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September 2, 2011

Via Electronic Filing and U.S. Mail

Oregon Public Utility Commission
Attention: Filing Center
550 Capitol Street NE, #215
PO Box 2148
Salem OR 97308-2148

Re: UE 228

Attention Filing Center:

Enclosed for filing in the captioned docket are an original and two copies of:

- **REPLY IN SUPPORT OF PGE'S MOTION TO STRIKE**

This is being filed by electronic mail with the Filing Center. An extra copy of the cover letter is enclosed. Please date stamp the extra copy and return to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "DCT", is written over the typed name.

DOUGLAS C. TINGEY
Assistant General Counsel

DCT:cbm
Enclosures
cc: UE 228 Service List

**BEFORE THE PUBLIC UTILITY
COMMISSION OF OREGON**

UE 228

In the Matter of
PORTLAND GENERAL ELECTRIC
COMPANY
2012 Annual Power Cost Update Tariff
(Schedule 125)

**PORTLAND GENERAL ELECTRIC
COMPANY'S REPLY IN SUPPORT OF
PGE'S MOTION TO STRIKE**

On August 29, 2011, Portland General Electric Company ("PGE") filed a motion to strike portions of the deposition and surrebuttal testimony of the Industrial Customers of Northwest Utilities' ("ICNU") expert Donald Schoenbeck. On August 31, 2011, ICNU filed a Response in Opposition ("Response") to the motion to strike. PGE now files its reply respectfully requesting that the Public Utility Commission of Oregon ("Commission") grant PGE's motion to strike and further, decline to admit the newly offered declaration by ICNU.

INTRODUCTION

ICNU's response to PGE's motion to strike misses the point of the motion and the applicable law. ICNU's response addresses Rule 703, which is not in issue. Rule 703, entitled "Basis of opinion of expert testimony," addresses what an expert can properly use as a basis for the expert's opinion. ORS §40.415. PGE did not make its motion under Rule 703 and does not claim that the testimony of Mr. Schoenbeck violates Rule 703.

PGE's motion was made under Rule 705, which states in part: "The expert may in any event be required to disclose the underlying facts or data on cross-examination." ORS §40.425. ICNU's response did not address this rule or the substance of PGE's objection.

As part of its response, ICNU improperly attempted to offer evidence, in the form of an evidentiary declaration of one of the attorneys for ICNU. As discussed below, this improper declaration should be rejected by the Commission.

ARGUMENT

I. LEGAL STANDARD

ICNU, as the proponent of its expert's testimony, bears the burden to establish its admissibility and compliance with rules. ICNU's arguments regarding relevance, and the standards under Rule 703, are not responsive because PGE's motion to strike is not based on relevance or on Rule 703. Rule 703 deals with the admissibility of the information underlying the expert's opinion, not with the discoverability of that information. Rule 705 addresses the right to discovery of the information in order to test its reliability and accuracy. Because ICNU's testimony does not comply with the requirements of Rule 705, it should be stricken.

ICNU also cites to, and is unclear about the outcome of, a previous docket where testimony of an ICNU witness was stricken by the Commission. In Docket UE 177, several portions of the testimony of an ICNU witness were stricken by order of the ALJ. ICNU requested certification of that decision to the Commission. In Order 08-176, the Commission granted certification, and affirmed the ALJ's ruling striking the testimony. In Order 09-177, the Commission revisited part of that ruling, but not in the way represented by ICNU. In that Order, the Commission modified Order 08-176 regarding certain portions of the stricken testimony.

The Commission stated:

“On reconsideration, we modify Order No. 08-176 and consider the testimony of Blumenthal relating to the validity of OAR 860-022-0041. Because the testimony consists of legal argument and does not address any disputed fact, however, we consider the testimony as comment rather than factual evidence.”

Order 09-177, p. 3. The Commission did not alter its previous order striking other portions of the testimony. ICNU's statement that the Commission "reversed its prior decision to strike portions of ICNU expert testimony" is imprecise. The Commission reconsidered only regarding certain parts of the stricken testimony. Other parts remained stricken. The part allowed in was not considered factual testimony, just comment. In any case, the arguments in that case, that the testimony was irrelevant and consisted of legal argument, are inapposite to this docket.

II. THE SUBJECT PORTIONS OF MR. SCHOENBECK'S TESTIMONY SHOULD BE STRICKEN AS INADMISSIBLE UNDER THE OREGON RULES OF EVIDENCE

Oregon has long recognized, even before adoption of Rule 705, that an expert must disclose the data supporting his opinion when asked. *Wulff v. Sprouse-Reitz Co.*, 262 Or. 293, 498 P.2d 766 (1972) (under former Rule 52 "the opposite party on cross-examination may require the witness to specify the data on the hypothesis of which his conclusion is based."). The legislative commentary regarding Rule 705 is also clear. It says: "In any event, an adverse party may require an expert to state the facts supporting the expert's opinion on cross-examination." LAIRD C. KIRKPATRICK, OREGON EVIDENCE, Article VII-66 (4th ed. 2002).

In ICNU's response to PGE's motion to strike, ICNU states that there are "numerous authorities on point" in Oregon that PGE fails to address. Response at 5. ICNU then cites cases referring to OEC Rule 703, which are not on point.

ORS §40.425, Evidence Rule 705 states that:

"An expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

The only citation by ICNU to a case dealing with Rule 705 is to *Tiedemann v. Radiation Therapy Consultants, P.C.*, 701 P.2d 440, 299 Or. 238 (1985). That case only dealt with whether a doctor

could opine as to the standard of care without first disclosing the underlying facts or data, as allowed by the first sentence of Rule 705. *Id.* at 243. This case did not address the issue at hand, which is covered by the second sentence of Rule 705, regarding the refusal of a witness, because of a claim of confidentiality, to disclose the underlying facts when requested.

The Oregon Supreme Court has, however, briefly addressed the requirement of an expert to disclose the basis for the expert's opinion on cross-examination. In *Plemel v. Walter*, 303 Or. 262 (1987). The Supreme Court, in a footnote, recognized the applicability of Rule 705 to expert testimony, stating:

“Under OEC 705, the expert could testify as to the probability of paternity without initially disclosing the basis for the calculation. Such disclosure, however, must be made at the direction of the court or on cross-examination.”

Id. at 276, footnote 10.

The cases cited by PGE in its motion agree with and support this statement by the Oregon Supreme Court. In *In re Leap Wireless International, Inc.*, 301 B.R. 80 (S.D. Cal. 2003) the court granted a shareholder's motion to strike expert testimony and report where confidential information relied on was not disclosed. The court held that an expert witness's failure to disclose the source data denied the opposing party the right to cross-examine the expert's methodology, and the court struck the testimony. See also *U.S. ex rel. Maxwell v. Kerr-McGee Chemical Worldwide, LLC*, 2006 WL 2053534, No. CIV A04CV01224PSFCBS (D. Colo. 2006) (denying the motion to strike without prejudice to allow expert to supplement his opinion with non-confidential information or the motion to strike could be renewed).

ICNU argues that PGE failed to cross-examine Mr. Schoenbeck on any matter, and therefore “has no basis to claim that Mr. Schoenbeck's testimony should be excluded under Rule 705.” Response, p. 7. ICNU fails to recognize that PGE had previously cross-examined Mr.

Schoenbeck through a deposition and in that deposition Mr. Schoenbeck stated he could not provide the basis for his opinion because it was covered by a protective order. That is the basis of this motion and it is those very sections of his deposition that PGE seeks to have stricken. ICNU offered the entire transcript of that deposition in the record and it has been received subject to PGE's motion to strike. Mr. Schoenbeck's more recent written testimony also clearly states that he is unable to provide the underlying data because it is subject to a protective order. PGE sent written discovery to Mr. Schoenbeck seeking the basis for his statements in that testimony, and again received the response that the basis was covered by protective orders and it was not disclosed. PGE attempted to verify the basis of his opinions, but Mr. Schoenbeck consistently refused to provide it claiming it is subject to protective orders.

ICNU also claims that if Mr. Schoenbeck's testimony is deficient, so is the testimony of Mr. Stoddard, PGE's expert witness. That is not true. ICNU again makes its arguments based on Rule 703, and ignores Rule 705. ICNU also ignores the record in this proceeding. At no point in his written or oral testimony did Mr. Stoddard fail to disclose the basis for his opinion or claim that he could not disclose it because of confidentiality requirements or protective orders in other dockets. Mr. Stoddard answered all of ICNU's cross-examination questions and disclosed the facts requested. Mr. Stoddard identified the facts underlying his testimony including the names of numerous other utility companies with hedging strategies comparable to PGE's. Mr. Schoenbeck, however, did not do the same.

III. ATTEMPT TO INTRODUCE EVIDENCE

Along with its Response, ICNU has attempted to add evidence to the record in the form of a declaration from Melinda Davison, one of ICNU's attorneys. This is wholly improper. First, the hearing was Tuesday, August 30, and any attempt at introducing evidence should have occurred then. It would be improper and prejudicial for the Commission to admit evidence at this point in the process. If evidence were allowed, PGE would need to be allowed the opportunity to challenge the evidence and introduce evidence of its own. That time has passed.

The evidence submitted also has nothing to do with the subject of PGE's motion. The motion seeks the exclusion of claims Mr. Schoenbeck has made for which he says he cannot provide the basis because the information is covered by protective orders. The offered evidence has nothing to do with that issue. If ICNU is attempting to show that the Commission could itself find evidence to corroborate Mr. Schoenbeck's testimony, that too is improper. If there was evidence that ICNU wanted the Commission to consider, it should have submitted it at or prior to the August 30 hearing. It would be improper for the Commission to seek its own evidence beyond the record, and it is improper for Mr. Schoenbeck to suggest it.

The evidence submitted is also irrelevant to any disputed issue in this docket. The declaration attempts to show that certain products were "available." There is no factual dispute as to the availability of any product. As stated repeatedly in PGE's testimony at the hearing and before, PGE agrees that any gas product was available for a high enough price. The issue in this docket and addressed in testimony is whether the market for these products was liquid. ICNU and Mr. Schoenbeck have never disclosed the basis for his opinion that monthly and quarterly products were liquid in PGE's market. Mr. Schoenbeck has never provided the factual underpinnings of his opinion to allow the Commission and other parties to test the reliability of

the information. ICNU has not addressed that issue, and this latest attempt to introduce evidence also does not address that issue.¹

IV. VIOLATION OF A PROTECTIVE ORDER

The disputed portions of Mr. Schoenbeck's deposition and the disputed portions of Mr. Schoenbeck's Surrebuttal testimony make clear that he is basing his testimony on information he received subject to protective orders. In the data response submitted with PGE's motion to strike, ICNU again confirmed that Mr. Schoenbeck did not state whether the protective orders in question were issued by the Oregon PUC, or in other jurisdictions.

The Commission's rules prohibit the use of confidential material received under a protective order "for any purpose other than to participate in the proceedings unless the designating party gives written consent." OAR 860-001-0080(3)(b). The Commission's standard protective order, section 12, contains similar language: "Without the written permission of the designating party, any person given access to Confidential Information under this order may not use or disclose Confidential Information for any purpose other than participating in these proceedings." Mr. Schoenbeck stated that he is using this confidential information as part of the basis for his testimony in this docket. If any of the information was provided to Mr. Schoenbeck under a protective order issued by this Commission, then it appears the use of the information is in violation of such orders.


¹ It is also improper for an attorney in a matter to also act as a witness and attempt to introduce evidence regarding a contested issue. This situation has been addressed by this Commission in Docket DR 10/UE 88/UM 989. See the Ruling issued July 25, 2005 (page 2, footnote 1), and Corrected Memorandum issued August 23, 2005 (page 2), in that docket (stating that Oregon Rules of Professional Conduct 3.7 prohibits an attorney from representing a client while also appearing as a witness). As stated above, PGE believes the evidence offered in this docket is irrelevant to any contested issue.

CONCLUSION

PGE respectfully requests that the Commission grant the motion to strike, and also decline to admit into the record the untimely and improper Declaration of Melinda J. Davison.

DATED this 2nd day of September, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused **REPLY IN SUPPORT OF PGE'S MOTION TO STRIKE** to be served by electronic mail to those parties whose email addresses appear on the attached service list for OPUC Docket No. UE 228.

Dated at Portland, Oregon, this 2nd day of September, 2011.



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