

October 14, 2004

VIA FACSIMILE AND OVERNIGHT DELIVERY

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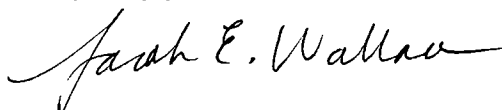
Re: UM 1121 – Applicants' Response to Motion to Strike of the Industrial Customers  
of Northwest Utilities

Dear Ms. Taylor:

Enclosed for filing in the above-referenced docket are the original and five copies of Applicants' Response to Motion to Strike of the Industrial Customers of Northwest Utilities.

Please contact me with any questions.

Very truly yours,



Sarah E. Wallace

Enclosures

cc: UM 1121 Service List

1 **BEFORE THE PUBLIC UTILITY COMMISSION**  
2 **OF OREGON**  
3 **UM 1121**

4  
5 In the Matter of

6 OREGON ELECTRIC UTILITY COMPANY, LLC,  
7 et al.,

8 Application for Authorization to Acquire Portland  
9 General Electric Company

**APPLICANTS' RESPONSE TO  
MOTION TO STRIKE OF THE  
INDUSTRIAL CUSTOMERS OF  
NORTHWEST UTILITIES**

10 Oregon Electric Utility Company, LLC, *et al.* ("Applicants") respectfully submit this  
11 response to the Motion to Strike of the Industrial Customers of Northwest Utilities ("ICNU")  
12 filed on October 12, 2004 ("ICNU Motion").

13 **INTRODUCTION**

14 ICNU moves to strike the testimony of Applicants' expert witness, Professor Daniel J.  
15 Bussel. According to ICNU, Professor Bussel's testimony "consists of legal argument and  
16 analysis of bankruptcy issues," and is therefore "not an appropriate subject for testimony" in this  
17 proceeding. *ICNU Motion at 1-2.*

18 ICNU's Motion should be denied. Professor Bussel's testimony is not "legal argument,"  
19 as ICNU contends, but rather admissible expert testimony that will assist the trier of fact in this  
20 proceeding. It is also admissible because ICNU itself opened the door regarding bankruptcy  
21 issues by submitting testimony of its own expert, John Antonuk, an attorney who offered his  
22 legal opinions regarding bankruptcy issues. Equity and fairness demand that Applicants have  
23 the opportunity to respond to Mr. Antonuk's otherwise un rebutted testimony.

1 **ARGUMENT**

2 **A. PROFESSOR BUSSEL’S TESTIMONY IS PERMISSIBLE OPINION**  
3 **TESTIMONY, NOT ARGUMENT, AND IT IS ADMISSIBLE**

4 Professor Bussel’s expert opinion testimony is admissible evidence under both the  
5 Commission’s own evidentiary rules and the rules of evidence used in state and federal court. It  
6 will assist the Commission in understanding a complex issue of mixed law and fact that ICNU  
7 raised in its testimony, namely, the alleged risk of “substantive consolidation”<sup>1</sup> if Oregon  
8 Electric Utility Company, LLC (“Oregon Electric”) is allowed to acquire Portland General  
9 Electric (“PGE”) on the proposed terms and, at sometime in the future, files for bankruptcy. *See*  
10 OEC 702, 1981 Conference Committee Commentary (“There is no more certain test for  
11 determining when experts may be used than the common sense inquiry whether the [trier of fact]  
12 would be qualified to determine intelligently and to the best possible degree the particular issue  
13 without enlightenment from those having a specialized understanding of the subject involved in  
14 the dispute.’ [Citations omitted.]”).

15 **1. *Professor Bussel’s Testimony Is of a Type Commonly Relied Upon by***  
16 ***Reasonably Prudent Persons in the Conduct of Their Serious Affairs.***

17 In a contested case proceeding, the Administrative Law Judge (“ALJ”) has broad  
18 discretion to admit relevant evidence.<sup>2</sup> *See Bonneville Automobile Ins. Co. v. Ins. Division,*  
19 *Dep’t of Commerce*, 53 Or. App. 440, 449 (1981) (relevant evidence “may be received despite  
20 the fact that no showing is made to satisfy [the Oregon Evidence Code] criteria . . . required for  
21 admission of the same document in court”). Such evidence is admissible if it is “of a type  
22  
23

24 <sup>1</sup> As noted in text, *infra*, John Antonuk introduces opinion testimony regarding the risk that Oregon  
25 Electric’s creditors will “pierce the corporate veil,” which is a legal concept used to establish liability. ICNU/400,  
Antonuk-Vickroy/3. The proper term for this legal concept in the bankruptcy context is “substantive consolidation.”

26 <sup>2</sup> ICNU does not challenge the relevancy of Professor Bussel’s testimony.

1 commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.”

2 ORS 183.450; OAR 860-014-0045(1)(b).

3 In its motion, ICNU fails to address this evidentiary standard. Instead, it notes that ALJ  
4 Logan has admonished the parties for submitting testimony that does not rise to the level of  
5 evidence, and asserts, in conclusory fashion, that “Professor Bussel’s testimony consists entirely  
6 of legal argument.”<sup>3</sup> *ICNU Motion at 2*. In fact, Professor Bussel’s testimony is not “argument,”  
7 but permissible expert opinion by an undisputed bankruptcy expert based on facts at issue in this  
8 proceeding and supported by a thoughtful explanation of the basis for his conclusions. Further,  
9 Professor Bussel’s testimony is not a “legal memorandum,” but an opinion based in large part on  
10 his experience and judgment “developed over the years as a practitioner, scholar, and professor  
11 of bankruptcy law.” *Oregon Electric/800, Bussel/5*.

12 Applicants submit that rebuttal testimony given by a distinguished professor of  
13 bankruptcy law at the University of California at Los Angeles is evidence “of a type commonly  
14 relied upon by reasonably prudent persons in the conduct of their serious affairs.” OAR 860-14-  
15 0045(1)(b). ICNU does not contend otherwise.

16 **2. Professor Bussel’s Testimony Is Admissible Under the Oregon Evidence**  
17 **Code and the Federal Rules of Evidence**

18 Although the Commission follows the evidentiary standard of admissibility set out above,  
19 *see Bonneville Automobile Ins. Co.*, 53 Or. App. at 449, it is noteworthy that opinion testimony  
20 of the kind offered by Professor Bussel would be admissible under Rule 702 of the Oregon  
21 Evidence Code (“OEC”) and the Federal Rules of Evidence (“FRE”). *See, e.g., United States v.*  
22 *Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) (permitting professor of law to give an opinion  
23 embodying legal conclusions that did not invade the court’s authority to instruct jury on  
24 applicable law).

25  
26 <sup>3</sup> Applicants are cognizant of ALJ Logan’s admonition, but for the reasons stated herein, contend that  
Professor Bussel’s testimony is proper expert opinion, not improper argument.

1 Rule 702 of the OEC and FRE share similar wording. The Oregon rule provides:

2 If scientific, technical or other specialized knowledge will assist the trier of fact to  
3 understand the evidence or to determine a fact in issue, a witness qualified as an  
4 expert by knowledge, skill, experience, training or education may testify thereto  
in the form of an opinion or otherwise.

5 The 1981 Conference Committee Commentary to OEC 702 further explains the rule:

6 The rule is broadly phrased. The fields of knowledge which may be drawn upon  
7 are not limited merely to the ‘scientific’ and ‘technical’ but extend to all  
8 ‘specialized’ knowledge. Similarly, the expert is viewed, not in a narrow sense,  
9 but as a person qualified by ‘knowledge, skill, experience, training or education.’  
Thus within the scope of the rule are not only experts in the strictest sense of the  
10 word, *e.g.*, physicians, physicists and architects, but also the large group  
sometimes called ‘skilled’ witnesses, such as bankers or landowners testifying to  
land values.

11 (Quoting 7 Wigmore, *Evidence* § 1918 (3d ed. 1940).)

12 ICNU argues that Professor Bussel’s testimony is inadmissible under Rule 702, citing  
13 *dicta* in a footnote of one federal case for the general proposition that “expert testimony should  
14 be confined to knowledge of factual matters rather than legal conclusions.” *ICNU Motion at 2,*  
15 *fn. 1.* In fact, as explained further below, opinions of legal experts that embody conclusions of  
16 law are *not* inadmissible under the circumstances presented here. *See, e.g., Bilzerian, 926 F.2d at*  
17 *1294.*

18 In the judicial context, a general rule excluding expert opinions embodying legal  
19 conclusions is intended to prevent the invasion of the court’s authority to instruct the jury on the  
20 applicable law. *See Bilzerian, 926 F.2d at 1294 (citing cases).* However, when an attorney’s  
21 expert opinion does *not* invade the court’s authority, but rather “will assist the trier of fact to  
22 understand the evidence or to determine a fact in issue,” OEC 702, a court will readily admit it,  
23 *see Bilzerian, 926 F.2d at 1294; see also AMFAC Foods, Inc. v. Int’l Systems & Controls Corp.,*  
24 *294 Or 94, 116 (1982) (allowing attorney to testify about the meaning of specialized terms).*

25 Admissibility is especially favored when, as here, an attorney offers an expert opinion  
26 with respect to an issue which, while legal in nature, does not amount to the ultimate conclusion

1 of law that the court or other tribunal must make in reaching its disposition of the case. *See, e.g.,*  
2 *United States v. Vogel*, 1994 WL 556994, \* 7 (4th Cir. 1994) (unpublished opinion) (admitting  
3 opinion testimony of expert legal testimony on questions of bankruptcy law when the bankruptcy  
4 issues were “matters relevant to the factual framework underlying the government’s theory of the  
5 case”); *see also* Note, *Expert Legal Testimony*, 97 Harv. L. Rev. 797, 802 (1984) (“Courts may  
6 admit expert legal testimony more readily when it concerns a collateral issue (particularly a  
7 complex one) than when it relates to the main subject in dispute.”).

8 Applying the foregoing principles, Professor Bussel’s expert opinion testimony is  
9 admissible. First, it will assist the Commission in understanding a complex issue of mixed law  
10 and fact that ICNU raised in its testimony, namely, the alleged risk of substantive consolidation  
11 if Oregon Electric is allowed to acquire PGE on the proposed terms and, at sometime in the  
12 future, files for bankruptcy. Therefore, it meets the primary criterion for admissibility under  
13 Rule 702. *See* OEC 702; FRE 702.

14 Second, although an attorney, Professor Bussel offers his expert opinion on an important  
15 but collateral issue raised by a hypothetical bankruptcy, not on the ultimate legal issue whether  
16 the proposed transaction “will serve the public utility’s customers in the public interest” under  
17 ORS 757.511. *Compare Vogel*, 1994 WL 556994 at \* 7 (admitting testimony relating to legal  
18 “matters relevant to the factual framework underlying the government’s theory of the case”),  
19 *with Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 368 (4th Cir. 1986) (excluding testimony  
20 regarding the meaning and applicability of securities law to the transaction at issue before the  
21 court). Professor Bussel’s testimony is necessary only to rebut Mr. Antonuk’s opinion and to  
22 understand why Oregon Electric will not accept various conditions proposed by ICNU that  
23 address A supposed risk of substantive consolidation.

24 Lastly, Professor Bussel’s testimony does not “invade” or “encroach upon” the province  
25 of the Commission in any way; it merely assists the Commission in making a determination  
26

1 whether the alleged risk of substantive consolidation, first put forth by ICNU, merits any weight  
2 in the ultimate analysis of net benefits under ORS 757.511.<sup>4</sup>

3 **3. *The Probative Value of Professor Bussel's Testimony Is Not***  
4 ***Substantially Outweighed by the Danger of Unfair Prejudice, Confusion***  
5 ***of the Issues, or Undue Delay.***

6 The Commission may exclude evidence that is otherwise admissible “if the probative  
7 value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by  
8 undue delay.” OAR 860-014-0045(1)(c). ICNU suggests that it is prejudiced by Professor  
9 Bussel’s testimony, because he expresses an opinion in sur-surrebuttal testimony “to which Staff  
10 and intervenors have no opportunity to respond.” *ICNU Motion at 3.*

11 This argument is spurious. First, it is premised on ICNU’s conclusory (and incorrect)  
12 assertion that the Professor’s testimony is “legal argument” and not an expert opinion. Second,  
13 as noted above, ICNU introduced surrebuttal testimony from their own expert witness, an  
14 attorney, opining as to the probability that creditors of Oregon Electric would “pierce the  
15 corporate veil” in a hypothetical bankruptcy. Applicants are entitled to introduce evidence in  
16 sur-surrebuttal testimony to rebut any evidence introduced by a party in surrebuttal testimony.  
17 By filing its motion to strike, ICNU merely attempts to nullify the advantage Applicants have as  
18 the party carrying the burden of proof in this proceeding: The last word. Under the  
19 circumstances, the exercise of that advantage cannot be considered “prejudicial.”

20 **B. ICNU OPENED THE DOOR TO TESTIMONY REGARDING THE RISK**  
21 **OF BANKRUPTCY CONSOLIDATION, AND PROFESSOR BUSSEL’S**  
22 **TESTIMONY SHOULD BE ADMITTED AS A MATTER OF FAIRNESS**

23 A primary purpose of Professor Bussel’s testimony is to rebut ICNU’s expert witness,  
24 John Antonuk. Mr. Antonuk is a lawyer, and he co-sponsored testimony requesting that Oregon  
25 Electric be required to enter restrictive covenants with its lenders before the Commission grants

26 <sup>4</sup> One can imagine circumstances, not present here, under which Professor Bussel’s testimony might be excluded; for example, if offered in a bankruptcy proceeding in which the bankruptcy court is called upon to rule whether Oregon Electric should be consolidated with PGE. That is not the case here.

1 approval of the acquisition of Portland General Electric (“PGE”). Mr. Antonuk justified this  
2 request based on his opinion that there is a risk that Oregon Electric’s lenders will seek to  
3 consolidate PGE into the bankruptcy proceeding if Oregon Electric finds itself in bankruptcy at  
4 some future date. For example, Mr. Antonuk’s testified:

5 [If bankruptcy occurs,] there remains an inappropriate level of risk that [Oregon  
6 Electric’s] creditors will seek to break down the ring fencing imposed to protect  
7 [PGE]. ICNU/200, Antonuk-Vickroy/26.

8 No entity but [PGE] will have the resources to make [Oregon Electric’s] interest  
9 payments as they become due. In that case, one can expect lenders to seek to  
10 *pierce the corporate veil*. ICNU/400, Antonuk-Vickroy/3 (emphasis added).

11 The risk that lenders will “pierce the corporate veil” is a distinctly legal concept. A  
12 primary purpose of Professor Bussel’s testimony was to provide his opinion on the true risk of  
13 “substantive consolidation” (the proper bankruptcy term for “piercing the corporate veil”)  
14 thereby rebutting Mr. Antonuk’s assertions.

15 It was ICNU itself that made the risk of substantive consolidation a central theme of its  
16 testimony; offered its own legal opinion that this risk is at an “inappropriate level;” and, to  
17 address the perceived risk, proposed that Oregon Electric obtain unorthodox lender covenants as  
18 a condition to close. Under the rules establishing the presentation of evidence, OAR 860-014-  
19 0035, and as a matter of fairness, Applicants should be allowed to respond to ICNU’s testimony  
20 as a means of explaining why ICNU’s proposed lender covenants are unnecessary. *Cf. State v.*  
21 *Adonri*, 143 Or. App. 298, 301-02 (1996) (opponent may offer testimony whose only claim to  
22 admission is that it negatives or explains or counterbalances prior testimony on the same fact,  
23 subject matter, or issue).



1 **CONCLUSION**

2 For the foregoing reasons, Applicants respectfully request that the Commission deny  
3 ICNU's motion to strike the testimony of Professor Daniel J. Bussel.

4 Respectfully submitted this 14th day of October, 2004.

5 ATER WYNNE LLP

6  
7 By: 

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**CERTIFICATE OF SERVICE  
UM 1121**

I hereby certify that a true and correct copy of **APPLICANTS RESPONSE TO MOTION TO STRIKE OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES** was served via U.S. Mail on the following parties on October 14, 2004:

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