

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 228

In the Matter of)	
)	
PORTLAND GENERAL ELECTRIC	)	RESPONSE IN OPPOSITION TO PGE'S
COMPANY	)	MOTION TO STRIKE PORTIONS OF
	)	SURREBUTTAL TESTIMONY AND
2012 Annual Power Cost Update Tariff	)	DEPOSITION OF DONALD W.
(Schedule 125)	)	SCHOENBECK
)	
)	
)	

I. INTRODUCTION

Pursuant to OAR § 860-001-420, the Industrial Customers of Northwest Utilities (“ICNU”) hereby responds in opposition to Portland General Electric Company’s (“PGE” or the “Company”) Motion to Strike Certain Portions of Surrebuttal Testimony and Deposition of Donald W. Schoenbeck, filed on August 29, 2011 (“Motion”). ICNU respectfully requests that Administrative Law Judge Pines or the Public Utility Commission of Oregon (the “Commission” or “OPUC”) deny PGE’s motion because it is contrary to the Oregon Evidence Code (“OEC”), contradicts Commission and Oregon Court appellate precedent, and it is based on significant misinterpretations of Mr. Schoenbeck’s statements.

PGE’s Motion is fraught with questionable legal analysis, not least of which is the inexplicable omission of any consideration of the central rule governing this entire matter: OEC Rule 703. In short, the entire Motion should be rejected under a plain reading of Rule 703 and Oregon precedent interpreting the rule, which expressly allows an expert like Mr. Schoenbeck to

state his expert opinion—even if derived from facts or data which are *not* admissible in evidence. For PGE to move to strike Mr. Schoenbeck’s testimony because “it cites to confidential information not in the record” evinces a complete disregard for the evidentiary law that has governed the tribunals of this state for three decades. Further, PGE’s reliance upon OEC Rule 705 also fails as the Company seems to miss the purpose of the rule’s conditional allowance that an expert witness “may” be required to disclose underlying facts or data during cross-examination.

Moreover, the Motion is riddled with factually incorrect misrepresentations of Mr. Schoenbeck’s surrebuttal and deposition testimony. PGE’s apparent factual misunderstandings compound the Motion’s flawed legal analysis.

In addition, PGE’s own expert witness, Robert B. Stoddard, also bases his testimony upon the same foundation of professional experience underlying Mr. Schoenbeck’s testimony. PGE/500, Stoddard/1-2. Hence, the irony of PGE’s Motion is that its request to strike Mr. Schoenbeck’s testimony would be applicable to Mr. Stoddard’s testimony as well. In the final analysis, OEC Rule 703 permits the testimony of both experts, with the distinguishing characteristic between them resting in Mr. Schoenbeck’s longer and more relevant industry experience.

Finally, PGE’s central complaint is their inability to cross examine Mr. Schoenbeck on the basis of his opinion. This position is completely without merit as PGE failed to cross examine Mr. Schoenbeck on any topic at the hearing. This alone is a significant basis to deny the Motion since there is no factual basis to support PGE’s Motion. This Response points

out and corrects PGE's flawed analysis and misrepresentations and provides the Commission with a reasoned explanation of why Mr. Schoenbeck's testimony and exhibits should not be stricken and constitute permissible evidence in this proceeding.

II. LEGAL STANDARD

As long as evidence is relevant and of a type normally relied upon by prudent persons in the conduct of their serious affairs, it is admissible and should not be stricken. OAR 860-001-0450(1)(b). In considering a motion to strike, the Commission's own rules provide a definition of "[r]elevant evidence" as "evidence tending to make the existence of any fact at issue . . . more or less probable than it would be without the evidence." OAR 860-001-0450(1)(a). As explained below, Mr. Schoenbeck's surrebuttal and deposition testimony precisely matches this definition of admissible, relevant evidence and conforms to the standard of admissible expert testimony under OEC 703.

Indeed, the Commission has set a very high standard which a moving party must meet in order to prevail on a motion to strike. This was demonstrated in UE 177, when the OPUC actually withdrew an Order on appeal before the Oregon Court of Appeals for reconsideration and reversed its prior decision to strike portions of ICNU expert testimony. Re PacifiCorp, UE 177, Order No. 09-177 (May 20, 2009). In fact, the Commission admitted the previously stricken testimony even though it continued to believe that the testimony did "*not address any disputed fact.*" Id. at 3 (emphasis added). Plainly, if even testimony which the Commission considers irrelevant to any disputed fact should not be stricken, then testimony such

as Mr. Schoenbeck's—which *directly* addresses key factual issues central to this proceeding—must be admissible.

III. ARGUMENT

A. Opinion Testimony by an Expert is Admissible Whether or Not the Data Upon Which the Expert Bases His Testimony Are Admissible

In administrative hearings, the Commission expressly relies upon the OEC to determine evidentiary issues. E.g., Central Lincoln PUD v. Verizon Northwest, Inc., UM 1087, Order No. 04-379 at 4 (July 8, 2004) (determining evidentiary issues through reliance on OEC 503); Re PGE, UE 115, Order No. 01-777 at 4 & n.8 (Aug. 31, 2001) (distinguishing between the two meanings of “burden of proof” via OEC Rules 305 and 307).

PGE's novel claim that expert testimony is not permissible if it is based on facts or data not entered into the record demonstrates a lack of understanding of the OEC. Rule 703 of the Oregon Evidence Code controls the admission of expert testimony. The rule states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

ORS § 40.415. The Conference Committee that drafted the rules of evidence made clear that the purpose of adopting this rule was to allow experts to present opinions to the court when the court was unable to consider all of the data that an expert in the field would properly, in the practice of his profession, rely upon when forming an opinion. Evidence Code Rule 703, Oregon Rules of Evidence, Conference Committee Commentary. PGE failed to cite any Oregon case on the question of whether an expert may present an opinion even if the underlying data supporting the

opinion is not admissible, and instead seeks to have the Commission rely on the decisions of a bankruptcy court in southern California, and an unreported opinion from the Federal District of Colorado.^{1/} Motion at 3. In fact, In Re Leap Wireless International, 301 BR 80 (S.D. Cal. 2003), is completely off point. The Court rejected an expert's opinion because it was a "novel" opinion and did not meet the standard for FRCP 26(a)(2)(b), which requires in federal court disclosure of expert testimony accompanied by a written report. ICNU finds PGE's reliance on an out of jurisdiction bankruptcy court's opinion puzzling, as a cursory review of Oregon case law reveals numerous authorities that are on point. For example, the Court of Appeals has held that Rule 703 "provides that the expert may give an opinion based on information that, although *not admissible* is reliable." Oregon v. Knepper, 62 Or. App. 623, 626 (1983) (emphasis added); see also Stevens v. Horton, 161 Or. App. 454, 465 (1999).

In this case, Mr. Schoenbeck explicitly bases his opinion upon facts and data known to him prior to this case. He repeatedly states that his opinions are based upon facts and data made known to him during his over 40 years of experience as a purchaser, seller, and consultant on energy related matters. See, e.g., ICNU/100, Schoenbeck/1; ICNU/101, Schoenbeck/1; ICNU Response to PGE Data Request 11 (Aug. 29, 2011).

PGE has never suggested that Mr. Schoenbeck is not an expert in this field, nor has PGE suggested that Mr. Schoenbeck's testimony is not based on facts or data known to him before the hearing. Indeed, PGE has never suggested that Mr. Schoenbeck failed to rely upon

^{1/} PGE also cites to U.S. ex rel. Maxwell v. Kerr-McGee Chemical Worldwide, LLC. ICNU's Counsel subscribes to Lexis, not Westlaw, and was unable to obtain this unreported opinion from a trial court in a different jurisdiction.

data reasonably relied upon by experts in his field, nor suggested that Mr. Schoenbeck's opinion is not based upon information that, "although not admissible, is reliable." It is, therefore, uncontested that Mr. Schoenbeck's testimony meets all of the criteria for expert witness testimony under OEC 703.

Notwithstanding, in an apparent attempt to exclude evidence properly before the Commission, PGE only offers a vague assertion that the testimony it wishes to strike violates "Rule 705 as Codified." Motion at 3. Rule 705 reaffirms that an expert may testify without prior disclosure of the underlying facts or data, and notes that the "expert *may* in any event be required to disclose the underlying facts or data on cross examination." ORS § 40.425 (emphasis added). PGE's reading of this rule ignores the conditional term "may," and again displays fundamental lack of understanding of the OEC. It is critical, however, that PGE did not even attempt to cross examine Mr. Schoenbeck at the hearing.

The Conference Committee that wrote Rule 705 notes that it was instituted to end the practice of requiring disclosure of underlying facts used by experts in every case, precisely because an expert should not "divulge facts relied upon that are not themselves admissible evidence." Oregon Evidence Code, Rule 705, Oregon Rules of Evidence, Conference Committee Commentary. The Oregon Courts have explained that an expert is allowed to testify to an opinion based on facts not admissible at a hearing, but the rules do "not authorize an expert witness to tell . . . inadmissible details of the basis of his opinion." Knepper, 62 Or. App. at 626; see also Tiedemann v. Radiation Therapy Consultants, 299 Or. 238, 243 (1985) ("[Rule] 705...provides that an expert may provide testimony in the form of an opinion without prior

disclosure of underlying facts or data.”) Thus, the term “may” in Rule 705 is properly construed as limiting cross examination of the expert witness to admissible data; it does not somehow overrule Rule 703, which mandates that the witness’ testimony is permissible.

PGE claims that Mr. Schoenbeck “has failed to disclose information underlying his testimony.” Motion at 3. Mr. Schoenbeck has repeatedly stated that the basis on which he has formed his opinion over 35 years of experience in the industry, over which time he has observed or participated in thousands of transactions. Pursuant to the OEC, PGE was free to cross examine Mr. Schoenbeck on any aspect of this experience to help the Commission evaluate what *weight* to give his testimony. At the hearing in this matter, PGE elected not to cross examine Mr. Schoenbeck regarding the basis for his opinion; therefore PGE has no basis to claim that Mr. Schoenbeck’s testimony should be excluded under Rule 705.

In sum, PGE’s attempt to strike testimony of an expert, based on facts known to the expert before the hearing, is a blatant misreading of well-established Oregon law. PGE failed to avail itself of an opportunity to cross examine Mr. Schoenbeck. The Company could have attempted to challenge the weight of his testimony by questioning him and raising issues on the admissibility of the underlying facts and data upon which that testimony rests. ICNU requests that Administrative Law Judge Pines or the Commission apply the OEC and Oregon case law in this proceeding and deny PGE’s frivolous motion to strike.

B. Mr. Schoenbeck Neither Violated any Protective Order Nor Encouraged Anyone Else to Do So

In its Motion, PGE twice states that Mr. Schoenbeck “appears” to have violated a protective order in another case. Motion at 2, 5. Nevertheless, the Company does not cite to a

single statement to support its assertion. The Company merely suggests, “[T]he cited sections of Mr. Schoenbeck’s Surrebuttal testimony and deposition testimony refer to information covered by a protective order in another proceeding.” Motion at 4. Such vague accusations should not be considered by the Commission in the absence of any substantive evidence.

Further, PGE exhibits a profound misunderstanding of Mr. Schoenbeck’s testimony. For example, the Company seems to suggest that Mr. Schoenbeck references confidential information that he and the Commission possess. Motion at 4. Again, no citation is provided for this accusation. ICNU has reviewed confidential Attachment A to the Motion, and surmises that PGE may be referring to Mr. Schoenbeck’s statement that the Commission can readily verify his assertion that long term monthly strips are readily available because “at least four of PGE’s counter-parties executed gas transactions in 2007 and 2008 on a quarterly basis.” Motion, Attachment A at 1. Mr. Schoenbeck does not suggest that the Commission look to any confidential information. Rather, he states, “These third parties can verify the products they had available during this time period.” Id. at 2.

Verifying what products third parties had available in 2007 and 2008 does not violate any protective orders. In fact, counsel for ICNU called a company known to engage in gas hedging transactions, and spoke to an employee at that company. Counsel had never met nor had dealings with anyone working at the company on this topic. Nonetheless, when asked by a complete stranger whether the company had purchased or sold monthly or quarterly gas options during 2007 and 2008, the employee readily confirmed that the company did, and then affirmed

via e-mail that such products were available during that period. Declaration of Melinda J. Davison at 1.

PGE claims that it cannot verify the existence of Mr. Schoenbeck’s assertion, and that any verification would be a violation of a protective order. Motion at 4. Conversely, a single cold-call by ICNU’s counsel verified Mr. Schoenbeck’s claim without violating any protective orders.

PGE may also be objecting to Mr. Schoenbeck’s statement that “[t]he Commission should review whether other utilities in Oregon have entered into these transactions.” The suggestion that Mr. Schoenbeck is urging the Commission to violate its own protective orders is bizarre, to say the least. Mr. Schoenbeck suggests only that the Commission should take stock of utility practice in the region. It is widely known that utilities such as Avista, Northwest Natural, Idaho Power, and PacifiCorp have gas purchasing needs. ICNU is hard pressed to understand how suggesting that the Commission merely consider prudent strategies used by other companies operating within its own jurisdiction somehow violates any protective order.

C. PGE Expert Witness Robert B. Stoddard Grounds His Testimony on the Same Foundation as Mr. Schoenbeck—Experience in the Industry

Ironically, PGE seeks to strike the testimony of ICNU’s expert witness while the Company’s own outside expert, Mr. Robert B. Stoddard, also bases his opinions in no less measure upon accumulated professional experience. For instance, when asked how a utility should hedge—the central issue to this proceeding—Mr. Stoddard prefaced his answer by explaining: “*my experience in the industry* suggests the following standards should apply to a

utility hedging program.” PGE/500, Stoddard/5.^{2/} (emphasis added). Also, like Mr. Schoenbeck, Mr. Stoddard relies upon contemporaneous third party market options. When opining upon the prudence of PGE’s hedging strategy, Mr. Stoddard again prefaces his conclusion with the following: “Judging the strategy *based on contemporaneous market data . . .*” Id. at 6 (emphasis added).

As with nearly any expert testimony in any field, Mr. Stoddard and Mr. Schoenbeck ground their testimony on the same foundation of experience in the industry. As previously established, OEC Rule 703 permits the testimony of both these experts, regardless of the admissibility of the underlying facts and data which comprise their experience. The only relevant distinction goes to weight. Mr. Schoenbeck bases his testimony on over 35 years of professional experience in the utility industry, while Mr. Stoddard’s credentials indicate both less overall experience and far less time in the relevant industry. Compare ICNU/100, Schoenbeck/1, and ICNU/101, and ICNU Response to PGE Data Request 11 (Aug. 29, 2011), with PGE/501, and ICNU/110C, Schoenbeck/14. Finally, on issues related to competitive markets, where underlying data is routinely subjected to confidentiality restrictions, it would be virtually impossible for an expert to give an opinion if the Commission imposed a requirement that all confidential data underlying the opinion be disclosed.

^{2/} See also PGE/500, Stoddard/11 (stating: “My experience in the industry indicates”); id. at 19–20 (again prefacing “[i]n my experience . . .”); id. at 23 (stating “I know of no utility that hedges...,” and affirming that “[m]ost utilities” do things in a certain way).

IV. CONCLUSION

PGE's Motion to Strike urges the Commission to disregard, and in fact, contradict well-settled rules of evidence in the State of Oregon. Its claims that it is unable to verify Mr. Schoenbeck's statements or was incapable of competently cross examining him are factually inaccurate, and PGE's completely false and unsupported assertion that Mr. Schoenbeck has breached some unidentifiable protective agreement is ungrounded. The Commission should deny the Motion to Strike in its entirety.

Dated this 31st day of August, 2011.

Respectfully submitted,

DAVISON VAN CLEVE, P.C

/s/ Melinda J. Davison

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August 31, 2011

Via Electronic and U.S. Mail

Public Utility Commission
Attn: Filing Center
550 Capitol St. NE #215
P.O. Box 2148
Salem OR 97308-2148

Re: In the Matter of PORTLAND GENERAL ELECTRIC COMPANY
2012 Annual Power Cost Update Tariff (Schedule 125)
Docket No. UE 228

Dear Filing Center:

Enclosed please find the original and one (1) copy of the Response to PGE's Motion to Strike Portions of Surrebuttal Testimony and Deposition of Donald W. Schoenbeck, with Attachment A, and the Declaration of Melinda J. Davison, on behalf of the Industrial Customers of Northwest Utilities in the above-referenced docket. Thank you for your attention to this matter.

Sincerely yours,

/s/ Sarah A. Kohler
Sarah A. Kohler

Enclosures

cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Response to Motion to Strike and Declaration on behalf of the Industrial Customers of Northwest Utilities upon the parties, on the service list, by causing the same to be deposited in the U.S. Mail, postage-prepaid, and via electronic mail where paper service has been waived.

Dated at Portland, Oregon, this 31st day of August, 2011.

/s/ Sarah A. Kohler

Sarah A. Kohler

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 228

In the Matter of)	
)	DECLARATION OF MELINDA J.
PORTLAND GENERAL ELECTRIC	)	DAVISON IN SUPPORT OF ICNU'S
COMPANY	)	RESPONSE IN OPPOSITION TO PGE'S
	)	MOTION TO STRIKE PORTIONS OF
2012 Annual Power Cost Update Tariff	)	SURREBUTTAL TESTIMONY AND
(Schedule 125)	)	DEPOSITION OF DONALD W.
	)	SCHOENBECK
_____)	

I, Melinda J. Davison, declare and state as follows:

1. I am an attorney representing the Industrial Customers of Northwest Utilities ("ICNU") in this docket. My business address is: 333 SW Taylor, Suite 400, Portland, OR 97204.
2. The matters set forth below are based on my personal knowledge, and I am competent to attest to these facts.
3. On August 29, 2011, I placed a phone call to Jeff Deturi at San Diego Gas & Electric. The purpose of my call was to verify, for myself, whether it was possible to ascertain from third parties whether monthly or quarterly options for natural gas were available during the 2007–2008 time period. Mr. Deturi and I have had no prior business dealings. In short, I placed a cold-call to an individual I had never spoken to before.
4. In response to my call, Mr. Deturi stated orally and later confirmed via email that "Monthly and Quarterly options were available in 2007 and 2008." Attachment A is a true and correct copy of Mr. Deturi's email, dated August 29, 2011.

PAGE 1 –DECLARATION OF MELINDA J. DAVISON

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

SIGNED THIS 31st day of August, 2011, at Portland, Oregon.

A handwritten signature in cursive script, appearing to read "Melinda J. Davison", written over a horizontal line.

Melinda J. Davison

Attachment A

From: Deturi, Jeff - E&FP [JDeturi@semprautilities.com]
Sent: Monday, August 29, 2011 1:37 PM
To: Melinda J. Davison
Subject: 2007/8 Nat Gas Options

Hi Melinda,

We just spoke on the phone regarding Natural Gas options in 2007 and 2008. Monthly and Quarterly options were available in 2007 and 2008. Let me know if you need anything else.

Jeff DeTuri
San Diego Gas & Electric
858-650-6153