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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 Motion to Strike the Testimony of Hugh Larkin, Jr. 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
Office Manager

Enclosure

cc: Service List

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**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 MOTION TO STRIKE THE
TESTIMONY OF HUGH LARKIN, JR.

REQUEST FOR EXPEDITED
CONSIDERATION.**

I. INTRODUCTION

Pursuant to OAR 860-001-0420(1) Northwest Natural Gas Company ("NW Natural" or "Company") moves the Public Utility Commission of Oregon ("Commission") to issue an order striking portions of the rebuttal testimony of Hugh Larkin, Jr., filed on July 20, 2012, on behalf of the Citizens' Utility Board of Oregon (CUB) and the Northwest Industrial Gas Users (NWIGU).¹ Portions of this testimony should be stricken from the record in this case because they consist of inadmissible hearsay evidence and are arguments improperly raised for the first time in rebuttal testimony. The testimony that is the subject of this Motion begins on page 26, line 1, and extends through page 28, line 6, of Mr. Larkin's rebuttal testimony (the "Testimony").

The Company requests expedited consideration of this motion under OAR 860-001-0420(7) because the Company's surrebuttal testimony is due August 9, 2012. Pursuant to OAR 860-001-0420(7)(a) the Company contacted Staff, CUB and NWIGU regarding the request for expedited consideration. The Company did not receive a response from Staff before the time this Motion was filed. CUB and NWIGU object to the request for expedited

¹ NWIGU-CUB/200, Larkin/26, I. 1 – 28, I. 6.

1 consideration and request that the Administrative Law Judge set a prehearing conference
2 to discuss the timing of any responsive pleadings.

3 II. BACKGROUND

4 In this case, NW Natural is seeking cost recovery related to the environmental
5 remediation efforts required at former manufactured gas plants that were operated by NW
6 Natural's predecessors in interest. In the Company's direct case, four witnesses provided
7 testimony related to these costs. Of these, C. Alex Miller and Dr. Andrew Middleton
8 provided testimony directly relevant to this Motion. Mr. Miller testified as to the proposed
9 rate recovery mechanism² and Dr. Middleton, the Company's expert witness, testified
10 regarding, *inter alia*, the historical operations of manufactured gas plants along with the
11 regulatory environment that existed at the time these plants were in operation.³

12 In his direct testimony, filed on May 3, 2012, Mr. Larkin testified regarding the
13 Company's proposed cost recovery mechanism and the equities involved in requiring
14 customers to fund the environmental cleanup required at the former manufactured gas
15 plants.⁴ Mr. Larkin's direct testimony did not make reference to or respond directly to Dr.
16 Middleton's direct testimony.

17 Following the submission of NW Natural's reply testimony (which did not include
18 testimony from Dr. Middleton because no intervenor had filed direct testimony in response
19 to his direct testimony) Mr. Larkin filed his rebuttal testimony, which, for the first time,
20 responded to issues raised by Dr. Middleton in his direct testimony.⁵ Specifically, Mr.
21 Larkin sought to rebut the claim made by Dr. Middleton that the Company could not have
22 anticipated the environmental harms or the cleanup obligations that exist under the current

23 ² NWN/1500.

24 ³ NWN/1600.

25 ⁴ See, NWIGU-CUB/100, Larkin/49-53.

26 ⁵ NWIGU-CUB/200, Larkin/26, I. 1 – 28, I. 6. As discussed below, Mr. Larkin inappropriately claims that his testimony responds to Mr. Miller's rather than Dr. Middleton's testimony.

1 regulatory environment.⁶ To that end, Mr. Larkin quotes extensively from a book
2 published by Dr. Allen W. Hatheway⁷ and concludes this section of his testimony with the
3 following statement: “**Based on the statements in Dr. Hatheway’s book**, it appears that
4 the Company likely knew the risks involved and planned on doing just what it is attempting
5 to do now, take the rewards and push the consequences onto innocent ratepayers.”⁸ Mr.
6 Larkin’s testimony does not set forth any basis on which Mr. Larkin himself is qualified to
7 testify as to his conclusion; instead, this portion of his testimony relies entirely on the
8 expert opinion of Dr. Hatheway.

9 **III. ARGUMENT**

10 **A. The Testimony is Inadmissible Hearsay.**

11 Pre-filed written testimony is subject to the rules of admissibility and cross
12 examination.⁹ Hearsay is defined as a statement made by someone other than the
13 witness that is offered to prove the truth of the matter asserted¹⁰ and is inadmissible
14 unless subject to an exception.¹¹ Hearsay testimony “cannot be tested by cross-
15 examination” and is therefore excluded because it is untrustworthy.¹² The Commission
16 has ruled that, “It is well established that the testimony of a witness cannot be given much
17 weight without permitting cross-examination” because “allowing testimony without cross-
18 examination makes it difficult to determine whether the testimony is credible.”¹³

19 _____
20 ⁶ See e.g., NWN/1600, Middleton/18 – 20.

21 ⁷ NWIGU-CUB/200, Larkin/26, ll. 5-10.

22 ⁸ NWIGU-CUB/200, Larkin/26, l. 1 – 27, l. 10 (emphasis added).

23 ⁹ OAR 860-001-480(10).

24 ¹⁰ ORS 40.450(3).

25 ¹¹ ORS 40.455. Hearsay can be admissible if it fits within recognized exceptions, which are set
26 forth in ORS 40.460 –.465.

27 ¹² *Sheedy v. Stall*, 255 Or. 594, 596 (1970).

28 ¹³ *Central Lincoln People’s Utility District v. Verizon Northwest Inc.*, Docket UM 1087, Order No. 04-
29 379 at 5 (July 8, 2004).

1 Here, the lengthy quotations from Dr. Hatheway's book and the conclusions put forth
2 by Mr. Larkin "[b]ased on the statements in Dr. Hatheway's book" are hearsay. The
3 content of the book is clearly a statement¹⁴ made by someone other than Mr. Larkin and
4 Mr. Larkin offers the excerpts from Dr. Hatheway's book specifically to prove the truth of
5 the matter asserted in the book. Mr. Larkin relies on the substance of Dr. Hatheway's
6 book in his attempt to demonstrate that NW Natural was aware of the environmental
7 damage caused by manufactured gas plants. Mr. Larkin provides no other evidentiary
8 support for his conclusions other than Dr. Hatheway's book.

9 Because Mr. Larkin's conclusions are based entirely on Dr. Hatheway's book, neither
10 NW Natural nor the Commission will have an opportunity to subject Mr. Larkin's testimony
11 to meaningful cross examination and, likewise, no party to this case be able to conduct
12 discovery related to Dr. Hatheway's work. Without discovery and cross examination, Dr.
13 Hatheway's work will not be tested and Commission will be unable to determine whether
14 his conclusions are sound.

15 CUB and NWIGU may argue that Mr. Larkin is an expert witness and as such the
16 materials he relied upon in forming his expert opinion are admissible. It is true that in
17 certain limited circumstances hearsay can be admitted into evidence if the statement was
18 relied upon by an expert witness in forming that expert's opinion.¹⁵ In this case, however,
19 Mr. Larkin is not an expert witness testifying about environmental standards for former
20 manufactured gas plants. Rather, Mr. Larkin relies on Dr. Hatheway's expertise as the
21 basis for his own opinions. Dr. Hatheway, as Mr. Larkin's testimony states, is a "Geologist
22 Professor of Engineering at the University of Missouri" and has an extensive academic
23 and professional background related to the issue of environmental liability at former

24 ¹⁴ ORS 40.450(1) ("A 'statement' is: (a) An oral or written assertion . . .").

25 ¹⁵ See e.g., *Rieker v. Kaiser Found. Hospitals*, 194 Or. App. 708, 711 (2004) ("Excerpts from
26 medical literature may, however, be offered as the basis of expert opinion testimony under OEC
703 . . .").

1 manufactured gas plants.¹⁶ Mr. Larkin, on the other hand, is an accountant who,
2 according to the evidence submitted in this docket, has absolutely no professional or
3 educational background that would qualify him to testify as to the matters discussed in Dr.
4 Hatheway's book.¹⁷ Indeed, if Mr. Larkin were competent, he would not need to base his
5 testimony on Dr. Hatheway's book, he could have simply made the same statements
6 based on his own analysis and qualifications. Instead, Mr. Larkin introduces Dr.
7 Hatheway, describes Dr. Hatheway's qualification as an expert witness, quotes Dr.
8 Hatheway's book at length, and then provides his own opinion "[b]ased on the statements
9 in Dr. Hatheway's book."¹⁸ Thus, while the Company will be able to cross examine Mr.
10 Larkin, that examination will not be able to test the credibility of Dr. Hatheway's book
11 because Mr. Larkin cannot testify as to the credibility of Dr. Hatheway's book.

12 **B. The Argument Raised in the Testimony was Improperly Raised in Mr. Larkin's**
13 **Rebuttal Testimony.**

14 In addition to being inadmissible hearsay testimony, the Testimony also for the first
15 time responds to issues raised in Dr. Middleton's direct testimony. The Testimony
16 purports to respond to Company witness C. Alex Miller's reply testimony.¹⁹ Specifically,
17 Mr. Larkin claims that his testimony is responding to Mr. Miller's statement that "the
18 Company and its regulators therefore could not have anticipated either the health or
19 environmental harms we recognize today or the cleanup obligations that exist under
20 today's current laws."²⁰ However, that statement in Mr. Miller's testimony is a direct

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23 ¹⁶ NWIGU-CUB/200, Larkin/26, ll. 5-7.

24 ¹⁷ See e.g., NWIGU-CUB/100, Larkin/1; NWIGU-CUB/101.

25 ¹⁸ NWIGU-CUB/200, Larkin/26, l. 1 – 27, l. 10 (emphasis added).

26 ¹⁹ NWIGU-CUB/200, Larkin/26, ll. 1-4.

²⁰ NWIGU-CUB/200, Larkin/26, ll. 1-4.

1 reference to Dr. Middleton's direct testimony.²¹ So while Mr. Larkin claims to be
2 responding to Mr. Miller, he is actually responding to the substantive issues raised in the
3 direct testimony of Dr. Middleton. Indeed, Dr. Middleton's direct testimony in this case
4 specifically "[d]escribe[s] the state of gas industry knowledge regarding the potential
5 environmental consequences, as understood today, of the operation of manufactured gas
6 plants"²²

7 Mr. Larkin's direct testimony, filed on May 3, 2012, did not directly respond to the
8 testimony of Dr. Middleton. Rather, CUB and NWIGU chose to respond to Dr. Middleton's
9 direct testimony for the first time in their rebuttal testimony filed on July 20, 2012. As a
10 case moves forward, the issues involved should narrow as each round of testimony
11 responds to the testimony that immediately preceded it. By filing rebuttal testimony
12 responding to NW Natural's direct, rather than reply, testimony, CUB and NWIGU are
13 frustrating this purpose.

14 Moreover, if the Testimony is not stricken, CUB and NWIGU's decision to improperly
15 raise this argument for the first time in their rebuttal testimony will cause undue prejudice
16 to NW Natural because the Company will have a limited opportunity to conduct discovery
17 and only one opportunity to respond to Dr. Hatheway's claims. And because NW
18 Natural's surrebuttal testimony is due on August 9, the timeline for NW Natural's
19 responsive testimony is much more limited as compared with the response time the
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22 _____
23 ²¹ NWN/2600, Miller/11, ll. 1-6 ("His argument fails in light of Dr. Middleton's direct testimony, which
24 establishes that plant operations during the 'MGP era' were not viewed as risky from an
25 environmental perspective, and that Companies were not subjected to broad environmental laws at
26 that time. 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.").

²² NWN/1600, Middleton/2, ll. 14-18 and Middleton/18 – 20.

1 Company would have had if CUB and NWIGU had properly raised this argument in their
2 direct testimony.²³

3 **IV. CONCLUSION**

4 The testimony set forth in Mr. Larkin's rebuttal testimony beginning on line 1 of page
5 26 and extending through page 28, line 6, should be stricken from the record in this case.
6 The Commission should strike the Testimony because it constitutes untrustworthy,
7 inadmissible hearsay that will not be subject to cross examination. Moreover, the
8 Testimony consists of claims improperly raised for the first time in rebuttal testimony,
9 prejudicing the Company's ability to respond.

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11 Respectfully submitted this 1st day of August, 2012.

12
13 **MCDOWELL RACKNER & GIBSON PC**

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25 ²³ The schedule allows for only 20 days between the filing of intervenor's rebuttal testimony and the
26 Company's surrebuttal testimony. On the other hand, had CUB and NWIGU properly raised this
issue in their direct testimony, the Company would have had 43 days to respond.

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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Dated: August 1, 2012



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