BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 2032

In the matter of PUBLIC UTILITY COMMISSION OF OREGON, Investigation into the Treatment of Network Upgrade Costs for Qualifying Facilities	NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, RENEWABLE ENERGY COALITION, AND COMMUNITY RENEWABLE ENERGY ASSOCIATION'S REPLY TO MOTION TO STRIKE

I. INTRODUCTION

The Northwest and Intermountain Power Producers Coalition, the Renewable Energy Coalition, and the Community Renewable Energy Association (together referred to as the "Interconnection Customer Coalition") file this Reply to Idaho Power Company, PacifiCorp, dba Pacific Power, and Portland General Electric Company's (the "Joint Utilities") Response to the Interconnection Customer Coalition's motion to strike ("Motion to Strike"). The Joint Utilities ask the Oregon Public Utility Commission (the "Commission" or "OPUC") to deny the motion claiming that:

1) Their witnesses must be able to describe the regulatory landscape to build an effective evidentiary record;
2) Their witnesses are qualified to submit the type of legal discussion present in the testimony; and
3) Granting the Motion to Strike would make it difficult to present their policy recommendations at this point in the proceeding.

The Commission should strike the portions of the testimony highlighted in the initial Motion to Strike because it includes inadmissible legal arguments and conclusions, which could have a prejudicial impact on the Commission's decision in this proceeding. As the Motion to Strike previously explained, parties may submit relevant evidence in testimony, which Oregon

law defines as evidence that would tend to make the existence of *fact* at issue more or less probable than it would be without the evidence.[1] The Joint Utilities' witnesses may assert their opinions based on facts, as well as their policy recommendations within testimony. However, they cannot prop up their opinion or policy recommendations with legal arguments, precedential interpretations, or legal conclusions, especially when a particular legal conclusion is not based on settled law or is disputed by other parties.

Furthermore, the Joint Utilities' witnesses' qualifications are irrelevant because Commission precedent simply does not permit testimonial legal analysis by non-lawyer witnesses when that legal analysis is central to the case at hand. Ultimately, the witnesses' qualifications are a secondary issue to the admissibility of the substance of the testimony. The substance of much of the testimony here is a legal argument, interpretation, and conclusion, and it is inadmissible regardless of the witnesses' credentials. Accordingly, the Commission should strike all inadmissible legal analysis and conclusions in the Joint Utilities' testimony.

II. BACKGROUND

On September 2, 2020, the Interconnection Customer Coalition filed the Motion to Strike in Docket Number UM 2032. As the Joint Utilities state in their Response, "the purpose of this docket is to investigate the [Commission's] interconnection service requirements and cost-allocation policies for state jurisdictional qualifying facility [("QF")] interconnections."[2] The primary issue in this proceeding is setting appropriate interconnection policies that are consistent with the state and federal Public Utility Regulatory Policies Act of 1978 ("PURPA") and setting

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1 OAR 860-0014-0450(1)(a); *see*, *e.g.*, *Am. Can Co. v. Lobdell*, 55 Or App 451, 466 (1982) (upholding Commission's exclusion of irrelevant evidence); see also OAR 860-001-0480(10) ("written testimony is subject to rules of admissibility").

2 Joint Utilities' Response to Motion to Strike at 1:1-9.

the implementation procedures for those policies, while still ensuring that Oregon's laws protect interconnection customers from unjust, unreasonable, and discriminatory rates and services. The Joint Utilities aim to retain and change some of the Commission's interconnection policies on interconnection service requirements. To do so, they elected to submit testimony with extensive legal analysis and conclusions, even though the Joint Utilities agreed in their own Response that legal analysis in the form of applying the law to facts is impermissible.[3] This Reply explains why the law requires the Commission to strike the Joint Utilities' testimony.

III. DISCUSSION

At issue here is the difference between: 1) a witness offering its understanding of the law to build a foundation for the Commission's understanding of factual evidence; and 2) a witness offering legal analysis within evidentiary testimony. If the witnesses' testimony is essentially debating what the law is and how the law should be applied, then the witnesses' interpretation of that law is inadmissible as factual evidence for testimony. The Joint Utilities' Response encapsulates this issue. It states, "[t]o the extent the Interconnection Customer Coalition disagrees with the Joint Utilities' statements of current Commission policy, the Coalition is free to explain their own understanding in testimony."[4] What the Joint Utilities actually mean is "[t]o the extent the Interconnection Customer Coalition disagrees with the Joint Utilities' statements of [*federal and state law, its interpretations of applicable federal and Oregon state cases, and its application of the law to the facts in this case*], the Coalition is free to explain their own understanding in testimony." It is inappropriate for the Interconnection Customer Coalition to

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3 *Id.* at 4:1-2, 4-5, 9-10.

4 *Id.* at 8:3-5.

debate the law in its response testimony, as it is a "well-established principle that legal argument *per se*, belongs in briefs and not in the testimony of non-lawyer witnesses."[5]

This Reply highlights how the Joint Utilities' testimony goes beyond a mere description of the regulatory landscape, why the witnesses may not presume what is within the scope of this docket, why the witnesses are not qualified to present legal arguments (though the qualifications of the witnesses are only a secondary concern to the substance of the testimony), and why allowing this testimony would be prejudicial to the Interconnection Customer Coalition in this proceeding.

A. The Joint Utilities Can Discuss Undisputed Regulatory Framework But They Cannot Interpret How that Legal Framework Might Apply to This Current Proceeding

The Joint Utilities assert that the "testimony appropriately describes the witnesses' understanding of the applicable requirements that they implement on a day-to-day basis in their interconnection and regulatory roles."[6] The Interconnection Customer Coalition agrees to an extent: a witness may discuss its understanding of the regulatory framework, but the Joint Utilities' testimony goes beyond providing the witnesses' understanding of the framework. It consists of legal interpretations and conclusions.

As the initial Motion to Strike explained, a witness may cite to statutes, orders, and rules as a necessary foundation to establish admissible factual evidence.[7] That said, testimony

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5 *In re Or. Pub. Util. Comm'n Staff Requesting the Comm'n Direct PacifiCorp to File Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, Docket No. UE 177, Order No. 08-176 at 3 (Mar. 20, 2008).

6 Joint Utilities' Response to Motion to Strike at 3:5-7.

7 Motion to Strike at 4.

discussing such sources is inadmissible when the witness' proceeds to explain the law and apply these laws, orders, and rules to facts.[8]

The Joint Utilities' Response cites several Commission cases where it was permissible for witnesses to provide statements of *settled law* relevant to the case.[9] Those particular cases were all decided prior to the *Blue Marmot* case, which was more stringent regarding the type of testimony admissible.

In *Blue Marmot*, Portland General Electric Company ("PGE") pointed out that the Commission had previously accepted expert legal testimony provided by lawyers in other cases, particularly for areas of law that the Commission did not commonly address.[10] However, PGE argued that the testimony provided by Blue Marmot had offered "opinions of non-lawyers about the very questions of law that this Commission must resolve…"[11] Furthermore, PGE argued that Blue Marmot "presented their legal arguments as if they were statements of well-settled law — when in fact, they are not; and they have provided virtually no citations to precedent, making it particularly difficult for PGE to respond."[12] Below is a table providing *just a sampling* of the type of testimony the ALJ struck in that case.

Testimony	Reason it was Stricken
"The QF enters into a legally enforceable obligation by committing itself to sell power to an electric utility." Blue Marmot/200, Talbott/13:17-18.	Interpretation of Law
"a legally enforceable obligation allows a QF to "lock in" current avoided cost rates and contract terms, especially when a utility is delaying or otherwise imposing unreasonable terms and conditions." Blue Marmot/200, Talbott/14:4-7.	Interpretation of Law

8 *Blue Marmot V LLC, et al. v. Portland Gen. Elec. Co.,*, Docket Nos. UM 1829, ALJ Ruling at 3 (Dec. 13, 2017) [hereinafter *Blue Marmot*] (consolidated with Docket Nos. UM 1830, 1831, 1832, 1833).

9 Joint Utilities' Response to Motion to Strike at 7 n. 15, n.16.

10 *Blue Marmot*, PGE's Reply to Motion to Strike at 1:12-14.

11 *Id.* at 2:1-2.

12 *Id.* at 2:2-4.

Describing and citing the facts of a case, "the OPUC explained that a legally enforceable obligation cannot be formed until the utility and QF have undertaken the contracting process, and negotiations have progressed beyond the initial communications. The OPUC then adopted a policy that a legally enforceable obligation and a QF's right to then current avoided cost rates begins at the time the QF signs a final draft of an executable contract that includes specific requirements, including on line dates, minimum and maximum output, penalties for failure to deliver, etc. The OPUC also recognized that there may be problems, delays or obstructions toward the execution of a final contract that will entitle a QF to then current avoided cost rates prior to the utility sending an executable PPA." Blue Marmot/200, Talbott/14:18-15:5.	Interpretation of Law
"all five projects have satisfied both the OPUC's and FERC's standard for forming legally enforceable obligations" Blue Marmot/200, Talbott/15:12-13.	Legal Conclusion
"In a recent 2016 order, the OPUC noted that 'a QF has the power to determine the date for which avoided costs are calculated by obligating itself to provide power.'" *citing* "Re OPUC Investigation into QF Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 23-24 (May 13, 2016)." Blue Marmot/200, Talbott/14:13-15.	Interpretation of Law (even though it only quoted a case)
"PGE Merchant's refusal to execute the PPAs is not consistent with the requirements of PURPA and how off-system QFs are handled in Oregon and by FERC." Blue Marmot/300, Moyer/3:14-16.	Legal Conclusion
"Contrary to PURPA Requirements" preceding a description of PGE's actions. Blue Marmot/300, Moyer/8:8.	Legal Conclusion
"The problem with PGE Merchant's request is that the Blue Marmots are not obligated to obtain transmission service for themselves or on behalf of PGE Merchant on PGE's transmission system, or in this case on BPA's transmission system to accommodate PGE Merchant's transmission requests. Instead, the Blue Marmots have the choice to sell their power to PGE at the specific point of their choosing where ownership of the transmission between PacifiCorp and PGE changes." Blue Marmot/300, Moyer/8:14-20.	Interpretation of the Law

In this case, the Joint Utilities argue that their testimony does not include inadmissible legal discussion "of the type that has previously been stricken from testimony," but their

testimony is clearly akin to that stricken in *Blue Marmot* as a legal conclusion or an interpretation of the law, as can be seen in the chart below.[13]

Testimony	Reason it Should Be Stricken
"The Commission's current policies, which allocate the costs of QF-driven Network Upgrades to the QFs that cause them, are consistent with PURPA's customer indifference standard." Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/5:16-18.	Disputed Legal Conclusion
"PURPA's unique operational mandates—its must-take requirement, which includes a prohibition on the curtailment of QF power (outside of emergency conditions), and its mandate that 100 percent of a QF's output be delivered to load on firm transmission—mean that NRIS is the only appropriate interconnection service type for QFs." Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/5:21-6:2.	Disputed Legal Conclusion
"Small generators, including QFs, are required to pay for all interconnection costs caused by their interconnection, both up to and beyond the point of interconnection. This means that small QFs pay for the cost of Interconnection Facilities and System Upgrades" Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/11:9-11.	Disputed Legal Conclusion
"PURPA mandates a very specific arrangement: Under PURPA, a directly interconnected QF arranges for its interconnection with the utility's system; the utility is then required by PURPA to make transmission service arrangements to deliver the power from the QF's point of delivery to the utility's load using firm transmission service". Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/15:9-13.	Disputed Legal Conclusion based on an interpretation of case law
"given PURPA's unique operational requirements, NR Network Upgrades needed to ensure that a QF's power can be delivered to load using firm network service are also upgrades necessitated by the QF's interconnection." Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/19:9-12.	Disputed Legal Conclusion
"PURPA's definition of interconnection costs is very broad, and it includes all types of facilities or upgrades that may be necessary for a QF's interconnection, including Network Upgrades." Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/28:20-12.	Disputed Legal Conclusion with no citation for support

Furthermore, the cases are similar because the testimony in both cases was offered by non-lawyers who were explaining their "understanding of the applicable requirements that they

[13] This chart does not include every instance of legal conclusion or interpretation of law in the Joint Utilities' Testimony. Its main purpose is to efficiently highlight the similarities between testimonies.

implement on a day-to-day basis in their interconnection and regulatory roles."[14] Accordingly, the Commission should consider the types of testimony previously stricken in *Blue Marmot* when determining whether to strike the highlighted portions of the Joint Utilities' testimony. Additionally, the Joint Utilities should not be allowed to use qualifying language regarding their "understanding of the law" to mask clear legal opinions or analysis.[15]

To provide a more detailed example of inadmissible testimony, the Joint Utilities argued that the following statement should not be stricken: "FERC has held that a purchasing utility must deliver a QF's power on firm transmission without curtailment (except in emergency conditions)."[16] The Joint Utilities concede that their witnesses testify about the law, but they allege that it is necessary to "provide their understanding of [the] relevant FERC case where these operational requirements were clarified."[17] Whatever their purpose may have been, the witnesses gave their legal interpretation of a FERC case to explain how these operational considerations were, in their view, "factually relevant to the interconnection policy issues raised in this case, including whether QFs should be required to obtain NRIS."[18] So, the witnesses state what the law is, then they apply the law to the facts of this proceeding, then finally, they state that the law "requires" their preferred outcome. That is exactly how a legal analysis works. As an additional issue, the witnesses' interpretation of this law and their legal conclusions stemming from it are disputed.

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14 Joint Utilities' Response to Motion to Strike at 3:5-7.
15 Motion to Strike at 13-14.
16 Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth at 19:1-2.
17 Joint Utilities' Response to Motion to Strike at 8:14-15.
18 Joint Utilities' Response to Motion to Strike at 8:15-17.

By contrast, it would have been appropriate for the witnesses to explain, if true, that they operate their system as if the purchasing utility must deliver power without curtailment, except in emergency conditions. The witnesses could have made factual assertions regarding how these operational requirements impacted or caused the utilities to incur certain interconnection and transmission costs. Then the witnesses could have made their recommendations regarding the allocation of those costs. However, it is not appropriate for the witnesses to explain the utilities' disputed legal theories as to why certain costs should be allocated to specific customers as a matter of law.

The Interconnection Customer Coalition should respond to these Vail-Bremer-Foster-Larson-Ellsworth-legal conclusions in legal briefs, where their lawyers can explain why the Joint Utilities' reading of PURPA, the FERC rules, and relevant case law is incorrect. However, the Interconnection Customer Coalition should not be asked to and does not intend to have their witnesses provide legal analysis and interpretations in their responding testimony to the Joint Utilities.

B. The Joint Utilities Cannot Presume What is Within the Scope of this Docket.

In their Response, the Joint Utilities argue that their witnesses are allowed to discuss their understanding of this this docket's scope of. They assert that "[s]uch testimony is not legal analysis; it is simply a recitation of the witnesses' understanding, based on Commission orders and other information in the docket."[19] In other words, witnesses can testify regarding a docket's scope when those statements are based on an understanding of the facts already present in the docket. For that reason, the Interconnection Customer Coalition was prudently selective of the testimony it highlighted to strike. For example, it specifically did not strike the majority of the

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[19] Joint Utilities' Response to Motion to Strike at 11:16-18.

Joint Utilities' page-long answer to the question, "[g]iven the fragmented rules and policies applicable to generators of various sizes, what do you understand to be the scope of this docket?"[20] The only language the Motion sought to strike on this page was the statement "clearly within the scope of the docket."[21] The witnesses firmly made this statement without qualifying that it was their understanding of the scope of the docket, thus, it is a legal conclusion.

Furthermore, the witnesses assert that the ultimate policy treatment of system upgrades was "presumably within the scope of this docket,"[22] and they stated that it was their "understanding" that upgrades to a utility's distribution system were not within the scope of this docket.[23] These statements are not admissible. This "presumption" and this "understanding" in the testimony were not based on any understanding of a Commission order or fact present in the docket or testimony. Thus, by the standard described in the Joint Utilities' own Response, these statements are inadmissible.[24]

C. The Qualifications of the Joint Utilities' Witnesses Are a Secondary Issue to the Substance of the Testimony the Witnesses Seek to Offer

The Motion to Strike explained that the witnesses' qualifications are, in effect, irrelevant when the crux of the witnesses' testimony is legal in nature.[25] The Joint Utilities argue that their witnesses "are experts in their respective fields and are therefore perfectly qualified to provide

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20 Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth at 12:2-3.

21 Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth at 12:19-20.

22 Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth at 13:4-5.

23 Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth at 13:12-13.

24 That said, the Interconnection Customer Coalition concedes that the statement regarding the witnesses' understanding of what is not included in the scope of this docket presents a close call between a legal conclusion and a witnesses' understanding based on fact. For that reason, the Interconnection Customer Coalition agrees with not striking Joint Utilities/100 Vail-Bremer-Foster-Larson-Ellsworth at 13:12-13.

25 Motion to Strike at 11-12, 14.

the testimony that they filed."[26] The witnesses have relevant experience, which the Motion to Strike mentioned on several occasions.[27] Their experience, however, is irrelevant. Legal testimony is only appropriate in limited circumstances where a lawyer is testifying about settled law, and in most cases, that law is not familiar to the Commission.[28] The Commission is familiar with the bodies of law the Joint Utilities described in their testimony. More importantly, the Joint Utilities' witnesses are not lawyers and many of the legal conclusions are disputed.

In any event, the primary issue here is still the substance of the testimony. Commission precedent has already held that witnesses with extensive engineering, economics, and business experience in relation to transmission and interconnection were not permitted to analyze energy policy or legal precedent in their testimony because legal analysis is simply not permitted, regardless of the witnesses' expertise.[29] Accordingly, the Commission should uphold its precedent and hold that the Joint Utilities' testimony consisting of legal analysis, opinions, or conclusions is inadmissible.

D. Admitting the Legal Analysis and Legal Conclusions in the Joint Utilities' Testimony Complicates the Proceeding and Striking It Will Not Prejudice the Joint Utilities

The Joint Utilities argue that striking the previously highlighted testimony will lead to an incomplete and unclear record and that it would "be extremely difficult to understand parties' positions and efficiently develop a record for this policy investigation if [all parties] were required to reserve their policy recommendations for the briefing stage."[30] The Joint Utilities are

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[26] Joint Utilities' Response to Motion to Strike at 4 n. 10.
[27] Motion to Strike at 10, 14.
[28] *Blue Marmot*, PGE's Reply to Motion to Strike at 1:12-14.
[29] Motion to Strike at 11-12 (citing Blue Marmot, PGE Motion to Strike at 3; Blue Marmot, Ruling at 4-5 (Dec. 13, 2017).
[30] Joint Utilities' Response at 11:9-11; 13:6-7.

free to make policy recommendations to the Commission, but they cannot allege that those recommendations are required, nor can they support their recommendations with legal analysis or conclusions. In addition, the Joint Utilities ignore that both the Commission and FERC have previously set interconnection policies and rules without any testimony.

To illustrate what is and is not admissible, the Interconnection Customer Coalition did not strike most of the testimony where the witnesses explained why "directly interconnected QF should be required to interconnect with NRIS."[31] This statement is an admissible policy recommendation as it does not attempt to apply the law to facts or assert that a recommendation is mandated or consistent with PURPA and its implementation rules and orders.

Conversely, it is impermissible for the witnesses to say that the Commission's current policies are "firmly grounded in PURPA and state policy," that "PURPA requires state commissions to encourage QF development within the bounds of customer indifference and the avoided cost rate," and that adopting new Commission policies could "contravene both PURPA and state law in order to drive QF development."[32] These are inadmissible legal conclusions

Additionally, the Joint Utilities assert that the testimony will not "overly complicate" the proceeding.[33] As was previously stated in the Motion to Strike,

> If the Utilities' testimony is not stricken, the Interconnection Customer Coalition will have to choose between leaving the [legal] testimony unrefuted [and] conducting discovery, submitting responsive testimony, and cross-examining the witnesses about their views and interpretations of the law. The first option will prejudice the Interconnection Customer Coalition because there would be no responsive testimony to these core issues. The second option will significantly increase the cost and complexity of this proceeding.[34]

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31 Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth at 29:1-10.
32 Joint Utilities/200, Wilding-Macfarlane-Williams at 13:21; 14:1-2; and 14:8.
33 Joint Utilities Response to Motion to Strike at 12:12.
34 Motion to Strike at 5.

The Interconnection Customer Coalition chose the first option and sent discovery requests that sought "detailed factual information" from the utilities, with the exception of the question on the "quantifiable system-wide benefits," which the Joint Utilities mentioned they are responding to.[35] The Interconnection Customer Coalition plans to follow Commission precedent and Oregon law by testifying with factual information, and not with legal analysis. Unfortunately, the lack of responsive legal testimony will prejudice the Interconnection Customer Coalition as the legal analysis may be unrefuted in testimony. The Joint Utilities did not address this harm in their Response. Therefore, the Commission should strike all legal analysis and conclusion from the testimony to avoid any prejudicial impact on the Interconnection Customer Coalition.

IV. CONCLUSION

The legal argument and conclusions of the Joint Utilities' non-lawyer witnesses are inadmissible as testimony. Moreover, the Joint Utilities' attempt to justify these legal arguments, based on needed context and witness qualifications, is unpersuasive and irrelevant for the reasons described above. Therefore, the Commission should strike all of the legal analysis and conclusions highlighted in Exhibit A of the Interconnection Customer Coalition's original Motion to Strike.

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[35] Joint Utilities Response to Motion to Strike at 6:10-20, 13:13.

Dated this 17th day of September 2020.

Respectfully submitted,

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