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October 12, 2004

Via Facsimile, Electronically, and U.S. Mail

Ms. Annette Taylor
Oregon Public Utility Commission
P.O. Box 2148
Salem OR 97308-2148

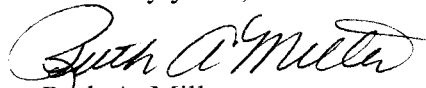
Re: In the Matter of Oregon Electric Utility Company, LLC, et al., Application for
Authorization to Acquire Portland General Electric Company
Docket No. UM 1121

Dear Ms. Taylor:

Enclosed please find an original and six copies of the Motion to Strike of the
Industrial Customers of Northwest Utilities in the above-captioned Docket.

Please return one file-stamped copy of the document in the self-addressed,
stamped envelope provided. Thank you for your assistance.

Sincerely yours,



Ruth A. Miller

Enclosures

cc: Service List

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1121

In the Matter of)	
)	
OREGON ELECTRIC UTILITY COMPANY, LLC, <i>et al.</i> ,)	MOTION TO STRIKE OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES
)	
Application for Authorization to Acquire Portland General Electric Company.)	(Expedited Consideration Requested)
)	
)	
_____)	

INTRODUCTION

Pursuant to OAR § 860-013-0031, the Industrial Customers of Northwest Utilities (“ICNU”) submits this Motion to Strike (“Motion”) the sur-surrebttal testimony and exhibits of Daniel J. Bussel filed by Oregon Electric Utility Company, LLC (“Oregon Electric”) on October 11, 2004, in Oregon Public Utility Commission (“OPUC” or the “Commission”) Docket No. UM 1121. ICNU requests that the Administrative Law Judge (“ALJ”) strike Professor Bussel’s testimony on the grounds that it consists of legal argument and analysis of bankruptcy issues rather than evidence that is appropriately included in the record. It is inappropriate to present Oregon Electric’s legal analysis regarding the transaction in the form of testimony. Professor Bussel’s “testimony” is more accurately described as a legal brief on the issue of “substantive consolidation” in bankruptcies. As such, Professor Bussel’s testimony should be stricken from the record.

DISCUSSION

The legal argument in Professor Bussel's testimony is not an appropriate subject for testimony that is to be offered into evidence in this proceeding. ALJ Logan or Smith should grant this Motion for the following reasons: 1) the ALJ has made clear that argument submitted in testimony form is not the same as evidence; 2) Professor Bussel's testimony consists entirely of legal argument; and 3) legal argument is not the appropriate subject for testimony that is to be submitted into evidence.

ALJ Logan distinguished between argument and evidence in a Status Conference Report issued on September 30, 2004. Re Oregon Electric et al., OPUC Docket No. UM 1121, Status Conference Report at 2 (Sept. 30, 2004). The ALJ admonished the parties that evidence that is to be offered in testimony is not the same as argument: "[p]arties have submitted testimony that can be more appropriately characterized as [argument], rather than evidence. Unrebutted argument is not the same as unrebutted evidence." Id.; Re Oregon Electric et al., OPUC Docket No. UM 1121, Ruling at 2 (Oct. 4, 2004).

Professor Bussel's testimony consists almost entirely of legal argument.^{1/} First, Professor Bussel states that he formulated his testimony by reviewing the relevant testimony and evidence already submitted in this Docket and conducting research regarding the relevant legal principles with the help of another attorney. Oregon Electric/800, Bussel/4-5. This is basic legal research and analysis. Although such analysis may be appropriate to present in a legal memorandum or brief, it is not appropriate for testimony that is to be submitted into evidence.

^{1/} As an initial matter, certain courts have indicated that expert testimony should be confined to knowledge of factual matters rather than legal conclusions. A.T. Kearney v. Intl. Business Machines, 73 F.3d 238, 244 n. 4 (9th Cir. 1995).

Furthermore, Oregon Electric/802, which Professor Bussel attaches in support of his testimony, is a legal memorandum prepared for TPG principal Richard Schifter regarding whether Oregon Electric and Portland General Electric Company (“PGE” or the “Company”) could be substantively consolidated in a bankruptcy proceeding. This memorandum reaches the same conclusions offered by Professor Bussel. Under these circumstances, Professor Bussel is merely the medium by which Oregon Electric attempts to submit this legal argument and analysis into the record.

The legal argument that makes up Professor Bussel’s testimony is not appropriately included in testimony. Professor Bussel does not testify as to any facts or evidence in this proceeding, which typically is the subject of expert witness testimony. Instead, Professor Bussel testifies as to the alleged lack of a legal basis for concerns expressed about the impact on PGE of a bankruptcy filing by Oregon Electric. This is not expert testimony that is properly included in evidence.

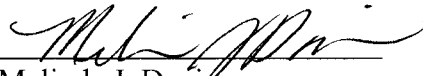
Finally, to allow extensive legal argument in testimony is prejudicial, especially when that argument is presented in sur-surrebuttal testimony to which Staff and intervenors have no opportunity to respond. Although parties may have the opportunity to respond to Professor Bussel’s legal analysis through argument in briefs, that argument will not be afforded the same weight as evidence in the record. As the ALJ stated in the Status Conference report, argument by the parties is not the same as evidence. Under these circumstances, ALJ Logan or Smith should grant this Motion and strike Professor Bussel’s testimony from the record.

WHEREFORE, ICNU requests that the ALJ grant this Motion to Strike. In addition, ICNU requests an expedited ruling on this Motion to Strike by Monday, October 18, 2004.

Dated this 12th day of October, 2004.

Respectfully submitted,

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Of Attorneys for the Industrial Customers of
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Motion to Strike of the Industrial Customers of Northwest Utilities upon the parties, shown below, on the official service list for Docket No. UM 1121, by causing the same to be electronically served on all parties who have an email address on the official service list, and by U.S. Mail, postage-prepaid, to those parties who do not have an email address on the official service list.

Dated at Portland, Oregon, this 12th day of October, 2004.


Ruth A. Miller

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