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August 8, 2012

VIA ELECTRONIC FILING
& FIRST CLASS MAIL

Oregon Public Utility Commission
Attn: Filing Center
550 Capitol Street N.E., #215
P.O. Box 2148
Salem, Oregon 97308-2148

Re: In the Matter of Northwest Natural Gas Company –
Application for a General Rate Revision
Docket No. UG-221

Dear Filing Center:

Enclosed is Northwest Industrial Gas Users and Citizens Utility Board's Response to NW Natural's Motion to Strike.

Please do not hesitate to contact our office with any questions.

Very truly yours,

Tommy A. Brooks

TAB:sk
Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UG 221

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

Pursuant to OAR § 860-001-0420(5), the Northwest Industrial Gas Users ("NWIGU") and Citizens' Utility Board of Oregon ("CUB") hereby file this response to Northwest Natural Gas Company's ("NW Natural") Motion to Strike ("Motion") the Rebuttal Testimony of Hugh Larkin, Jr. NW Natural argues that portions of Mr. Larkin's Rebuttal Testimony should be stricken because those portions consist of "inadmissible hearsay evidence", and because the arguments are "raised for the first time in rebuttal testimony".[1]

NW Natural also attempts to argue that Mr. Larkin is not qualified to be an expert witness in regard to the issues on which NW Natural is objecting.[2] However, Mr. Larkin's testimony on the issues to which NW Natural is objecting is not being offered for the purposes that NW Natural is attempting to ascribe to it.

We also note at the outset that NW Natural is overbroad in its statement of complaint. NW Natural states the testimony it is objecting to starts on page 26 line 1 and extends through page 28 line 6, but in its motion NW Natural addresses only Mr. Larkin's testimony from page 26 line 1 through page 27 line 11. Even if the Commission were to accept NW Natural's

[1] UG 221 Northwest Natural Gas Company's Motion To Strike The Testimony Of Hugh Larkin, Jr., at 1 lines 16-17.
[2] UG 221 Northwest Natural Gas Company's Motion To Strike The Testimony Of Hugh Larkin at 3 lines 6-8 and 5 lines 1-11.

arguments in their entirety, the Motion should be granted only with respect to the excerpts from Dr. Hatheway's book.

As described below, NW Natural is wrong on all accounts.

BACKGROUND

NW Natural has included in its "Application For A General Rate Revision" environmental cost recovery related to nine contaminated sites, including the clean-up of the Portland Harbor Superfund Site, which is occurring as the result of more than a century of heavy industrial use along the Willamette River. In particular, NW Natural, or its predecessors, owned, operated and profited from manufactured gas plants and some or all of these sites are now contaminated. The total cleanup cost associated with these sites is unknown at this point, but will be considerable.

In this rate case, NW Natural's proposal is to pass 100 percent of these environmental remediation costs onto its customers, without accounting for the fact that today's customers did not cause the contamination or benefit from the historic operations associated with the contamination. NWIGU and CUB believe this cost proposal is inequitable, and the testimony of Mr. Larkin responds to NW Natural's cost proposal associated with the environmental remediation.

The Motion relates to Mr. Larkin's response to NW Natural's Reply Testimony on the environmental remediation issue. In particular, NW Natural witness Alex Miller made the following statement in his Reply Testimony,

> "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."[3]

[3] NWN/2600 Miller/11 lines 4-6.

Notwithstanding the fact that this statement appears to lack any foundation, Mr. Larkin responded to Mr. Miller's testimony and quoted Dr. Hatheway's book on the remediation of former manufactured gas plants to support his testimony.[4] Mr. Larkin's Rebuttal Testimony at issue in the Motion is focused on the proper cost allocation of environmental remediation costs related to historic operations. Mr. Larkin is not testifying regarding what NW Natural or its predecessors knew when these plants were operating. Indeed, to do so without specific evidence would be improper as he would have no foundation upon which to do so—much like the quoted testimony of Alex Miller above. Rather, Mr. Larkin identifies cost allocation related evidence that contradicts portions of NW Natural's Reply Testimony of Alex Miller and that supports Mr. Larkin's own testimony related to cost allocation.

On August 1, 2012, NW Natural filed its Motion to strike Mr. Larkin's Rebuttal Testimony arguing that the testimony is inadmissible hearsay and that it is untimely. For the reasons described below, NW Natural's motion should be denied.

ARGUMENT

A. The Hearsay rules applicable to state court proceedings, and the evidentiary standard before the Commission, are different.

NW Natural inappropriately relies on the hearsay rules codified in ORS Chapter 40 (the "Oregon Evidence Code") in its Motion. By its express terms, the Oregon Evidence Code "applies to all courts in this state…." ORS 40.015. The Commission has not adopted the Oregon Evidence Code as part of the rules governing Commission proceedings. The evidentiary standard set forth in the Commission rules, and applicable to this proceeding, is more relaxed than the

[4] Allen W. Hatheway, *Remediation of Former Manufactured Gas Plants and Other Coal-Tar Sites* (Florida, CRC Press, 2012), p. 618.

standard contained in the Oregon Evidence Code. The Commission's rule on evidence provides as follows:

> (1) Relevant evidence:
>
> (a) Means evidence tending to make the existence of any fact at issue in the proceedings more or less probable than it would be without the evidence;
>
> (b) Is admissible if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs; and
>
> (c) May be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.
>
> (2) A party objecting to the introduction of evidence must state the grounds for the objection at the time the evidence is offered.
>
> (3) When an objection is made to the admissibility of evidence, the Commission or ALJ may have the evidence presented and reserve ruling until a later time.
>
> (4) When a party takes exception to a ruling excluding certain evidence, the Commission or ALJ may require that the party make an offer of proof by stating what the evidence would indicate if received. Alternatively, the Commission or ALJ may permit the excluded evidence to be received like other evidence, but it must be marked and designated as evidence offered, excluded, and to which exception has been taken.[5]

Mr. Larkin's Rebuttal Testimony at issue in the Motion relates to whether it is appropriate to shift all environmental remediation costs onto rate payers. The quoted language from Dr. Hatheway's book is clearly relevant to the issues in this proceeding. It is, therefore, admissible under OAR 860-001-0450. 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 than it would be without the evidence, consistent with the evidentiary standard set forth

[5] OAR 860-001-0450

in OAR 860-001-0450(1)(a). The Larkin testimony and the Hatheway excerpt are directly relevant to the ultimate decision on the proper allocation of environmental remediation costs in this proceeding, and, as a well-recognized expert in the field, Dr. Hatheway's book is the type of information that would be relied upon by a reasonably prudent person. OAR 860-001-0450(1)(b). Mr. Larkin relied on that information, among other things, in forming his own opinion in this matter that the Company should not be allowed to **"**take the rewards and push the consequences onto innocent ratepayers. In light of these facts, these costs should be borne by the Company."[6] As has been noted even in court opinions, "[e]very expert de-rives much of his knowledge from books as well as from experience, and can give his opinion based upon the knowledge acquired from both sources."[7]

The probative value of the information cited by Mr. Larkin is ***not*** substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.[8] Notably, although NW Natural finds fault with the information in the Hatheway book, its Motion makes no attempt to describe how those concerns outweigh any of the probative value of that evidence. Nor should the Commission come to that conclusion. 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; the Commission is sophisticated in the area of energy regulation and the cost allocation issues raised in this proceeding, making it unlikely that the Commission will be confused by this information; and consideration of this issue will not delay the proceedings. There is therefore no basis for excluding this evidence under the Commission's rules. The only issue for the Commission to decide is the weight to attach to the Larkin testimony.

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[6] UG 221 NWIGU-CUB 200/Larkin 27 at lines 9-11.
[7] *Scott v. Astoria RR.*, 43 Ore 26 , 39; 72 P. 594, 598 (1903) citing to *Central R. Co.* v. *Mitchell* , 63 Ga. 173 (1879).
[8] OAR 860-001-0450(1)(c).

B. Even if statements are Hearsay, they are relevant and admissible.

Even if the Commission were to apply the more stringent evidentiary standards applicable to Oregon state courts, the Larkin testimony and Hatheway excerpt would still be admissible. The Oregon Evidence Code has a liberal standard regarding expert witness testimony. ORS 40.410 (Rule 702) provides that a qualified expert may testify when "scientific, technical or other specialized knowledge will *assist the trier of fact* to understand the evidence or to determine a fact in issue."[9] Rule 702 thus adopts the view advocated by Wigmore:

> The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter, but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the Court or the jury in determining the questions at issue.[10]

Further, experts may rely on published materials in forming their opinions. The opinion may be based on facts or data that would be inadmissible in evidence, provided that they are ″of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.″[11] Further, as NW Natural itself admits,[12] the courts have allowed excerpts from published materials to be used by experts in forming their opinions. For example, excerpts from medical literature may be offered as the basis of expert opinion testimony under Rule 703 or may be used to impeach an expert witness if the expert either relied on the treatise in forming

[9] (Emphasis added.)
[10] 7 Wigmore, *Evidence* 1923 at 31-32 (J. Chadbourn rev 1978) (emphasis added).
[11] OEC Rule 703.
[12] UG 221 Northwest Natural Gas Company's Motion To Strike The Testimony of Hugh Larkin, Jr., at 4 lines 16 – 18.

an opinion or acknowledges it as a recognized authority in the field.[13] Here, Mr. Larkin used Dr. Hatheway's well recognized book on the subject of remediation of manufactured gas plants in forming his own opinion on cost allocation. Citation to Dr. Hathaway's book as part of the basis for that opinion is proper under Oregon law.

C. The quotes from Mr. Larkin are not offered for the Truth of the Matter Asserted.

NW Natural also misses the mark regarding the purpose of Mr. Larkin's testimony.[14] Mr. Larkin is testifying about whether it is appropriate to shift 100 percent of the environmental remediation costs onto customers, or whether it is more equitable for NW Natural and its shareholders to have to share some of the costs. Mr. Larkin's testimony does not use the Hatheway excerpt to illustrate what NW Natural or its predecessors knew or should have known. Rather, Mr. Larkin uses the Hatheway excerpt to illustrate the basis of his own opinion that, as to the proper allocation of environmental remediation costs between the company and its ratepayers, the Company should not be allowed to **"**take the rewards and push the consequences onto innocent ratepayers. In light of these facts, these costs should be borne by the Company."[15] This is ***not*** hearsay.

D. Mr. Larkins' Rebuttal Testimony responded to Mr. Miller's Reply Testimony and is timely.

NW Natural also argues that Mr. Larkin was inappropriately responding to NW Natural's Direct, rather than NW Natural's Reply Testimony. On page 2, the Motion states, "[s]pecifically, Mr. Larkin sought to rebut the claim made by Dr. Middleton that the Company could not have anticipated the environmental harms or the cleanup obligations that exist under

[13] *Rieker v. Kaiser Found. Hosp.* 194 Ore. App. 708, 710, 96 P.3d 833, 834 (2004) citing to *Devine v. Southern Pacific Co.* , 207 Ore. 261, 275-76, 295 P.2d 201 (1956); *Kern v. Pullen*, 138 Ore. 222, 231-32, 6 P.2d 224 (1931), overruled in part on other grounds by *Fitze v. American Hawaiian S.S. Co.*, 167 Ore. 439, 117 P.2d 825 (1941).
[14] UG 221 Northwest Natural Gas Company's Motion To Strike The Testimony of Hugh Larkin, Jr. at 4 lines 2-5
[15] UG 221 NWIGU-CUB 200/Larkin 27 at lines 9-11.

the current regulatory environment." However, a simple review of the testimony filed in this proceeding demonstrates that NW Natural's argument has no merit. Mr. Larkin's response was not intended to address Dr. Middleton's Direct Testimony but rather to address a specific statement in Mr. Miller's Reply Testimony. In fact, the statement from Mr. Miller's Reply Testimony was directly quoted in Mr. Larkin's Rebuttal Testimony. Mr. Larkin did not reference Dr. Middleton's Direct Testimony at all. The relevant question in Mr. Larkin's testimony is as follows:

> 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 believe differently?[16]

The Larkin testimony is clear and unmistakable—and makes no reference to Dr. Middleton. However, NW Natural ignores Mr. Miller's Reply Testimony and inappropriately attempts to tie Mr. Larkin's Rebuttal Testimony to Dr. Middleton's Direct Testimony. As demonstrated above, and based on a review of all of the testimony, there is no question that Mr. Larkin was responding directly to Mr. Miller's Reply Testimony.

Mr. Miller made a statement in his Reply Testimony and Mr. Larkin is entitled to respond to Mr. Miller's statement regardless of whether any other witness has made a similar statement.

NW Natural also argues in its Motion, "[a]s a case moves forward, the issues involved should narrow as each round of testimony responds to the testimony that immediately preceded it. By filing rebuttal testimony responding to NW Natural's direct, rather than reply, testimony, CUB and NWIGU are frustrating this purpose."[17] Again, Mr. Larkin's response was to a specific statement contained in Mr. Miller's Reply Testimony, not to NW Natural's Direct Testimony.

[16] NWIGU-CUB/200 Larkin/26 lines 1-4.
[17] Motion p. 6.

Mr. Larkin was not impermissibly expanding testimony; he was merely rebutting what NW Natural had just filed. As such, Mr. Larkin's Rebuttal Testimony was responding to the testimony that had immediately preceded it. If NW Natural did not intend to leave the door open for further discussion of this topic it should have more carefully reviewed its own witness' Reply Testimony.

E. NW Natural's Motion is unreasonably broad.

As noted in the introduction to this Response to the Motion, NW Natural's Motion is focused on the excerpt from Dr. Hatheway's book, and whether the Commission should allow the testimony to remain in the record. NW Natural, however, requested that the Commission strike all of Mr. Larkin's testimony from page 26 line 1 to page 28 line 6. Much of that testimony has nothing to do with the excerpt from Dr. Hatheway's book. Even if the Commission were to accept NW Natural's arguments related to the excerpt from the book in their entirety, the Motion should be granted only with respect to the lines of testimony which actually relate to the excerpt from Dr. Hatheway's book. Those lines are found at page 26, line 1 through page 27 line 11, and <u>not</u> at page 27 line 12 through page 28 line 6.

F. Mr. Larkin is a well qualified expert in environmental remediation cost allocation.

Mr. Larkin's testimony references only six sentences from Dr. Hatheway's 1,354 page book, a book in which Mr. Larkin's own testimony from a prior rate case proceeding in New York - related to MGP remediation costs - is quoted at page 1037. The cited New York testimony related to Mr. Larkin's opposition to recovery of MGP remediation costs. We are attaching page 1037 as Exhibit 1 to this Response to the Motion to Strike for ease of reference. In addition to the New York Case No. 05-E-0934/05-G-0935, which is cited in Dr. Hatheway's book, Mr. Larkin has also offered testimony relating to environmental remediation cost

allocation in other jurisdictions such as Washington (Docket UE-92-1262) and Illinois (Dockets 90-0080 through 91-0095). Despite NW Natural's contention to the contrary, Mr. Larkin is a well qualified expert fully capable of discussing environmental remediation cost allocation on his own terms.

CONCLUSION

For the foregoing reasons, NW Natural's Motion should be denied and Mr. Larkin's Rebuttal Testimony relating to environmental remediation costs should not be stricken.

Dated this 8th day of August 2012.

Respectfully submitted,

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KeySpan by this time had morphed into KeySpan Energy Delivery and then also attracted the attention of National Grid. NG's continued acquisitions are undergoing scrutiny by federal antimonopoly watchdog agencies. The NG "ripple" has, in fact, reached the state and county level in some East Coast areas where irate citizens are as yet displeased with the remediation and rate recovery track record of KeySpan, particularly in the Long Island (New York State) county of Suffolk.

Meanwhile, National Grid is on record as planning to export its UK gas plant remediation teams to the United States to meet its newly garnered gasworks cleanup responsibilities.

Cost Recovery as a Means of Funding Gasworks Remediation

Most parties to gasworks remediation have basic agreement on what constitutes appropriate cost categories necessary to characterize and remediate a coal-tar site. Disagreements come about mainly over who is going to pay those costs (Table 11.9).

Coal-Tar Riders on Utility Rates

Generally speaking, American utility companies have fared quite well in terms of being granted "coal-tar riders," which is a regulatory term for having the current consumers pay for much of the "prudent" remediation costs attendant to making FMGPs less dangerous to the public and to the environment. Consumer advocacy groups maintain that the corporate entities now tagged as RPs have previously enjoyed the economic fruits of their gasworks and that costs passed to rate payers constitute retroactive rate adjustment. Such an argument was presented in March 2006 before the NY State Public Service Commission (NYSPSC) by the State Consumer Protection Board through its CPA rate recovery expert (Case 05-G-1494; *Proceedings on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Orange and Rockland Utilities, Inc. for Gas Service*). $32 million is FMGP remediation costs that were at stake:

> As a threshold matter, ratepayers should not pay 100% of MGP site remediation costs. In my opinion, the Company's proposal to recover investigation and site remediation costs entirely from current ratepayers constitutes retroactive ratemaking. During the 1800s, when the manufactured gas plants occupied the sites in question, the Company, or its predecessors, provided service to certain commercial and residential customers.
>
> These customers received the benefit of this service and provided the Company with a return on its costs and a return on its investment. The cost of service should have reflected the entire cost of providing the manufactured gas service. That cost would have included the cost associated with properly disposing of any bi-products from the manufactured gas process. The Company is now requesting that current ratepayers should be held responsible for costs associated with providing services to an unknown and unrelated group of ratepayers. The manufactured gas sites were contaminated decades ago by the Company or predecessors. Retroactive ratemaking is the recovery in current rates of an expense or liability which occurred or accrued in a prior period.
>
> [The liability for proper disposal accrued to the owners of this property prior to the 1940's.] This is clearly retroactive ratemaking since the cost was caused at the time the gas was manufactured. To now attempt to charge current ratepayers with the entire cost and legal fees incurred would be retroactive ratemaking. Current ratepayers received no service associated with the manufactured gas. Clearly, Orange and Rockland or its predecessors were, or should have been, aware of how the land it acquired had been used. They were aware of the existence of the on-site storage of the manufactured gas bi-products and received a return on its investment in the manufactured gas plant and the site on which it was located. Ratepayers both then and now did not have the knowledge nor the opportunity to avoid or mitigate these costs. Other than the denial by the Commission of the Company's request for recovery, current ratepayers have no way of protecting themselves against the current expense which Orange and Rockland desires to place upon them. his cost has nothing to do with the provision of current services.
>
> http://www.consumer.state.ny.us/pdf/natural_gas/orangerock/or_hl_3-30-06.pdf

CERTIFICATE OF SERVICE

I CERTIFY that I have on this day served the foregoing document upon all parties of record in this proceeding via electronic mail and/or by mailing a copy properly addressed with first class postage prepaid.

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Dated in Portland, Oregon, this 8th day of August 2012.

/s/ Tommy A. Brooks

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