts in question.[4] PGE next asserts that the magnitude is relevant to demonstrate as to whether it is reasonable to assume that PGE would have drafted a PPA that implicitly set the 15-year period at contract execution. Thirdly, PGE states that it intends to argue that some of the express language from the original 2007 contract forms was deleted as part of an irrelevant revision to the contracts in response to an unrelated order. The Khandoker testimony, in PGE's view, serves to demonstrate that PGE would not have implicitly changed its approach to the 15-year period of fixed prices, but would have done so explicitly, as ordered by the Commission in docket UM 1805. PGE states that, contrary to NewSun QFs' assertion, the Khandoker testimony does not improperly seek to modify the contracts. Rather, the Commission should consider the Khandoker testimony as a relevant aspect of the interpretation of the NewSun PPAs.[5]

PGE asserts that the Macfarlane testimony is relevant and admissible because it provides detailed evidence of the regulatory process underlying the standard contract forms and that the history and context of these forms—which are not common law contracts but arise out of regulatory processes—will be critical to the interpretation of the NewSun QF PPAs. According, PGE argues that the contracts should be interpreted as administratively required documents rather than as common law contracts. While PGE notes that the administrative law judge has stated that the state of the parties' minds must be examined, "[t]he Commission has not yet made a definitive determination as to which interpretive standard governs review of which aspects of the NewSun PPAs."[6] In any event, PGE states, the Macfarlane regulatory history testimony is relevant to the interpretation of the agreements.

Next, PGE contends that NewSun QFs have failed to identify or provide discussion of any specific language they find objectionable, quoting only sentence fragments. PGE cites precedent indicating that NewSun QFs must articulate the specific basis for their motion, rather than a generalized objection, especially in light of PGE's assertion that the testimony to be stricken "consists largely of accurate paraphrases and quotations from Commission orders and from standard contract forms,"[7] thus depriving PGE the opportunity to directly address allegedly improper statements.

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[4] *Id.* at 8, citing New Sun QFs' Answer at ¶18.
[5] *Id.* at 11.
[6] *Id.* at 13.
[7] *Id.* at 14.

Finally, PGE contends that the Macfarlane testimony does not consist of legal conclusions because he expressly states that he speaks of "his understanding" of what the commission orders require, rather than as the correctness of the assertions themselves. Similarly, PGE states that the testimony of Bruce True is admissible, as New Sun QFs have provided no discussion of any of the language in the True testimony.[8]

In reply, NewSun QFs reassert their contention that the Khandoker testimony is improper and irrelevant, while acknowledging that "the Commission's interpretation of the PPAs will have a significant financial impact upon the parties."[9] Defendants state that the testimony "provides no insights into the drafting history of the PPAs" or that Khandoker had any involvement in the PPA development process in docket UM 1610. NewSun QFs also note that the financial impact data relates to late 2018 and not to the time of contracting or when the PPA standard form was developed. They assert that the testimony was not offered in support of expedited action or oral argument but rather to influence the decision on the merits; neither does it purport to provide an accurate assessment of the differing impact of the parties' interpretation of the PPA contracts on their merits.

Next, NewSun QFs contend that, with respect to the Macfarlane testimony and True testimony, that they did indeed respond with particularity, citing Exhibit A to their motion to strike; a line-by-line exhibit of each instance would be, in defendants' view, unnecessarily long and repetitive and a burden upon the Commission. They do not wish to strike regulatory historical facts, but object to legal speculation.

B. Discussion and Resolution

1. 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."[10]

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[8] *Id.* at 17-8. PGE also asks that, in the allegedly improper and unlikely event, we permit NewSun QFs to make specific citations in its responsive pleading, that PGE be permitted to respond with particularity in kind.

[9] Defendants' Reply at 2 (Jan 4, 2018).

[10] OAR 860-001-0450(1)(a) and (b).

2. Resolution

For the reasons set forth below, the motion to strike is denied.

In my ruling of August 23, 2018, in this docket denying NewSun QFs' motion for summary disposition, I stated that the Commission intends to address *de novo* what the respective NewSun QF contracts meant. In discussing an analysis under the *Yogman*[11] standard, I cited the following text from that opinion:

> Because the contractual provision at issue is ambiguous, we proceed to the second of the three analytical steps that the court follows in interpreting contracts. *That step is to examine extrinsic evidence of the contracting parties' intent.*
>
> > If a contract is ambiguous, the trier of fact will ascertain the intent of the parties and construe the contract consistent with the intent of the parties. Words or terms of a contract are ambiguous when they reasonably can, in context, be given more than one meaning. (emphasis added).[12]

Thus, because the states of mind of those entering into the PPAs are central to the disposition of this case, 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.

The aforementioned ruling thus narrows the relevant issues in this proceeding. 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. NewSun QFs answered the PGE complaint in kind with a comment on its *present* estimate, [13] rather than moving to strike the allegation as outside the scope of this proceeding.

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.

NewSun QFs' motion to strike PGE/100 on the grounds that Mr. Macfarlane, as a non-attorney provides inadmissible legal conclusions and interpretations of law, is denied.

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[11] *Yogman v. Parrot,* 325 Or 358, (1997).
[12] *Id.* citing *Pacific First Bank v. New Morgan Park Corp.,* 319 Or. 342, 347-48 (1994).
[13] *See* Defendants' Answer and Affirmative Defenses at 9, ¶18 (Jun 6, 2016).

The motion to strike all references in Mr. True's testimony to Mr. Macfarlane's testimony is also denied.

At PGE/100, Macfarlane/30-31, the witness states that he wrote the language regarding the Renewable Fixed Price Option in Schedule 201 and testifies as to his intentions in doing so and to his extensive participation in PGE's internal processes leading to the development of the standard PPA pursuant to PGE's understanding of Commission regulations, orders and policies. While not an attorney, his understanding as to the regulations and case law surrounding the development and drafting of the standard contract PPAs and their relationship to Schedule 201, is admissible under the standard that I previously provided in my ruling in the *Blue Marmot* proceeding:

> In examining each of the sections of testimony [the movant] seeks to strike, it is important to distinguish between the witness' understanding of the law and the witness' interpretation and application of the law to the facts purported to being offered in testimony. The former relates to the witness' state of mind in developing testimony (which may have some limited evidentiary value and be admissible in an administrative proceeding), while the latter would constitute legal analysis or argument and be inadmissible. [14]

As someone who drafted relevant language and was intimately involved with the contract drafting and related regulatory processes, Mr. Macfarlane's state of mind and his understanding of the environment in which he performed his tasks and engaged in interactions with fellow employees as the language evolved are relevant to this proceeding. Consequently, I conclude that his testimony, along with Mr. True's references to it, are admissible.

Dated this 15th day of January, 2019, at Salem, Oregon.

Allan J. Arlow
Administrative Law Judge

[14] *Blue Marmot V LLC, Blue Marmot VI LLC, Blue Marmot VII LLC, Blue Marmot VIII LLC, Blue Marmot IX LLC v. Portland General Electric Company*, Docket Nos. UM 1829-1833, Ruling at 3 (Dec 13, 2017).