

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UG 490

In the Matter of)	
)	OREGON CITIZENS' UTILITY BOARD'S
NW Natural)	RESPONSE TO NW NATURAL'S MOTION
)	TO STRIKE
NW NATURAL REQUEST FOR A GENERAL)	
<u>RATE REVISION</u>)	

I. INTRODUCTION

Pursuant to OAR 860-001-0420(5) and Administrative Law Judge (ALJ) Spruce's direction at the Hearing in this matter on August 1, 2024, the Oregon Citizens' Utility Board (CUB) hereby files this Expedited Response to NW Natural's (NWN or the Company) Motion to Strike CUB's Additional Exhibits (Motion). The Company raises a number of unavailing procedural and substantive objections to CUB's Exhibits CUB/500, CUB/501, CUB/503, and CUB/505 (collectively, the Exhibits).¹ The Exhibits offered by CUB are admissible and relevant. They provide factual evidence contrary to the arguments the Company made in its Surrebuttal Testimony, and notably are materials the Company and its witnesses have either played a hand in developing or have referenced in its own materials. The Oregon Public Utility Commission (Commission) should deny NWN's Motion to Strike as the Exhibits offered by CUB provide evidence with significant probative value to a central issue in this proceeding. Further, the Commission should ignore Company's attempts to dismiss CUB Motion on procedural grounds because no party is prohibited from introducing evidence in a contested case proceeding, prior to a hearing for that matter. This Response will address NWN's procedural and substantive objections to

¹ CUB confirms withdrawal of Exhibit CUB/504 as represented at the August 1, 2024 Hearing in this matter.

the inclusion of the Exhibits in the administrative record. The Commission should deny NWN’s Motion to ensure a robust evidentiary record upon which to decide the live issues in this proceeding.

II. BACKGROUND

The Company has proposed to change its Line Extension Allowance (LEA) tariff which remains a live issue in this proceeding.² CUB continues to oppose the Company’s proposal. In Opening Testimony, CUB relied on the Company’s filing and assumed it followed its tariff. Once the Coalition of Communities of Color, Climate Solutions, Verde, Columbia Riverkeeper, Oregon Environmental Council, Community Energy Project, and Sierra Club (the Coalition) put on the record the historic practice that NWN was overspending and investing in LEAs well above the tariff levels, CUB responded to the Coalition’s testimony in Rebuttal and Cross-Answering testimony.³ The Company did not raise an objection to CUB testimony on this issue until it filed its Motion to Strike.

The Company leaned on the “portfolio approach” much more in Surrebuttal Testimony than it did in its Reply Testimony,⁴ emphasizing its portfolio approach in defense of the LEA overspend allegations raised by the Coalition and CUB. Witness Therrien responds to CUB Rebuttal and Cross-Answering Testimony on the Company’s claims it is using a “portfolio approach” to its LEA policy, and states “the portfolio approach is the best way to determine whether, in total, the LEA allowance is fair to both existing and new customers” and that “evaluation of the efficacy of the LEA through individual residential customer audit is overly complex and potentially misleading, while the portfolio review provides the Commission with sufficient evidence that existing customers are not subsidizing new customers.”⁵ NWN also testified in Surrebuttal that evaluating actual costs would be

² See UG 490 – *Direct Testimony of Kyle T. Walker*, NW Natural/1700 and *Direct Testimony of Gregg Therrien*, NW Natural/1900.

³ UG 490 – CUB’s Rebuttal & Cross-Answering Testimony, CUB/400/Garrett/2 (referencing CUB/Coalition/100/Cebulko/37-43).

⁴ UG 490 – NWN Reply Testimony at NWN/4100/Zaubi/16-17.

⁵ See UG 490 – NW Natural/4900/Therrien/23-25.

administratively burdensome and too costly.⁶ CUB/500⁷, CUB/501,⁸ and CUB/503⁹ are a direct response to NWN’s claims about the reasonableness of its “portfolio approach.” These exhibits show that the portfolio approach as described by NWN does not really exist or at least is not described in these broad overviews of how LEAs work by providing national and Oregon analyses that counter this assertion by the Company. Likewise, CUB/505¹⁰ is a direct response to NWN’s claims¹¹ that it cannot charge a customer actual customer costs of an LEA by showing an example of a Company tariff that does so.

III. ARGUMENT

A. Additional Exhibits May be Admitted to the Record.

The Commission conducts contested cases under provisions contained in ORS 756.500 through 756.558, the Administrative Procedures Act (APA) set forth in ORS 183.310 et seq, as well as rules adopted in OAR 860-001-0300 et seq. And in contested cases, evidence is admissible if it is "of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs."¹² CUB argues the Exhibits are admissible as it is not uncommon to rely upon case law and legislative analyses in other

⁶ See NW Natural/5000/Zaubi-Kravitz/10-11.

⁷ See CUB/500/24-25, “Rules for service-line extensions should be simpler than rules for main-line extensions. The utility can simply calculate the cost for a service extension to an individual home or business and then determine, based on the approved regulatory rules, how much to charge the new customer (e.g., via a surcharge or in rates, or both).”

⁸ See CUB/501/29, “Nevertheless, a portfolio approach can result in material subsidization between different groups of prospective new customers. Should a portfolio approach be adopted the Commission should design it carefully so that cost-causation principles are observed.”

⁹ See CUB/503/2, referencing a new California LEA rule, “An even more recent decision pioneered the elimination of electric line extension allowances for mixed-fuel new construction that includes a fossil-fuel hookup, even if that hookup is paid for exclusively by the customer (effective July 1, 2024). The new rule introduces “actual cost billing” for electric line extensions to charge customers based on real, detailed expenses, covering direct, indirect, and overhead costs rather than estimated costs. To evaluate the subsidy removal’s impact, the CPUC also approved a reporting requirement for California’s three largest electric investor-owned utilities, beginning May 1, 2024.” (citing California Public Utilities Commission, Docket No. 19-01-011. *Decision Eliminating Electric Line Extension Subsidies for Mixed-Fuel New Construction and Setting Reporting Requirements*. December 14, 2023, available at <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M520/K709/520709181.PDF>).

¹⁰ See CUB/505/12-13.

¹¹ See NW Natural/5000/Zaubi-Kravitz/10.

¹² See ORS 183.450(1).

states in policy development and regulatory decision-making, nor is it uncommon to rely upon the research and reporting of experts testifying in the matter at issue.

The Commission has historically favored a robust evidentiary record.¹³ CUB is not claiming that adding evidence after testimony has been submitted is common, rather that it is not prohibited and not unheard of.¹⁴ The Commission has previously allowed relevant evidence to be admitted when not filed with party testimony.¹⁵ The Commission routinely allows parties to stipulate to admitting evidence into the record, including but not limited to data responses. Importantly, the Commission always retains discretion to determine how much weight to give different pieces of evidence.¹⁶

After receiving Surrebuttal Testimony from NWN, CUB conducted a literature search to see if we could find any references to a portfolio approach applied to standard LEAs (as opposed to justifying expansion to a new community) and did not find any. LEA overspend was not an issue we had a chance to address until cross answering gave us an opportunity to respond to what the Coalition found in its review of this case. Responding to CUB's and the Coalition's Rebuttal Testimony, NWN focused heavily on its portfolio approach, significantly more so than it had in its Reply to the Coalition's Opening Testimony.

CUB did not choose to include the Exhibits at random. CUB has weighed in on LEAs on both the electric and gas side for years. We cannot recall a time when a natural gas IOUs applied a "portfolio

¹³ See, e.g., *in re Public Utility Commission of Oregon Investigation to Determine the Resource Value of Solar*, OPUC Docket No. UM 1716, Order No. 16-404 (Oct. 19, 2016) (“[W]e do not believe it to be in the public interest to make findings unless the record is sufficiently robust to inform sound decisions and to provide meaningful guidance and direction.”).

¹⁴ UM 1908, UM 2206 - *In the Matter of QWEST CORPORATION, UNITED TELEPHONE COMPANY OF THE NORTHWEST, CENTURYTEL OF OREGON, and CENTURYTEL OF EASTERN OREGON, Joint Petition for Approval of Price Plan Pursuant to ORS 759.255 and Partial Exemption Pursuant to ORS 759.052*, Ruling, 2 (Dec. 1, 2023) (“The Commission has previously held that while presenting evidence after the submission of testimony may be procedurally unusual, proposed exhibits that contain information relevant to issues raised in testimony and at the hearing and are admissible as relevant evidence and can be admitted and given the appropriate weight.”); UE 374 - *In the Matter of PACIFICORP, dba PACIFIC POWER, Request for a General Rate Revision*, Ruling, 1 (Dec. 16, 2020).

¹⁵ UE 374 – Ruling at 1.

¹⁶ *In re Application of US West Communications, Inc. for an Increase in Revenues*, OPUC Order No 19-171 at 17 (May 19, 1997) (“The Commission’s role is to weigh the evidence presented on each issue in the case and determine where the preponderance lies.”).

approach” to existing LEAs, nor has NWN been able to cite to a utility using the novel approach it proposes. We ultimately recognized it from the SB 32 investigation where gas utilities proposed that the Commission adopt a “portfolio approach” to LEAs “in conjunction with other funding sources, to make uneconomic line extension allowances financially viable.”¹⁷ We note that while the gas utilities proposed the “portfolio approach” in the SB 32 investigation, the Commission never adopted it. As such, we believe adding information on how other utilities and regulators are addressing LEAs provide important reliable, factual context for the Commission to be able to make a fully informed decision.

B. The Exhibits are Relevant and Admissible.

According to the Commission’s rules, relevant evidence means “evidence tending to make the existence of any fact at issue in the proceedings more or less probable than it would be without the evidence.”¹⁸ Relevant evidence is admissible “if it is a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.”¹⁹ Commission rules state that relevant evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.²⁰ Evidence may be excluded on relevancy grounds if it does not relate to a “fact at issue” in the case.”²¹

Another Company procedural objection to admission centers on its perception that CUB’s Exhibits lack proper foundation to be used as a cross-examination exhibit. CUB’s intent was not to use the Exhibits for cross-examination, rather they were listed in the group “Additional Exhibits” and are exhibits CUB deems are necessary to provide important factual context to the claims NWN made in Surrebuttal Testimony. Since these exhibits were never intended to be used as a cross-examination

¹⁷ See CUB/501, Appx. A.

¹⁸ OAR 860-001-0450(1)(a).

¹⁹ OAR 860-001-0450(1)(b).

²⁰ OAR 860-001-450(1)(c).

²¹ *In re Madras PVI, LLC v. Portland General Electric Company*, Docket UM 2009, Ruling Denying Motion to Strike at 3 (Dec. 9, 2019).

exhibit, the foundation the Company asserts is necessary does not apply.

And in response to the Company's objection given that it claims the exhibits are hearsay. Even if they were determined to be so, Oregon Evidence Code's prohibition on hearsay evidence in criminal and civil litigation is not applicable to contested case proceedings in Oregon.²² As such, that evidence is hearsay does not impact its admissibility, but rather the weight afforded the evidence.²³

Furthermore, Commission rules provide for a process for exhibits to be offered at hearing, and indicating a preference that the moving party provide a copy of the exhibit prior to the hearing and CUB did so.²⁴ This rule is not limited to the introduction of cross-examination exhibits. Further, the Commission anticipates introduction of papers and documents on file with the Commission in its rules, like CUB 501.²⁵

These Exhibits are relevant because they offer necessary context to understand the novel approach NWN claims is fair to customers. As mentioned above, in Surrebuttal Testimony, Witness Therrien focused on the Company's proposed LEA portfolio approach, claiming it is fair to existing and new customers.²⁶ The Exhibits are relevant because they provide national and Oregon analyses that show the portfolio approach has not been adopted by Oregon despite its consideration in 2016, and that is not supported LEA policy in other jurisdictions. It is understandable that the Company would not want this industry analysis on the record. Nationwide regulators are finding that it no longer makes sense to include LEAs in natural gas utility rate base given the unreasonableness of continuing to pass on those costs to customers in the contemporary regulatory environment. Adding CUB's exhibits to the record would enable the Commission to consider their probative value and could help the Commission

²² See *Osuna-Bonilla v. Teacher Stds. & Practices Comm'n*, 282 Or App 260, 269, 386 P3d 229 (2016).

²³ UM 1908 – Ruling, 1-2 (Jan. 4, 2023).

²⁴ OAR 860-001-0480(7).

²⁵ OAR 860-001-0480(9).

²⁶ See UG 490 – NW Natural/1900/Therrien/23-25.

make a fully informed decision that is in the public interest.

1. Exhibit CUB 500

Exhibit CUB 500, *Line Extensions for Natural Gas: Regulatory Considerations*, is authored by Ken Costello, Principal Researcher at the National Regulatory Research Institute (NRRI), the research arm of the National Association of Regulatory Utility Commissioners (NARUC), and its Board of Directors are Commissioners from other states. This exhibit is relevant because it shows how regulators have viewed LEAs while assuming expansion of the gas system, even without considering electrification trends.

NWN does not dispute CUB's admission of CUB/502, an American Gas Association Report co-authored its Witness, Gregg Therrien, which cites CUB/500 as a reference.²⁷ Accordingly, the Company is not unfairly prejudiced by this exhibit as its witness is familiar with the document which was used in his AGA report published three weeks ago.²⁸

In the alternative, the Commission could enter CUB 500 into the record by taking Judicial Notice of the document under Evidence Rule 201(b).²⁹ First and foremost, CUB 500 is referenced in CUB 502 that NWN Witness Gregg Therrien contributed to and as such is familiar with. It is capable of accurate and ready determination by resort to sources like NRRI and its Commissioner Board of Directors or NARUC itself. Further, it is a report issued by NARUC, of which the Oregon Public Utility Commission is a member, which means that a reasonable party in the utility regulatory space would conclude that its accuracy cannot reasonably be questioned.

2. Exhibit CUB 501

Exhibit CUB 501, *Senate Bill 32: Study of Natural Gas Expansion to Unserved Areas*, was

²⁷ CUB/502/12, 48.

²⁸ See CUB/502: *The Current State of Natural Gas Utility Line Extension Policies*, American Gas Association (July 10, 2024).

²⁹ ORS 40.065.

produced by the Commission for the Oregon Legislature in 2016. The Commission opened investigation into new legislation passed, SB 32 (2015) and created a work group at the direction of the Legislature to conduct “a study on methods by which a public utility that furnishes natural gas may expand the public utility’s service to areas that do not have access to natural gas.”³⁰ Per the bill, representatives of natural gas utilities had to be included in the work group. Dan Kirchner of the NW Gas Association, of which NWN was and is a member, represented Natural Gas Companies in the Work Group.³¹ NWN was directly engaged in this investigative process.³² Accordingly, the Company is **not unfairly prejudiced** by this exhibit. It is relevant because it shows that the gas utilities were proposing the “portfolio approach” and reflects how the Commission previously considered this approach in its analysis.

In the alternative, the Commission could enter CUB 501 into the record by taking Official Notice of the document as it is a report from the Commission and therefore allowed to be officially noticed per OAR 860-001-0460(1)(b). It is also may be judicially noticed as its accuracy cannot reasonably be questioned given it was drafted by the regulator as the result of an investigative process informed by NWN and a representative of Oregon natural gas utilities.

3. Exhibit CUB 503

Exhibit CUB 503, *Case Studies: Gas Line Extension Allowances*, was published by Advanced Energy United in 2023.³³ It is relevant in that it describes other states’ regulatory reviews of LEAs and includes citations and hyperlinks to the legislation, laws, and dockets relevant to each state’s policy summary. LEA policies are a live issue in this case and factual information about how this issue is considered across the industry is relevant to this case. Its inclusion is not unfair to the Company

³⁰ Senate Bill 32 § 2(1) (2015).

³¹ See CUB/501/14 and UM 1748, *In the Matter of PUBLIC UTILITY COMMISSION OF OREGON, Report to the Legislature on Access to Natural Gas Infrastructure in Unserved Areas*, Staff Report for the August 16, 2016 Public Meeting, 4 (Aug. 11, 2016).

³² See also CUB/501/15 and UM 1748, last used service list (Dec. 1, 2017).

³³ Accessible at:

<https://advancedenergyunited.org/hubfs/2023%20Reports/Gas%20Line%20Extension%20Allowances%201.23.pdf>

because, as a member of this industry, it is familiar with general practices of natural gas utilities. And these national trends are certainly understood and familiar to the Company's Witness Therrien, who contributed to the AGA Line Extension report that also references the LEA policies and decisions summarized in this report.³⁴ The policies and dockets in this report provide important context around regulator considerations of Line Extension Allowance policies that show just how novel the Company's "portfolio approach" is and how the rest of the country is analyzing LEA policies.

In the alternative, CUB requests the Commission take Judicial Notice of the law and docket documents identified in Exhibit CUB 503's footnotes ii–xvii per Evidence Rule 201(b) and Rule 202.³⁵ The docket filings referenced are from other state regulatory agencies who by their nature are capable of accurate and ready determination by resort to those agencies and whose accuracy cannot reasonably be questioned. The statutes³⁶ and bills,³⁷ as well as the orders,³⁸ cited in these footnotes are also able to be Judicially Noticed under Rule 202 as law judicially noticed.

4. Exhibit CUB 505

Exhibit CUB 505 is a direct response to NWN's claim in Surrebuttal that it should not charge a customer actual customer costs of an LEA by showing an example of a Company that does so.³⁹ This is relevant because a contract like this has the potential to save ratepayers millions of dollars and eliminate future LEA overspend.

³⁴ California: CUB/503, n. ii-v and CUB/502/52 (the rulemaking docket cited in CUB 502 came from SB 1477 cited in CUB 503, n. ii), corrected citation for n. iv is: California Public Utilities Commission, *Phase III Decision Eliminating Gas Line Extension Allowances, Ten-Year Refundable Payment Option, and Fifty Percent Discount Payment Option under Gas Line Extension Rules*, Decision 22-09-026, Rulemaking 19-01-011, September 15, 2022, <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M496/K987/496987290.PDF>); New York: CUB, 503, n. viii, CUB/502/46, n. 46; Colorado: CUB 503, n. vi, CUB/502/46, n.45; Oregon: CUB/503, n. xii and CUB/502/46, 53; Washington: CUB/503, n. xi-xii and CUB/502/46, 54; Minnesota: CUB/503, n. xvi and CUB/502/46 & 49; and Massachusetts: CUB/503, n. xvii and CUB/502/13, 46, 53.

³⁵ ORS 40.065.

³⁶ ORS 40.090, Rule 202(1).

³⁷ ORS 40.090, Rule 202(2).

³⁸ ORS 40.090, Rule 202(1).

³⁹ See NW Natural/4900/Therrien/23-25 and NW Natural/5000/ Zaubi-Kravitz/10-11.

CUB expects any reference to this exhibit to be limited to information about the utility's customer contracts, particularly what is contained on pages CUB/505/8, 12-16, 24, 47, and customer contract-related hyperlinks on those pages). While CUB believes the entire document should be admitted in case of context, we understand if the Commission chooses to limit this exhibit to the aforementioned sections. This narrow scope can alleviate any unfairness concerns.

C. The Company has the opportunity to respond.

NWN argues that admitting the Exhibits would be unfair and that it does not have any ability to respond.⁴⁰ As CUB argues above, the Company is not unfamiliar with the documents and the subject of the contents of CUB 500, 501, and 503. Further as CUB indicated at hearing and above, the purpose of CUB 505 is to highlight the actual customer charge contract issue and is intended to be limited to those pages identified above, narrowing the scope of this exhibit to under ten pages.

CUB submitted these Exhibits while the record was still open. The procedural schedule reveals that the Company still possesses two rounds of briefing and an oral argument to respond to these exhibits and bolster its case. And the Commission has identified the presentation of legal argument as providing a reasonable opportunity to respond:

Due process therefore requires that all issues to be examined in a proceeding during a suspension period, be raised as early as possible, so that all parties may have a reasonable opportunity to respond via the submission of testimony, the cross-examination of witnesses of opposing parties in a public forum *and* the presentation of legal argument.⁴¹

The Company has been on notice of the Exhibits since July 29 and CUB's intent for introducing them,⁴² has had the opportunity to object, and has the opportunity to reply to this Response and agreed to the expedited timeline to do so. The Company will have had over two weeks until Opening Briefs are

⁴⁰ NWN Motion to Strike at 6.

⁴¹ UE 188 - *In the Matter of PORTLAND GENERAL ELECTRIC COMPANY Request for a rate increase in the company's Oregon annual revenues of \$13,000,000 for Biglow Canyon*, Order No. 07-573, 6 (Dec. 21, 2007) (emphasis added).

⁴² CUB and NWN exchanged emails about CUB's intent for the Exhibits prior to the Company filing its Motion to Strike on July 31, 2024.

due and a month until the deadline for Closing Briefs, as well as a month and a half until oral argument. The Company completed Surrebuttal Testimony within three weeks of reviewing Rebuttal. The Company has sufficient time to be able to respond to this narrow issue in these future opportunities. Further, CUB also has no objection to the Company submitting supplemental testimony in response to these Exhibits if it wishes to do so.

IV. CONCLUSION

The Commission has the statutory obligation under ORS 756.040(1) “to protect such customers and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates.” The Exhibits offered by CUB provide factual evidence contrary to the assertions of the Company made in Surrebuttal Testimony which could result in profound harm to customers if the record is not supplemented with the findings of the hard work of other utility regulators, lawmakers, and industry experts that provide important context on the LEA issue that is counter to the assertions made by the Company. These Exhibits are also materials the Company and its witnesses have either played a hand in developing or have referenced in its own materials. Further, a report from the National Association of Regulatory Utility Commissioners (500) and a report from the OPUC (501) are materials that are undisputably relied upon by reasonably prudent persons engaged in utility regulatory spaces. Likewise, it is also undisputed that CUB/505, a natural gas service guidebook, would be reasonably relied upon by a regulator, utility, or a utility customer. CUB respectfully requests the Commission deny the Company’s Motion to Strike and admit CUB 500, CUB 501, CUB 503, and CUB 505 into the record in this docket.

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Dated this 2nd of August 2024.

Respectfully submitted,

/s/Jennifer Hill-Hart

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