

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1829, UM 1830, UM 1831, UM 1832, UM 1833

Blue Marmot V LLC (UM 1829)
Blue Marmot VI LLC (UM 1830)
Blue Marmot VII LLC (UM 1831)
Blue Marmot VIII LLC (UM 1832)
Blue Marmot IX LLC (UM 1833),

Complainants,

v.

Portland General Electric Company,

Defendant.

RULING

DISPOSITION: MOTIONS TO STRIKE GRANTED IN PART AND DENIED IN PART; MOTION TO COMPEL GRANTED IN PART AND DENIED IN PART

I. OVERVIEW

The essence of this complaint relates to the obligation of Portland General Electric Company (PGE) to purchase the output of Blue Marmot V, LLC, Blue Marmot VI, LLC, Blue Marmot VII, LLC, Blue Marmot VIII, LLC, and Blue Marmot IX, LLC, (Blue Marmot) at a specific point of delivery without upgrades.¹

On October 25, 2017, PGE filed a motion to strike portions of the testimony of William Talbott (Blue Marmot/200, Talbott) and Keegan Moyer (Blue Marmot/300, Moyer) filed on October 13, 2017. PGE, in addition to filing its reply to the Blue Marmot response, filed a contingent motion to compel discovery of the bases for the legal assertions contained in the Talbott and Moyer testimony, should its motion to strike be denied.

PGE's motion objects to cited portions of Talbott and Moyer testimony which, it argues, constitute improper legal argument offered by non-lawyer witnesses.

¹ See ALJ Ruling on Motion to Compel (Oct 30, 2017), for a more detailed summary description of the dispute.

Pursuant to an agreed-upon schedule, Blue Marmot filed a response on November 6, 2017 and PGE filed a reply on November 9, 2017.

Blue Marmot's response contends that the Commission allows discussion of legal and policy matters and then decides the appropriate weight to the evidence presented and that the witnesses gave their understanding of the law, rather than their opinion.

Blue Marmot also filed a response to the motion to compel on November 27, 2017, asserting attorney-client privilege. PGE replied to Blue Marmot's response on December 4, 2017.

II. MOTION TO STRIKE

PGE states that the outcome of the proceeding hinges on the resolution of legal questions and thus should be addressed in parties' briefs and oral argument. PGE therefore argues that legal arguments and conclusions should not be presented via witness testimony, especially of non-attorneys, which PGE contends Blue Marmot is seeking to do. PGE therefore seeks to strike the following testimony²:

Blue Marmot/200, Talbott:

- a. 13:17-15:5
- b. 15:12-15:13

Blue Marmot/300, Moyer:

- a. 3:14-3:16
- b. 3:24-4:2
- c. 4:11-4:12
- d. 4:15-4:17
- e. 4:23 beginning with "because"-5:2, 6:16-7:24, ending with "Yes."
- f. 6:16-7:20
- g. 8:8: "Contrary to PURPA requirements,"
- h. 8:14-9:7
- i. 12:6 beginning with "A utility"-12:9
- j. 12:11-13:11
- k. 16:8 beginning with "As explained"-16:14
- l. 19:4 beginning with "PGE Merchant"-19:5
- m. 20:6-21:11
- n. 27:3-28:12
- o. 29:18-30:2

PGE cites OAR 860-001-0450(1)(a), stating that the purpose of testimony is to provide "relevant evidence" which means that it tends to make the existence of any fact at issue more or less probable than without the evidence. Legal opinion does not tend to make a fact more or less probable and, in PGE's view, the above-identified testimony should thus be excluded.

² Bound by beginning and end of sentences unless otherwise noted.

Blue Marmot states that its witnesses are describing their understanding of PURPA rules and are not testifying to the truth of any legal requirements. Further, Blue Marmot states that witness testifying as to PURPA law and policy is no different than is generally done in Commission administrative proceedings and is thus less stringent than the rules applying in the courts. Blue Marmot argues that the testimony discusses how the facts relate to the regulations and that administrative hearings “have a relaxed evidentiary standard.”³

III. MOTION TO COMPEL

PGE argues that if its motion to strike is unsuccessful, it will need to respond with its own testimony and will therefore need to obtain information to “understand the bases for the Blue Marmots’ legal arguments.”⁴ PGE cites exchanges with Blue Marmots’ counsel and states that its requests for information have been rebuffed with vague statements about the witness’ experience and communications with counsel and that its efforts to resolve the dispute as required by OAR 860-001-0500(7) have failed. PGE further argues that attorney-client privilege has been waived to the extent that the witness bases the proffered testimony on conversations with counsel.

Blue Marmot cites the long precedent of attorney-client privilege as being sacrosanct even in administrative proceedings and that mandating such disclosure would be “an unprecedented extension of the Commission’s discovery rules.”⁵ Blue Marmot also argues that the PGE motion to compel is not yet ripe because the PGE motion to strike is still pending.

IV. DISCUSSION

In examining each of the sections of testimony PGE seeks to strike, it is important to distinguish between the witness’ *understanding* of the law and the witness’ *interpretation and application* of the law to the facts purported to be offered in testimony. The former relates to the witness’ state of mind in developing testimony (which may have some limited evidentiary value and be admissible in an administrative proceeding), while the latter would constitute legal analysis or argument and be inadmissible.⁶ With respect to attorney-client privilege, the instances where the attorney’s advice is relied upon as the core basis of the testimony offered are deemed waived to the extent indicated. Furthermore, where indicated, other rules of evidence not relating to questions of a lay person’s interpretation or conclusions of law, are discussed.

³ Blue Marmot Response to PGE’s Motion to Strike, Nov 6, 2017, at 7.

⁴ PGE’s Motion to Compel, Nov 9, 2017, at 1.

⁵ Blue Marmot Response to PGE’s Motion to Compel, November 27, 2017 at 6.

⁶ See Federal Rule of Evidence 702 which permits the use of expert testimony only if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the *evidence* or to determine a *fact* at issue.” (Emphasis added.) See also Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. Kan. L. Rev. 325 (1992).

V. RULING

I provide my rulings on each section, below, *seriatim*:

Blue Marmot/200, Talbott:

a. 13:17-15:5

This portion of the testimony is stricken under the foregoing standard except as to 14:9-13, wherein the witness specifically confines the statement to their understanding of Commission policy.

b. 15:12-15:13

This portion of the testimony is stricken as a legal conclusion.

Blue Marmot/300, Moyer:

a. 3:14-3:16

This portion of the testimony is stricken as a legal conclusion.

b. 3:24-4:2

This portion of the testimony is stricken as a legal conclusion.

c. 4:11-4:12

This portion of the testimony is stricken as a legal conclusion.

d. 4:15-4:17

This portion of the testimony is stricken as a legal conclusion.

e. 4:23 beginning with “because”-5:2, 6:16-7:24, ending with “Yes.”

This portion of the testimony is stricken as an interpretation of the law

f. 6:16-7:20

This portion of the testimony is stricken under the foregoing standard except as to 6:16-6:19, wherein the witness specifically confines the statement to their understanding of Commission policy.

g. 8:8: “Contrary to PURPA requirements,”

This portion of the testimony is stricken as a legal conclusion.

h. 8:14-9:7

This portion of the testimony is stricken as an interpretation of the law.

i. 12:6 beginning with “A utility”-12:9

This portion of the testimony is stricken as a legal conclusion.

j. 12:11-13:11

Lines 13-15 are stricken as conjecture. Lines 15-18 are stricken as a legal conclusion. Lines-18-20 are not stricken because they are specifically limited to the witness' understanding of PURPA obligations precedence over contractual obligations. The remainder of the testimony is stricken as legal conclusions.

k. 16:8 beginning with "As explained"-16:14

This portion of the testimony is stricken as a legal conclusion.

l. 19:4 beginning with "PGE Merchant"-19:5

This portion of the testimony is stricken as a legal conclusion.

m. 20:6-21:11

The 20:6-17 and 21:1-6 portions of the testimony are stricken as a legal interpretation of the cited proceedings. The cited document speaks for itself or as interpreted by legal counsel. 21:6-11 is not stricken as it makes factual assertions or provides opinions about factual assertions.

n. 27:3-28:12

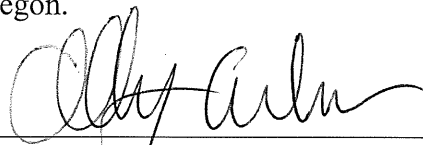
27:3-5 explicitly states the witness' understanding and is not stricken. 27:14-20 contains factual assertions and is thus not stricken. 27:21-28:12 is specifically provided as a second-hand opinion of counsel⁷ and thus stricken as legal argument. At its option, Blue Marmot may retain this portion of the testimony in the record if it drops its objection on the grounds of attorney-client privilege to PGE's motion to compel and the motion to compel is granted to that extent accordingly.

o. 29:18-30:2

This testimony is provided as a second-hand opinion of counsel⁸ and thus stricken as legal argument. At its option, Blue Marmot may retain this portion of the testimony in the record if it drops its objection on the grounds of attorney-client privilege to PGE's motion to compel and the motion to compel is granted to that extent accordingly.

Blue Marmot shall refile its testimony discussed herein consistent with this ruling within seven days.

Dated this 13th day of December, 2017 at Salem, Oregon.



Allan J. Arlow
Administrative Law Judge

⁷ Line 23: "****my understanding based on communications with counsel****"

⁸ 29:18: "I have been informed by counsel****"