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August 13, 2012

VIA ELECTRONIC FILING AND FIRST CLASS MAIL

PUC Filing Center
Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148

Re: Docket UG 221 – Northwest Natural Gas Company Application for a General Rate Revision

Attention Filing Center:

Enclosed for filing in the above captioned docket are the original and one copy of Northwest Natural Gas Company's Reply to the Northwest Industrial Gas Users' and Citizens' Utility Board of Oregon's Response to NW Natural's Motion to Strike. A copy of this filing has been served on all parties to this proceeding as indicated on the enclosed Certificate of Service.

Please contact this office with any questions.

Very truly yours,

Wendy McIndoo

Wendy McIndoo
Office Manager

Enclosure

cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UG 221

In the Matter of NORTHWEST NATURAL GAS COMPANY Application for a General Rate Revision.	**NORTHWEST NATURAL GAS COMPANY'S REPLY TO THE NORTHWEST INDUSTRIAL GAS USERS' AND CITIZENS' UTILITY BOARD OF OREGON'S RESPONSE TO NW NATURAL'S MOTION TO STRIKE**

I. INTRODUCTION

Pursuant to OAR 860-001-0420(6) Northwest Natural Gas Company ("NW Natural" or "Company") files this reply to the Northwest Industrial Gas Users' and Citizens' Utility Board of Oregon's Response to NW Natural's Motion to Strike ("Response"). The Public Utility Commission of Oregon ("Commission") should grant NW Natural's motion and strike portions of the rebuttal testimony of Hugh Larkin, Jr., filed on July 20, 2012, ("Larkin Rebuttal Testimony") on behalf of the Citizens' Utility Board of Oregon ("CUB") and the Northwest Industrial Gas Users ("NWIGU") (collectively, "Joint Parties").

The Company clarifies that the portions of the testimony subject to this motion are page 26, line 1 through page 27, line 11 of the Larkin Rebuttal Testimony (the "Testimony"). The motion incorrectly stated that the testimony subject to the motion extended through page 28, line 6, which was in error.

In its motion, the Company asked the Commission to strike that portion of the Larkin Rebuttal Testimony consisting of inadmissible hearsay, improperly offered in rebuttal of the direct testimony of Dr. Andrew Middleton. Specifically, Mr. Larkin offers a quotation from a book in which the author, Dr. Allen Hatheway, opines that "gas industry management . . . had knowledge of the damage that was sure to come from discharge of

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[toxic substances] to the ground and to surface waters and subsurface waters." Mr. Larkin concludes with the following: ***"Based on the statements in Dr. Hatheway's book, it appears that the Company likely knew the risks involved and planned on doing just what it is attempting to do now, take the rewards and push the consequences onto innocent ratepayers."***

NW Natural's Motion to Strike argued that:

- The quotation from Dr. Hatheway is inadmissible hearsay;
- Mr. Larkin is not an expert in historic operations of manufactured gas plants, and so is not entitled to opine on what NW Natural knew about the consequences of their waste disposal practices;
- While purportedly offered in response to Alex Miller's testimony, Mr. Larkin's quotation of Dr. Hatheway and his subsequent opinion that NW Natural likely knew the risks involved is really improper rebuttal to the direct testimony of Dr. Middleton, who testified to the contrary in the Company's original filing.

Based on the above, NW Natural demonstrated that the Hatheway quotation, and Mr. Larkin's opinion based on the quotation, should both be stricken.

In their response, the Joint Parties argue that the prohibition on hearsay does not apply to the Commission and that the Testimony is admissible under the Commission's evidentiary standard because the Testimony is relevant and not unfairly prejudicial. The Joint Parties also claim that the Testimony is admissible as Mr. Larkin's opinion even if it is hearsay and that the Testimony is not actually hearsay at all because the Joint Parties did not offer the testimony to demonstrate the truth of the matter asserted therein. The Joint Parties further argue that the Testimony properly responded to issues raised in NW Natural's reply testimony.

None of these arguments are persuasive. *First*, although the Oregon Evidence Code ("OEC") does not strictly apply to the Commission, the Commission's rules are clear that

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testimony must be subject to cross examination and Commission precedent suggests that hearsay is inadmissible. *Second*, the testimony is clearly hearsay because the factual statements made by Dr. Hatheway in his book form the basis for Mr. Larkin's opinion; therefore the Hatheway excerpts must have been offered for their truth. *Third*, if the Commission determines that the excerpts are not hearsay, then the Testimony is irrelevant because it necessarily must have been offered simply to demonstrate the existence of Dr. Hatheway's book, which is not a fact at issue in this case. *Fourth*, the testimony will cause NW Natural substantial, unfair prejudice because the Company will be unable to test the credibility of Dr. Hatheway's analysis because he is not subject to cross examination. *Fifth*, the Company will be prejudiced because, contrary to the Joint Parties' claims, the Testimony was clearly responding to issues raised in the Company's direct case and therefore improperly raising these claims now limits the Company's ability to respond. *Finally,* Mr. Larkin is not an expert with respect to the matters discussed in Dr. Hatheway's book and the simple fact that he is an expert in one subject matter—cost allocation issues—does not mean that he is an expert with respect to anything else.

In this case, the Joint Parties are clearly attempting to introduce into the record an inflammatory and totally baseless accusation—without accepting any responsibility for the statement. If allowed into the record, the Company will be forced to use cross examination of Mr. Larkin—a Certified Public Accountant—to probe the strength of Dr. Hatheway's quotation—which was cherry picked out of a book over a 1,000 pages in length. In this instance, the Testimony is clearly more prejudicial than probative and should be stricken.

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II. ARGUMENT

A. The Commission Can and Should Conclude that the Testimony is Inadmissible Hearsay.

The Joint Parties argue that the OEC, which prohibits the admission of hearsay testimony, has not been adopted by the Commission and therefore the OEC's stringent evidentiary standards do not apply to the Commission.[1] However, the Commission's rules state unequivocally that pre-filed written testimony is subject to the rules of cross examination.[2] Further, Commission precedent implies that hearsay, which is not subject to cross examination, should be excluded. In Order No. 04-379 the Commission noted that that "[a]llowing testimony without cross-examination makes it difficult to determine whether the testimony is credible."[3] To support this conclusion, the Commission quoted approvingly from the Oregon Supreme Court case of *Sheedy v. Stall*,[4] where the court noted that "[h]earsay evidence is excluded because of its untrustworthiness. The declarant's accuracy and veracity cannot be tested by cross examination."[5]

Here, the Company will not be able to cross examine Dr. Hatheway to determine the trustworthiness of his analysis and without cross examination, the testimony should be inadmissible—as it would be under the OEC. However, if the Commission concludes that the Testimony is admissible, consistent with its precedent, it should afford it little or no weight.[6]

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[1] Response at 3-5.

[2] OAR 860-001-0480(10).

[3] *Central Lincoln People's Utility District v. Verizon Northwest Inc.*, Docket UM 1087, Order No. 04-379 at 5 (July 8, 2004).

[4] 255 Or. 594, 596 (1970).

[5] Order No. 04-379 at 5.

[6] Order No. 04-379 at 5.

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B. The Testimony is Hearsay.

The Joint Parties argue that the "quotes from Mr. Larkin are not offered for the [t]ruth of the [m]atter [a]sserted" and are therefore not hearsay.[7] To support this argument, the Joint Parties claim that "Mr. Larkin's testimony does not use the Hatheway excerpt to illustrate what NW Natural or its predecessors knew or should have known."[8] This claim is clearly contradicted by Mr. Larkin's testimony. In the Testimony, Mr. Larkin was responding to the following question:

> Q. On page 11 of his Reply Testimony, Mr. Miller states "the Company and its regulators therefore could not have anticipated either the health or environmental harms we recognize today or the cleanup obligations that exist under today's current laws." Why do you think differently?[9]

In response to this question about the Company's knowledge, Mr. Larkin testifies that "[b]ased on the statements in Dr. Hatheway's book, it appears that the Company likely knew the risks involved and planned on doing just what it is attempting to do now . . ."[10] Indeed, the excerpts from Dr. Hatheway's book speak of nothing but the manufactured gas industry's knowledge—every single sentence quoted includes the word knowledge, aware, or awareness.[11] Because Mr. Larkin relied on the factual statements from the book as the ***only*** basis for his factual statement that "the Company likely knew the risks involved . . ." the excerpts have been offered to demonstrate the truth of the matter asserted therein and are hearsay.

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[7] Response at 7.

[8] Response at 7.

[9] NWIGU-CUB/200, Larkin/26, ll. 1-4.

[10] NWIGU-CUB/200, Larkin/27, ll. 8-9.

[11] NWIGU-CUB/200, Larkin/26, ll. 11 – 27, l. 6 ("The manufactured gas industry, from its earliest years, **was well aware** . . . Gas industry management . . . **had knowledge of the damage** . . . These choices were made with deliberation and the body of evidence supporting the wide availability of both **knowledge** and penalty is laid out in this book . . . there was a high level of **awareness** . . . Examples of the degree of **awareness** are quite common . . . Evidence of the high state of gas-industry **knowledge** . . .) (emphasis added).

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Even the Joint Parties admit that the Testimony is hearsay when they argue that the "Larkin testimony *coupled with the excerpt from the Hatheway book* makes the existence of certain facts at issue in the proceedings more or less probable that it would be without the evidence."[12] As discussed below, if the excerpt from the book was not offered to demonstrate its truth, then it cannot make the existence of any facts at issue in this proceeding more or less probable.

C. If the Testimony is Not Hearsay, it is Irrelevant.

While NW Natural maintains that the Testimony is clearly hearsay, if the Joint Parties argument to the contrary is accepted, then the Testimony is irrelevant and should be excluded on that basis. Evidence is relevant if it tends "to make the existence of any fact at issue in the proceedings more or less probable than it would be without the evidence."[13] If the excerpts were not offered for the truth of the matter asserted therein, then the excerpts were offered simply to demonstrate that Dr. Hatheway's book exists and the existence of Dr. Hatheway's book is not an issue in this case.

The commentary to OEC Rule 801, governing hearsay, states: "If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the intention of the declarant or the truth of anything asserted, and the statement is not hearsay." The Oregon Supreme Court provided the following illustration:

> For example, life insurance policies require a proof of death before benefits will be paid. In an action upon a life insurance policy the beneficiary may offer evidence of a statement by a physician that the decedent has died. This evidence is admissible for the purpose of proving that a proof of death has been made in compliance with the requirements of the insurance contract. The evidence is not admissible as proof that the decedent died. The evidence is not hearsay as to the question of whether the statement was made, but it is hearsay as to whether the decedent died.[14]

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[12] Response at 4 (emphasis added).

[13] OAR 860-001-0450(1).

[14] *Sheedy*, 255 Or. at 597.

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For Joint Parties argument to be correct—that the excerpts from Dr. Hatheway's book are not hearsay because they were not offered to demonstrate the truth of the matter asserted in the book—it would necessarily mean that the significance of the excerpts "lies solely in the fact" the statements in the book were made. In other words, the Joint Parties offered the excerpt simply to prove that Dr. Hatheway has written a book, not that the substance of his claims in the book are correct. If this is the case, the excerpts do not tend to make any fact at issue in this case more or less probable because whether Dr. Hatheway wrote a book is not a fact at issue in this case. So the Testimony is either hearsay or it is irrelevant. In either case, it is inadmissible.

D. The Probative Value is Substantially Outweighed by Unfair Prejudice.

The Joint Parties argue that even if the Testimony would be inadmissible hearsay in a court of law, it is admissible under OAR 860-001-0450 because it is relevant. However, even if the excerpt is relevant, its "probative value is substantially outweighed by the danger of unfair prejudice."[15] In this case, NW Natural will be unfairly prejudiced in two ways.

First, NW Natural will be unable to cross examine Dr. Hatheway regarding the claims made in his book. The Joint Parties claim that NW Natural is not prejudiced because it can "refute Mr. Larkin's testimony or the information in the Hatheway book with its own testimony and witnesses."[16] But the Company cannot cross examine Dr. Hatheway to test the credibility of his analysis and because Mr. Larkin's opinion is "[b]ased on the statements in Dr. Hatheway's book," the Company cannot meaningfully test the credibility of Mr. Larkin's opinion that "the Company likely knew the risks involved" in operating manufactured gas plants.[17] As the Oregon Supreme Court observed:

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[15] OAR 860-001-0450(1)(c).

[16] Response at 5.

[17] NWIGU-CUB/200, Larkin/27, ll. 8-9.

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> Hearsay evidence is excluded because of its untrustworthiness. The declarant's accuracy and veracity cannot be tested by cross-examination. It is not the untrustworthiness of the testimony of the witness on the stand who is asked to testify to what the declarant said that causes the exclusion of hearsay testimony. The credibility of the witness can be tested by cross-examination. The problem of the trustworthiness of the witness in the courtroom is the same whether the witness is testifying to another's conduct or to another's words. It is the untrustworthiness of the declarant's statement that causes hearsay testimony to be excluded.[18]

The inability to conduct cross examination is also inconsistent with the Commission's rules, which specifically state that "written testimony is subject to the rules of admissibility *and cross examination.*"[19]

Second, because the Joint Parties failed to raise these issues in their direct testimony, NW Natural's ability to conduct discovery and respond to the Testimony is limited. The Joint Parties claim that Mr. Larkin was responding to an issue raised in Mr. Miller's rebuttal testimony and as support for this claim they point to Mr. Larkin's testimony, which includes a quote from Mr. Miller to which Mr. Larkin claims to respond.[20] Mr. Larkin's testimony, however, selectively edited Mr. Miller's testimony to omit the fact that Mr. Miller is simply making reference to Dr. Middleton's direct testimony. The sentence that immediately precedes the sentence quoted in Mr. Larkin's testimony makes clear that Mr. Miller was referencing Dr. Middleton's testimony:

> [Mr. Larkin's] argument fails in light of Dr. Middleton's direct testimony, which establishes that plant operations during the "MGP era" were not viewed as risky from an environmental perspective, and that Companies were not subjected to broad environmental laws at that time. The Company and its regulators therefore could not have anticipated either the

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[18] *State v. Cazares-Mendez*, 350 Or. 491, 507 (2011).

[19] OAR 860-001-0480(10) (emphasis added).

[20] Response at 7-9.

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> health or environmental harms we recognize today or the cleanup obligations that exist under today's current laws.[21]

A reasonable reading of the entire section of Mr. Miller's testimony makes clear that he is making reference to conclusions that were made in Dr. Middleton's direct testimony. Indeed, on page 18 of Dr. Middleton's direct testimony he was asked "During the MGP Era, what was the gas industry's knowledge of environmental impacts as they are understood currently (2011)?" In response to this question, Dr. Middleton testifies at length regarding the gas industry's knowledge of the health and environmental impacts associated with the pollutants being created as part of the manufacturing process.[22]

As such, Mr. Larkin's response to Dr. Middleton was made out of order and on that basis alone should be stricken.

E. Mr. Larkin is not an Expert Qualified to Testify Regarding the Matters Discussed in Dr. Hatheway's Book.

The Joint Parties also argue that Mr. Larkin is a well-qualified expert in the field of cost allocation of environmental remediation costs and Mr. Larkin was even quoted in Dr. Hatheway's book.[23] The Joint Parties argue that because Mr. Larkin is an expert witness with respect to these issues, the Testimony is admissible as his expert opinion.[24] However, the fact that Mr. Larkin is an expert in cost allocation matters (including, presumably cost allocation for environmental remediation) does not mean that he is an expert on the historic operations of manufactured gas plants. In particular, there is nothing in the record to suggest that he has ever written or lectured on the subject, studied the subject in an academic setting, studied the subject (other than presumably reading a part of Dr. Hatheway's book), or interviewed anyone who has ever worked at a manufactured

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[21] NWN/2600, Miller/11, ll. 1-6

[22] NWN/1600, Middleton/18, l. 13 – 20, l. 11.

[23] Response at 6, 9.

[24] Response at 6, 9.

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gas plant. ORS 40.410 allows expert testimony "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." "To be helpful, the subject of the testimony must be within the expert's field."[25] "[E]xpertise derived from reading some material by one author . . . is not the stuff of expertise."[26]

Here, the "fact in issue" addressed by the Testimony is whether NW Natural knew of the risks associated with manufactured gas plants. As the Testimony states, "[b]ased on the statements in Dr. Hatheway's book, it appears that the Company likely knew the risks involved and planned on doing just what it is attempting to do now. . ."[27] The only facts expressed in Dr. Hatheway's book deal with gas industry knowledge. So Mr. Larkin's testimony on this issue may be admissible as expert opinion only if he is qualified to testify as to NW Natural's knowledge of the risks involved with manufactured gas plants. However, nothing in Mr. Larkin's witness qualification statement supports a finding that he is an expert with respect to the facts discussed in Dr. Hatheway's book. Indeed, that is precisely why Mr. Larkin relied on Dr. Hatheway to put forth the factual argument on which his conclusion is based.

III. CONCLUSION

NW Natural understands that the Commission has not strictly adopted the OEC, and retains some flexibility to allow hearsay into the record when it believes it is instructive and not unfairly prejudicial. This is not such a case. The hearsay offered by Mr. Larkin, as well as Mr. Larkin's opinion which is based entirely on that hearsay, is both inflammatory and prejudicial. Mr. Larkin introduces a new opinion late in the case that he is not qualified to render. And. Mr. Larkin attempts to bolster that opinion with another opinion of

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[25] *State v. Brown*, 297 Or. 404, 409 (1984).

[26] *State v. Dunning*, 245 Or. App. 582, 591 (2011).

[27] NWIGU-CUB/200, Larkin/27, ll. 8-9.

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a so-called expert who NW Natural will be unable to cross examine. As such, if the testimony is not stricken, NW Natural's only recourse will be to attempt to undermine Dr. Hatheway's opinion by cross-examining Mr. Larkin about a subject matter that Mr. Larkin is not qualified to opine upon. Clearly, this situation results in significant prejudice to NW Natural. For that reason, the Testimony should be stricken.

Respectfully submitted this 13th day of August, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in UG 221 on the following named person(s) on the date indicated below by email addressed to said person(s) at his or her last-known address(es) indicated below.

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