

**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 FOR CERTIFICATION OF RULING DENIED

I. SUMMARY

In this ruling, I deny the Defendants' Motion for Certification of my ruling dated January 15, 2019, filed on behalf of 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).

II. PROCEDURAL HISTORY

On December 7, 2018, Portland General Electric Company (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 QF's filed a motion to strike PGE/300-301 (the Khandoker testimony) in its entirety and portions of PGE/100 and PGE/200. 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.

By ruling of January 15, 2019, I denied the defendants' motion to strike. On January 30, 2019, defendants filed the instant motion to certify my ruling to the Commission for its review, solely with respect to the Khandoker testimony. On February 13, 2019, PGE filed a response, and defendants filed a reply in support of the motion for certification on February 20, 2019.

III. APPLICABLE LAW

860-001-0110 provides, as follows:

Appeal to the Commission from Ruling of Administrative Law Judge

(1) A party may request that the ALJ certify an ALJ's written or oral ruling for the Commission's consideration. A party must request certification of a ruling within 15 days of the date of service of the ruling or date of the oral ruling.

(2) 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 substantial detriment to the public interest or undue prejudice *to a party*; (emphasis added)

(b) The ruling denies or terminates a person's participation; or

(c) Good cause exists for certification.

OAR 860-001-0450 provides, in pertinent part, as follows:

Evidence

(1) Relevant evidence:

* * * * *

(c) May be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.

IV. IV. DISCUSSION

New Sun QF's motion for certification addresses two separate issues with respect to the Khandoker testimony. They assert that testimony on financial impact or ratepayer harm is both (1) irrelevant and (2) prejudicial. Below, I review and resolve each issue separately.

A. The Relevance of the Khandoker Testimony

With respect to relevance, defendants argue that the testimony is irrelevant to the meaning of the NewSun power purchase agreements (PPAs), the issue upon which this dispute turns and that the financial impact is unrelated to the narrower issue of the negotiating parties' respective states of mind. PGE asserts that the January 15, 2019 ruling correctly applied OAR 860-001-0450 in a lenient application of admissibility and its emphasis on the state of mind of the parties negotiating the contract.¹ PGE notes that I had "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."²

Analysis and Resolution

Certification of my ruling with respect to relevance is denied. In my ruling of August 23, 2018, I found that the defendants' choice to make a substantive response--rather than moving to strike the allegation of financial impact--had placed the question in issue. I noted that as "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."³ I ruled that the testimony was relevant, even as I had generally narrowed the relevant issues in these proceedings. An administrative law judge is obliged to provide the Commissioners with as complete a record as necessary for their full and fair consideration of a case, subject to the constraints mandated by our rules.

B. The Prejudicial Impact of the Khandoker Testimony

Defendants argue that the Khandoker testimony is intended to cause undue prejudice and that PGE may succeed in that effort. The standard for review, defendants state, is that the ruling, under OAR 860-001-0110(2)(a), "*may* result in undue . . . prejudice to a party."⁴ On the matter of prejudice, PGE argues that the defendants misapply OAR 860-001-0110(2)(a):

¹ PGE Response to Defendants' Motion for Certification at 6 (Feb 13, 2019).

² *Id.* at 4 and citations therein.

³ ALJ Ruling on Motion to Strike at 5 (Jan 15, 2019).

⁴ NewSun Reply at 4, emphasis in text (Feb 20, 2019).

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.⁵

Analysis and Resolution

Certification of my ruling with respect to prejudice is denied. "Prejudice" under both the Commission's Rules and the Oregon Rules of Civil Procedure (ORCP) encompasses two distinctly different types of circumstances: "Prejudice" to a *party* is essentially an unfair deprivation of procedural rights and the ability to fully and fairly present its case; "prejudice" as to *evidence* is an unfair distortion of the deliberative process for the trier of fact. With respect to prejudice, the parties have only addressed the rules relative to the former quality in their pleadings. NewSun QFs, in both their motion for certification and reply in support of motion for certification, refer only to OAR 860-001-0110(2) with respect to prejudice to a party.

Neither the defendants nor PGE directly address OAR 860-001-0450(1)(c), the subsection which provides that relevant evidence "may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay." OAR 860-001-0450(1)(c) is the rule which is properly applied in this case.

Commissioners are unlike lay juries, who come to a case with a knowledge of neither the regulatory environment nor law, nor policy. Rather, commissioners have acknowledged expertise, experience, and a commitment to appropriately apply relevant statutes and rules, and are supported by a staff of subject matter experts. They have been vested with broad powers, including acting as the triers of fact, as well as officials charged with making conclusions of law, and the development of policy in all matters within their jurisdiction.⁶ Given this mandate, I find that the asserted danger of unfair prejudice in the conduct of their deliberations does not "substantially outweigh" the admission of relevant, probative evidence, and that undue prejudice will not occur as a result of my January 15, 2019 ruling.

⁵PGE Response to Defendants' Motion for Certification at 3 (Feb 13, 2019).

⁶See Oregon Revised Statutes §756.040 (2).

V. RULING

The Defendants' Motion for Certification of Administrative Law Judge's Ruling dated January 15, 2019, is denied.

Dated this 6th day of March, 2019, at Salem, Oregon.



Allan J. Arlow
Administrative Law Judge