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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

FRANKLIN ENERGY STORAGE ONE,
LLC, FRANKLIN ENERGY STORAGE
TWO, LLC, FRANKLIN ENERGY
STORAGE THREE, LLC, FRANKLIN
ENERGY STORAGE FOUR, LLC,

Plaintiffs,

vs.

PAUL KJELLANDER, KRISTINE RAPER
and ERIC ANDERSON, in their official
capacity as Commissioners of the IDAHO
PUBLIC UTILITIES COMMISSION,

Defendants,

and,

IDAHO POWER COMPANY,

Defendant-Intervenor.

Case No.: 1:18-cv-00236-REB

**DEFENDANT-INTERVENOR'S
MEMORANDUM IN SUPPORT OF ITS
MOTION TO STRIKE THE
DECLARATION OF ROBERT A. PAUL
IN SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT [DKT. 29-
3]**

**DEFENDANT-INTERVENOR'S MEMORANDUM IN SUPPORT OF ITS MOTION TO
STRIKE THE DECLARATION OF ROBERT A. PAUL IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT [DKT. 29-3]**

Defendant-Intervenor Idaho Power Company (“Idaho Power”), by and through its counsel of record, hereby submits this Memorandum in Support of its Motion to Strike the Declaration of Robert A. Paul in Support of Plaintiffs’ Motion for Summary Judgment [Dkt. 29-3].

I. BACKGROUND

On September 5, 2018, Plaintiffs filed their Motion for Summary Judgment and supporting documents, including the Declaration of Robert A. Paul. (See Dkts. 29, 29-1, 29-2, 29-3 and 29-4.) In his declaration, Mr. Paul gives his “estimates” on the costs associated with constructing Plaintiffs’ four battery storage facilities and his personal opinions on whether two year contracts with Idaho Power for those facilities would “defeat[] the articulated national policy to encourage alternative energy development,” would make obtaining financing for their construction difficult and would make their construction fiscally irresponsible. (See Dkt. 29-3.) Plaintiffs do not cite to or rely upon Mr. Paul’s declaration in their Brief in Support for Motion for Summary Judgment. (See Dkt. 29-1.)

II. ARGUMENT

A. Standard Applicable to Summary Judgment Motions and the Documents Submitted in Support Thereof

It is well-established that “[a] trial court can only consider admissible evidence in ruling on a motion for summary judgment.” *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). In line with this rule, any “affidavit or declaration used to support...a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4).

To be admissible, all of the following must be true: (1) the evidence must be relevant; (2) the evidence must not constitute inadmissible hearsay; (3) the witness offering the evidence must

DEFENDANT-INTERVENOR’S MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE THE DECLARATION OF ROBERT A. PAUL IN SUPPORT OF PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT [DKT. 29-3] - 1

be competent to testify as to the matters, meaning he or she, among other things, must have personal knowledge of the matters; and (4) a lay witness must not be providing improper opinion testimony. Fed. R. Evid. 401, 402, 601, 602, 701, 801, 802. With respect to relevance, evidence is relevant if it “has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” Fed. R. Evid. 401.

B. This Court Should Strike Mr. Paul’s Inadmissible Declaration

In his declaration, Mr. Paul discusses his history with solar energy projects and, based upon that history and experience, declares in pertinent part as follows:

6. I estimate the total cost to construct and bring to commercial operation for each project to be approximately \$47,000,000 (forty-seven million dollars). The grand total of the costs for all four projects combined will be approximately \$188,000,000 (one hundred and eighty-eight million dollars).

7. In my experience, expertise, and opinion, it would be fiscally irresponsible, and imprudent, to promote a project(s) of such magnitude under a contract to purchase the energy produced of only two year’s duration.

8. A contract of such short duration would make procurement of financing extremely difficult, if not impossible, to obtain. Such an impediment certainly defeats the articulated national policy to encourage alternative energy development.

(Dkt. 29-3, ¶¶ 6-8.)

These paragraphs, along with the remainder of Mr. Paul’s declaration, are inadmissible for various reasons. First, as confirmed by the fact that Plaintiffs did not cite to Mr. Paul’s declaration *anywhere* in its entire Brief in Support of Motion for Summary Judgment, the information contained in Mr. Paul’s declaration is irrelevant to the matters at issue in this case in general or in Plaintiffs’ motion in particular. As alleged by Plaintiffs in their operative Complaint, the issue is whether the Idaho Public Utilities Commission (“IPUC”), in ruling upon Idaho Power’s Petition

for Declaratory Relief as to the rates and contract terms Plaintiffs are eligible for under the IPUC's scheme for implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA"), improperly intruded upon the exclusive jurisdiction of the Federal Energy Regulatory Commission by determining Plaintiffs' Qualifying Facility ("QF") status. (*See* Dkt. 2; *see also* Dkt. 29, 29-1.) Nothing contained in Mr. Paul's declaration is even remotely relevant to evaluating whether the IPUC determined Plaintiffs' QF status and, as such, it is inadmissible.

Additionally, Mr. Paul's conclusion as to the estimated costs for constructing Plaintiffs' four battery storage facilities, without any factual support for that conclusion, and his personal opinions on (1) the fiscal irresponsibility of constructing such a project if Plaintiffs are only eligible for a two year PURPA contract with Idaho Power; (2) Plaintiffs' ability to procure financing for the project if the contracts are limited to two years; and (3) whether that impediment "defeats the articulated national policy to encourage alternative energy development" are all inadmissible for other reasons. For example, these statements constitute inadmissible hearsay and improper opinion testimony by a lay witness. Finally, Mr. Paul is not competent, nor does he have the requisite personal knowledge, to testify to these statements. As such, this Court should strike Mr. Paul's declaration in its entirety or, at the very least, should strike paragraphs 6 through 8 therein.

III. CONCLUSION

Based upon the foregoing, Idaho Power respectfully requests that this Court strike the Declaration of Robert A. Paul in its entirety. In the alternative, Idaho Power respectfully requests that this Court strike paragraphs 6 through 8 of that declaration.

DATED this 26th day of October, 2018.

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/s/ Steven B. Andersen
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Attorneys for Defendant-Intervenor Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2018, I caused a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following persons:

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